

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JERRY A. MARTINEZ and U.S. POSTAL SERVICE,  
POST OFFICE, Downey, CA

*Docket No. 03-842; Submitted on the Record;  
Issued May 23, 2003*

---

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of an overpayment of compensation in the amount of \$14,814.82.

The Office accepted that appellant sustained a dislocation of his left knee on March 23, 1999 while carrying mail and authorized an arthroscopic medial meniscectomy that was performed on July 2, 1999.

Appellant returned to part-time limited duty on July 26, 1999 and the Office subsequently paid compensation for partial disability, based on the hours fewer than eight per day that appellant worked.

On June 7, 2001 the Office issued a schedule award for a seven percent permanent impairment of appellant's left leg. The period of the award was from May 20 to October 8, 2001.

After the period of the schedule award ended, the Office resumed payment of compensation for partial disability, based on appellant's part-time work at the employing establishment for four hours per day. Two such payments were made on the daily rolls: one for October 9 to November 3, 2001; and one for November 4 to December 1, 2001.

Appellant continued to work four hours per day, but the Office began paying compensation for total disability beginning December 2, 2001.

On December 18, 2002 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$14,814.82 that occurred because he received compensation for total disability from December 2, 2001 to November 30, 2002, a period during which he worked four hours per day. The Office preliminarily determined that appellant was at fault in the matter of the overpayment for the reason that he should have been aware he was not entitled to compensation for total disability during this period.

On December 27, 2002 appellant requested a review of the written record, stating that he was not at fault in creating the overpayment, as he called the Office on several occasions and was assured that the payments he was receiving during the period in question were correct. He stated that he last called the Office in August 2002 “to reconfirm that nothing had changed with my on-going pay status as I was going to commit to a larger mortgage and was depending on this monthly level of pay.... I refinanced my home in November 2002.” Appellant also asserted that repaying the overpayment “would cause me and my family severe financial hardship as we have just refinanced our home and I have committed to a larger monthly payment, due in large part to your staff’s continuous reaffirmation that I was receiving what I was supposed to receive based on my case status.” He completed an Office overpayment recovery questionnaire, indicating his household had \$6,193.00 in monthly income and \$5,798.07 in monthly expenses.

By decision dated January 21, 2003, the Office finalized the finding that appellant received an overpayment of compensation in the amount of \$14,814.82, but set aside finding that he was at fault on the basis that his contact with the Office to inquire about whether the amount of compensation that he was receiving was correct following his return to work part time was reasonable. The Office found that recovery of the overpayment would not defeat the purpose of the Federal Employees’ Compensation Act, as appellant did not need substantially all his current income to meet ordinary and necessary living expenses. The Office found:

“A review of the overpayment questionnaire returned to this Office by the claimant reveals a monthly surplus of \$395[.00] [per] month. Additionally, he reported expenses that are not deemed as a necessary living expense (cell [tele]phone, direct-tv, a line of credit and gardener) and indicated \$800[.00] per month for food, \$400[.00] per month for clothes and \$75[.00] per month for children school supplies which this Office does not find as reasonable allotments.

“It is therefore determined that the circumstances of this case do not warrant waiver of the recovery of the overpayment and as such, \$500[.00] per month will be withheld from the claimant’s continuing compensation payments.”

The Board finds that the Office did not abuse its discretion by determining that recovery of the overpayment would not defeat the purpose of the Act.

Section 8129 of the Act<sup>1</sup> provides that an overpayment of compensation must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter of the [Act] or would be against equity and good conscience.” 20 C.F.R. § 10.436 provides:

“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:

- (a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including

---

<sup>1</sup> 5 U.S.C. § 8129.

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."

As appellant indicated on his overpayment recovery questionnaire that his monthly household income exceeded his monthly expenses by \$394.97, the Office did not abuse its discretion by finding that he did not need substantially all of his current income to meet current ordinary and necessary living expenses.

The Board finds that the case must be remanded to the Office for exercise of its discretion with respect to whether recovery of the overpayment of compensation would be against equity and good conscience.

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.437(b) of the Office's regulations<sup>2</sup> provides:

"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."

In his December 27, 2002 response to the Office's preliminary determination regarding the overpayment of compensation, appellant stated that he refinanced his home and committed to a larger mortgage in reliance on the Office's assurances that his compensation payments, which included the overpayment, were correct. The Office failed to exercise its discretion to determine whether recovery of the overpayment should be waived on the basis of detrimental reliance and the case will be remanded to the Office for this purpose.

The Board finds that the Office abused its discretion by determining that \$500.00 per month would be withheld from appellant's continuing compensation payments.

Section 10.441(a) of the Office's regulations<sup>3</sup> provides in part that "[the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."

The Office's January 21, 2003 decision does not contain any findings that indicate that the factors enumerated in the above regulation were considered in setting the amount to be deducted from appellant's periodic compensation payments. The decision merely states that

---

<sup>2</sup> 20 C.F.R. § 10.437(b).

<sup>3</sup> 20 C.F.R. § 10.441(a).

waiver was not warranted and that \$500.00 per month will be withheld from appellant's continuing compensation payments. The amount of the monthly repayment, \$500.00, exceeds the amount, \$395.00, by which appellant's overpayment recovery questionnaire indicated that his monthly income exceeded his monthly expenses.

The Office's January 21, 2003 decision states that some of the expenses appellant reported were not "reasonable allotments," but did not indicate by how much it had reduced the amounts appellant reported for food, clothes and school supplies. The Office's procedure manual provides: "If the amount of certain expenses are found not to be ordinary and necessary -- particularly regarding the significant expenses of food, clothing and vehicles -- the [Office] must show in writing the reasons for this finding. The finding must be supported by clear and complete rationale...."<sup>4</sup> The case will be remanded to the Office for further consideration of the amount of the recovery from appellant's continuing compensation payments.

The January 21, 2003 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part as set forth in this decision of the Board.

Dated, Washington, DC  
May 23, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

---

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200(a)(2)(September 1994).