

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of WAYNE G. ROGERS and DEPARTMENT OF THE ARMY,  
TOOLE ARMY DEPOT, Toole, UT

*Docket No. 01-116; Submitted on the Record;  
Issued March 7, 2003*

---

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Branch of Hearings and Review properly denied appellant's request for subpoenas; (2) whether appellant received an overpayment of \$118,918.66; and (3) whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of the overpayment.

On May 21, 1985 appellant, then a 36-year-old mechanic helper, filed a notice of occupational disease alleging that he sustained a pulmonary condition as a result of his federal employment. By letter dated February 6, 1986, the Office accepted appellant's claim for inflammation of the upper and lower airways. On May 10, 1993 appellant filed a second claim, which was accepted for an episode of exposure to toxic fumes causing sinusitis and headaches. Appellant subsequently claimed that he had developed a chemical sensitization and ongoing medical problems due to his occupational chemical exposures. He stopped work on December 7, 1993 and was terminated effective January 23, 1994. By letter dated November 8, 1994, the Office amended the accepted condition to permanent, chronic sinusitis with headaches. In a letter dated September 25, 1995, the Office medical adviser amended appellant's accepted condition to reflect a chemical sensitivity, with cognitive dysfunction.

In 1996 appellant's physicians advised that he needed to relocate from his home to a safer place to live, away from polluted air and in nontoxic housing. In an October 30, 1996 letter to the Office, appellant indicated that he had relocated. The bill submitted for moving expenses indicated a move date of November 5, 1996. In a February 23, 1997 letter, appellant indicated that, due to the Office's acceptance of his house plans, he was proceeding with the bidding process.

In an undated memorandum to file, the Office medical adviser and a claims examiner indicated that, based on the medical evidence in appellant's file, he had to move from his house due to the chemicals in the house. The Office continued:

"Floor plans for a similar house which meets the specifications as identified by the physicians were submitted. Attending physicians have reviewed the plans and signed off on them.

"After reviewing the manual the floor plans are similar in size to his previous house.

"Based on the manual, [the Office] would pay the difference between the construction cost and the balance of his previous loan. In this instance the least expensive construction cost is \$327,906.00. The balance owed on his previous house was \$62,188.21, thereby [the Office's] cost would be \$265,717.79."

In a letter dated April 23, 1997, appellant noted that the pay off for his old house at the time of closing was \$62,188.21 and that the Office's portion of the new house cost was \$265,717.79. Appellant indicated that he was living in a camp trailer. In a letter to appellant dated May 6, 1997, the Office advised appellant that it had accepted the proposal, but this letter did not indicate the dollar amount to which the Office agreed. Appellant and his wife moved into the new house and appellant's relocation expenses were paid.

By letter dated August 20, 1999, the Office informed appellant that it incorrectly contributed \$265,717.79 towards the construction of his new home. The Office noted that the correct amount should have been \$146,799.13, which represented the amount of total construction costs less appellant's mortgage and equity in the old home and that the Office had overpaid appellant in the amount of \$118,918.66. The Office also made a preliminary determination that appellant was not at fault in the creation of the overpayment. Appellant was given 30 days to respond to the notice.

By letter dated August 25, 1999, appellant requested a prerecoupment hearing.

By letter dated October 27, 1999, appellant requested that subpoenas be issued to the following persons: John Sims from the Division of Occupational and Professional Licensing, in Utah; L. Jack Peterson, a building inspector; Gale Martin, Dave Schow and Robert Rieper all with the employing establishment; Loren Smith, a senior claims examiner; and Drs. Alfred Johnson and K. Joe Murdock. The hearing representative denied the request for subpoenas.

At the hearing held on May 31, 2000, the hearing representative noted that the Office accepted that appellant's condition required him to move into a new house and that the sole question was whether the amount of money that the Office was to contribute to the cost of the new house was calculated accurately. The hearing representative noted that the Office was to first determine the amount of money for which appellant's house sold, after payment of the mortgage and the remaining amount would constitute the proceeds from the house sale. The Office next was to take the amount of the new house, subtract the proceeds from the sale of the old house and also subtract the \$62,000.00 remaining mortgage. As the Office failed to do this,

the overpayment was created. At the hearing, appellant acknowledged that his house sold for approximately \$209,000.00. Appellant argued that he detrimentally relied on the Office's letter, contending that he would not have entered into the contract to build the new house had he been aware that the amount quoted as the Office's contribution had been inaccurate. Appellant stated that he sold his home and moved to a house in a remote area of the state in reliance on the Office's letter indicating the amount it would pay. He also noted that his wife quit her job and lost her retirement benefits and health insurance, as the new home was not near her place of employment. Appellant further stated that the house was poorly constructed and that repairs would cost \$100,000.00.

By decision dated August 22, 2000, the hearing representative found that an overpayment had been created in the amount of \$118,918.66; that appellant was without fault in the creation of the overpayment; but that waiver of recovery of the overpayment was denied as the evidence failed to establish that recovery would defeat the purpose of the Act or would be against equity and good conscience.

The Board finds that the hearing representative acted reasonably in denying the issuance of subpoenas.

In requesting a subpoena, a claimant must show why the testimony sought is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained."<sup>1</sup> The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.<sup>2</sup>

Appellant offered insufficient reason to show that the testimony of these individuals would be relevant in this case. The issue as to whether the new house was properly constructed is not material to this case; the Office is not a guarantor that the house was properly constructed -- its part in the construction of the house was limited to the financial aspects. Accordingly, testimony from a witness as to the construction of the house is not material to the issue on appeal. As the Office did not dispute the fact that appellant needed a new house, the testimony of the physicians with regard to the medical necessity for a new house would not be relevant to the issue on appeal, nor did appellant provide a relevant reason for issuing a subpoena for appearance by the Office claims examiner. Accordingly, the hearing representative acted within her discretion in denying the subpoenas.

The Board finds that the Office correctly determined that an overpayment had been made.

---

<sup>1</sup> 20 C.F.R. § 10.619.

<sup>2</sup> *Dorothy Bernard*, 37 ECAB 124 (1985).

Section 8103(a) of the Act provides in relevant part as follows:

“The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.”<sup>3</sup>

Section 8103(a) of the Act further provides that the employee may be furnished necessary and reasonable transportation and expenses incidental to the securing of such services, appliances and supplies.

In interpreting section 8103, the Board has recognized that the Office, as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office’s authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from the established facts. It is not enough merely to show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>4</sup>

The Office procedure manual provides guidelines for consideration of housing modifications and their associated costs. Housing modifications must be recommended by an appropriate medical specialist as necessary to increase mobility and independence, and consistent with the claimant’s preinjury standard of living. The procedure manual states:

“Where the present home cannot be modified without structural damage, [the Office] will be responsible for the difference between the cost of the new house and that of the existing house. For example: If the claimant owns a house worth \$100,000 with a mortgage at the time of sale of that house of \$85,000, his or her position at the time of purchasing or building the new home should be that he or she owes \$85,000 on the new mortgage. The [Office] does not purchase the house but will make up the difference up to the worth of the present residence, *i.e.*, \$100,000. In such a case, the responsibility of [the Office] would also include housing modifications and modifications to the architectural plans.”<sup>5</sup>

There is no dispute that acceptable modifications could not be made to appellant’s existing house and it was agreed that he would sell the house and move into a new house

---

<sup>3</sup> 5 U.S.C. § 8103(a).

<sup>4</sup> *Minnie B. Lewis*, 53 ECAB \_\_\_\_ (No. 00-2153, issued June 17, 2002); *Janice Kirby*, 47 ECAB 220 (1995) and cases cited therein.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Housing and Vehicle Modifications*, Chapter 2.1800.5b(3)(c) (September 1994).

financed, in part, by the Office. In an undated memorandum signed by both the senior claims examiner and the Office medical adviser, the Office noted that the floor plans for the proposed new dwelling met the specifications of the physicians and that the floor plans were similar to the size of appellant's existing home. The Office noted that the least expensive construction cost was \$327,906.00 and that the mortgage balance appellant owed on his previous house was \$62,188.00. It stated that it would pay the difference between appellant's outstanding mortgage from the construction costs, or \$265,717.00. However, the Office erred in that no consideration was taken of the amount appellant received from the sale of the existing house. Appellant's house sold for approximately \$209,000.00. As appellant still owed \$62,188.00 on his mortgage, the proceeds of the sale of the house were \$146,812.00. The cost of building appellant's new home, as agreed by the Office, was \$327,906.00. The proceeds of the sale of the existing house (\$146,812.00) and the outstanding mortgage (\$62,188.00) are subtracted from the cost of the new house (\$327,906.00) to determine the amount the Office should have contributed to the purchase of the new house, *i.e.*, \$118,906.00. As the Office had contributed \$265,717.00 towards the construction of the new house, this resulted in an overpayment of \$146,811.00.<sup>6</sup>

The Board finds that the Office did not abuse its discretion when it failed to waive the overpayment.

Section 8129(a) of the Act<sup>7</sup> provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b)<sup>8</sup> describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

“Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”

In the present case, the Office determined that appellant was without fault in the creation of the overpayment. The Office, therefore, proceeded to evaluate whether overpayment would defeat the purpose of the Act or would be against equity and good conscience. Regulations which codify the guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience are respectively set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations.

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (1) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including

---

<sup>6</sup> The Office determined that the amount of the overpayment was \$118,906.00.00. However, this is the amount that the Office should have contributed to the construction of appellant's house. The proper amount of the overpayment is \$146,811.00.

<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> 5 U.S.C. § 8129(b).

compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.<sup>9</sup> Appellant did not submit financial information or argue that he sought waiver based on financial hardship. Waiver, therefore, depends on whether adjustment or recovery would be against equity and good conscience.

Section 10.437(b) of Title 20 of the Code of Federal Regulations addresses the meaning of the phrase "against equity and good conscience:"

"Recovery of an overpayment is also considered to be against equity and good conscience when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, the Office does not consider the individual's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable and that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that individuals' position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."

Under detrimental reliance, recovery of benefit payments is considered to be inequitable and against good conscience when a person in reliance on such payments or on notice that such payments will be made, relinquishes a valuable right or changes his position for the worse.<sup>10</sup> An individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss. The conversion of the overpayment into a different form from which appellant derives some benefit does not constitute loss for this purpose. As stated above, questions of detrimental reliance are resolved independent of financial circumstances that exist at the time of recoupment.<sup>11</sup>

In the instant case, the Board is not persuaded that appellant has demonstrated detrimental reliance *i.e.*, that he relinquished a valuable right based solely or chiefly on the receipt of an incorrect amount of compensation paid by the Office. The correct amount for building of appellant's new house comprises three parts: (1) the old mortgage principal amount; (2) appellant's equity in the old house; and (3) the Office's contribution, which is the cost of the

---

<sup>9</sup> 20 C.F.R. § 10.436 (1999).

<sup>10</sup> *Abdul-Kabeer Abdullah*, 38 ECAB 164, 167 (1986).

<sup>11</sup> *Id.*; see also *James Lloyd Otte*, 48 ECAB 334, 339 (1997).

new house after subtracting the remainder of the old mortgage and the equity in the old house. Appellant contends that he would not have sold his existing house and built a new house had he known the correct amount of the Office's contribution to the building of the new house. However, this contention is not borne out by the record. Appellant moved out of his old house in November 1996. By the time of his February 23, 1997 letter, appellant was already beginning the building process on his new home and on April 23, 1997, appellant submitted the bids to the Office. He stated at the time that he was "living in a camp trailer." The Board finds that appellant was preparing to move and build a new house even though he had no firm dollar amount commitment from the Office upon which he could claim to rely. The Office's May 6, 1997 letter to appellant stated that the Office "has accepted the proposal..." Although it can be inferred from this statement that the Office was accepting responsibility for the incorrect amount, no reference was made to any specific dollar amount the Office was to pay. Furthermore, the transaction was already so far on its way, *i.e.*, appellant was already out of the existing house, living in a trailer and working on building the new house, that it is not credible that he would have changed his position or behavior had the Office corrected the amount on May 6, 1997. The Board finds that appellant's decision to purchase the new house would have been made irrespective of whether the Office had paid the proper amount towards the purchase of the new home.<sup>12</sup> The Board finds that appellant has not established detrimental reliance.

With regard to the question of whether appellant's position has changed for the worse, appellant must show that the decision to move into his new house would not have been made but for the receipt of the benefits and that this decision resulted in a loss. There is no evidence of a monetary loss. Assuming, *arguendo*, that the Office agreed to pay \$265,717.00 by its letter dated May 6, 1997, appellant had already moved out of his existing house and began the process of building the new house at the time. Appellant's argument that he will not get his money back if he tries to sell the new house is irrelevant to the issue at hand. The difference between the amount that the Office allegedly promised to pay, \$265,717.00 and the amount that it should have contributed towards the purchase of the new home, \$118,906.00, is the equity appellant had in his old home. There is no indication in the record as to what appellant did with the money he received for the equity in his existing home. Therefore, the evidence does not establish that appellant sustained a loss, as conversion of the overpayment into a different form from which appellant derived some benefits does not constitute loss.<sup>13</sup>

Accordingly, the Office did not abuse its discretion in refusing to waive recovery of the overpayment in this case.

---

<sup>12</sup> *Abdul-Kabeer Abdullah, supra* note 10.

<sup>13</sup> *James Lloyd Otte, supra* note 11.

The decision of the Office of Workers' Compensation Programs dated August 22, 2000 is hereby affirmed as modified.

Dated, Washington, DC  
March 7, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member