

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL D. MATTHEWS and U.S. POSTAL SERVICE,  
POST OFFICE, Lawrence, MA

*Docket No. 01-1562; Submitted on the Record;  
Issued March 17, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of a \$50,370.18 overpayment in compensation; and (2) whether the Office properly refused appellant's request for waiver of recovery of \$1,338.93 for the period July 27 through August 16, 1997.

The case has been on appeal previously.<sup>1</sup> On December 23, 1999 the Board found that appellant had received earnings from mowing lawns while receiving temporary total disability compensation and had not reported the income to the Office. He pled guilty to one count of making a false statement on a CA-1032 form in violation of 18 U.S.C. § 1920. The Board affirmed the termination of appellant's compensation under section 8148 on the basis of his guilty plea. The Board, however, found that the proper date for the termination of compensation was July 27, 1997, the date appellant's guilty plea was accepted by the presiding judge and adjudicated guilt. The Board found that appellant forfeited \$50,370.18 in compensation for the period October 4, 1992 through January 5, 1995 because he failed to report his earnings on the CA-1032 forms submitted during the period in question.

In a March 7, 2001 decision, the Office found that appellant had received a \$50,370.18 overpayment because he forfeited compensation for the period October 4, 1992 through January 5, 1995, after he pleaded guilty to one count of making a false statement to receive compensation. The Office further found that its preliminary determination that appellant was at fault in the creation of the overpayment was correct because appellant knowingly failed to report his earnings to the Office as directed and pled guilty to making a false statement to receive compensation.

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<sup>1</sup> Docket Nos. 98-2204 & 99-2508 (issued December 23, 1999). The history of the case is contained in the prior decision and is incorporated by reference.

In a June 26, 2001 letter, the Office informed appellant that it had recalculated the overpayment based on the date his guilty plea was accepted. The Office indicated that because of the Board's decision, the period of the overpayment was from July 27 to August 16, 1997 in the amount of \$1,338.93. The Office found that appellant was without fault in the creation of the overpayment. It informed him that he could seek waiver of recovery of the overpayment. The Office provided appellant with an overpayment recovery form to determine whether he was entitled to waiver of recovery of the overpayment.

In a July 11, 2001 response, appellant indicated that his family had a monthly income of \$3,900.00. He listed monthly expenses as follows: \$250.00 for rent or mortgage, \$600.00 for food, \$200.00 for clothing, \$350.00 for utilities and \$600.00 for other expenses. Appellant also indicated that there was \$27,000.00 of debt on which he paid \$540.00 each month. He listed total monthly expenses of \$2,540.00. Appellant reported that his assets included \$200.00 cash on hand, \$1,000.00 in checking accounts, \$9,200.00 in savings accounts, \$10,000.00 in current values of stocks and bonds and \$1,000.00 in value of other personal property and other funds for total assets of \$23,200.00.

In an August 3, 2001 decision, the Office found that appellant had received a \$1,338.93 overpayment because his compensation was terminated on July 27, 1997 but he received compensation through August 16, 1997. The Office further found that appellant was not entitled to waiver of recovery of the overpayment.

The Board finds that appellant was at fault in the creation of a \$50,370.18 overpayment in compensation.

Section 8129(a) of the Federal Employees' Compensation Act provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>2</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Section 10.433(a) of the Office's implementing regulation<sup>3</sup> provides as follows:

“[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient,

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<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.433(a).

who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to furnish information which he or she knew or should have known to be material; or
- (3) Accepted a payment, which he or she knew or should have been expected to know, was incorrect. (This provision applies to the overpaid individual only.)<sup>4</sup>

The Office properly found appellant was at fault under the first and second standards. Appellant, by his guilty plea, admitted that he made an incorrect statement as to a material fact which he knew or should have known was incorrect and failed to furnish a statement of his earnings from mowing lawns which he knew or should have known was material information.<sup>5</sup> His actions in not reporting his income from mowing lawns constitute fault under the Act in the creation of an overpayment.

The Board further finds that the Office properly denied appellant's request for waiver of recovery of the \$1,338.93 overpayment in compensation.

Since appellant's compensation was terminated effective July 27, 1997 because of the acceptance of his guilty plea, he was not entitled to compensation after that date. Therefore, the compensation paid from July 27 to August 16, 1997 constituted an overpayment in compensation.

Where an overpayment of compensation has been made because of an error of fact or law, collection of the compensation shall be waived when an overpayment has been made to an individual who is without fault and adjustment or recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. The waiver of an overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.<sup>6</sup>

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<sup>4</sup> 20 C.F.R. § 10.433(a).

<sup>5</sup> *Bob R. Gilley*, 51 ECAB 377 (2000).

<sup>6</sup> *William Phillips, Jr.*, 39 ECAB 330 (1987).

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. § 8129(b) as specified in 20 C.F.R. § 10.436 provides as follows:

“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:

The beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses.

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>7</sup>

In *Robert E. Wenholtz*,<sup>8</sup> the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, such as those set forth in section 10.436, were meant to read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those which are not exempted, do not exceed the set resource base.

In the overpayment recovery form, appellant indicated that his family had a monthly income of \$3,900.00 and monthly expenses of \$2,540.00. He, therefore, did not need substantially all of his income to meet his current ordinary and necessary living expenses. In addition, appellant’s assets of \$23,200.00 exceeded the resource base set forth in the Office’s procedures of \$5,000.00 for appellant and his spouse with one dependent.<sup>9</sup> The Office, therefore, properly denied appellant’s request for waiver of recovery because the financial information did not show recovery of the overpayment would defeat the purpose of the Act to provide at least a subsistence income.

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<sup>7</sup> 20 C.F.R. § 10.436.

<sup>8</sup> 38 ECAB 311 (1986).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 6 -- Overpayments, *Initial Overpayment Actions* Chapter 6.200.6(a)(1)(b) (September 1994).

The decisions of the Office of Workers' Compensation Programs, dated August 3 and March 7, 2001, are hereby affirmed.

Dated, Washington, DC  
March 17, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member