

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. DELNERO and U.S. POSTAL SERVICE,
POST OFFICE, Garden City, NY

*Docket No. 03-1842; Submitted on the Record;
Issued October 22, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant received an overpayment in the amount of \$3,840.71; (2) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment of recovery of the overpayment; and (3) whether the Office properly directed repayment of the debt by withholding \$237.00 each month from appellant's continuing compensation.

On February 6, 1996 appellant, then a 50-year-old letter carrier, filed a notice of traumatic injury alleging that, on that date, he slipped on ice and twisted his lower back while in the performance of duty. The Office accepted the claim for a lumbosacral strain and temporary aggravation of spondylolisthesis. Appellant received appropriate compensation for total and partial disability from January 1, 1998 until he returned to limited duty eight hours a day effective March 2, 1998. In a decision dated March 10, 1999, the Office terminated appellant's compensation. However, following a request for reconsideration filed by appellant, the Office vacated the March 10, 1999 decision and appellant's compensation was reinstated. Appellant was then placed on the periodic rolls.

On May 20, 2002 the Office issued a preliminary determination that an overpayment of compensation had been paid to appellant from December 3, 2000 through January 26, 2002, during which period appellant received compensation on the periodic rolls based on an augmented rate of 75 percent when he was only entitled to compensation at the rate of 66 and 2/3 percent based on his status of having no dependents. The amount of the overpayment was calculated as \$3,840.71. The Office found that appellant was without fault in the creation of the overpayment since he had not been asked to provide relevant information pertaining to his financial status prior to his reinstatement on the periodic rolls.¹ Consequently, the Office found that appellant would not have had any knowledge as to how his benefits were calculated. The Office advised appellant that he could contest the overpayment by requesting a telephone

¹ On January 30, 2001 appellant completed an EN1032 indicating that he had no dependents.

conference, requesting a final decision based on the written evidence of record or requesting a prerecoupment hearing within 30 days of the preliminary notice if he sought waiver of the overpayment. The Office requested that appellant complete an overpayment questionnaire for proper assessment of his financial situation.

Appellant requested a prerecoupment hearing, which was held on January 7, 2003. Appellant also submitted an unsigned overpayment questionnaire and a copy of his 2001 income tax return. Appellant testified that his monthly income consisted of \$196.00 from the Veterans Administration and \$2,007.26 in compensation. He described assets consisting of stocks and bonds valued at approximately \$3,400.00 and \$11,000.00 in a savings account. On the overpayment questionnaire, he listed monthly expenses of \$2,043.20 for food, utilities, insurance, taxes, medical expenses not covered by health insurance, and payments related to his automobile, computer and television. He also showed monthly credit card payments due in the amount of \$1,153.46.

In a decision dated March 3, 2002, an Office hearing representative determined that an overpayment existed in the amount of \$3,840.71 and that appellant was not at fault in the creation of the overpayment. The Office hearing representative, however, denied waiver of recovery of the debt, finding that recovery would not defeat the purpose of the Act nor be against equity and good conscience. The Office hearing representative ordered that the overpayment be deducted from appellant's continuing compensation in the amount of \$237.00 per month. This was noted to represent 10 percent of appellant's monthly income.

The Board finds that the Office properly calculated that an overpayment occurred in this case in the amount of \$3,840.71.

The Board notes that compensation for partial disability is paid as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.² Section 10.403 states that "the percentage is 66 [and] 2/3 percent of this difference if the employee has no dependents, or 75 percent of this difference if the employee has at least 1 dependent."³ In this case, from December 3, 2000 to January 26, 2002, appellant received compensation on the periodic rolls based on a 75 percent rate, which totaled \$33,261.26. Because appellant had no dependents he was only entitled to receive, for the same period of time, compensation at the rate of 66 and 2/3 percent, or \$29,420.55. By subtracting \$29,420.55 from \$33,261.26, the difference and total amount of the overpayment equals \$3,840.71.

The Board also finds that the Office properly refused to waive recovery the overpayment.⁴

² 20 C.F.R. § 10.403 (1999).

³ *Id.*

⁴ The Board affirms the Office's determination that appellant was not at fault in the creation of the overpayment since appellant was not provided the necessary forms to complete with regard to dependents.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁵ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."⁶ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁷ provides that 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 compensation benefits) to meet current or 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.⁸ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁹

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and 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.¹⁰

Appellant completed an overpayment questionnaire and provided testimony indicating that his assets include stocks valued at \$3,400.00 and a savings account of approximately \$11,000.00. Because appellant has assets that exceed the resource base of \$3,000.00 for an individual as set forth by the Office in its procedure manual, the Board concludes that appellant has failed to demonstrate that recovery of the overpayment would defeat the purposes of the Act. With total assets and savings in excess of \$14,000.00, appellant has not shown that he would experience severe financial hardship in repaying the overpayment debt of \$3,840.71.

⁵ See *Robert Atchison*, 41 ECAB 83 (1989).

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.436 (1999).

⁸ An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

⁹ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁰ 20 C.F.R. § 10.437 (1999).

The Board also finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that appellant relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse. Contrary to appellant's contention, although he decided to lease a new car based on the amount of his monthly compensation check, the lease arrangement is not deemed to be a "loss" since appellant merely converted his compensation benefits payments to lease payments¹¹ and derived benefit from owning the car.¹² Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹³ As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.

The Board also finds that the Office properly required repayment of the overpayment by withholding \$237.00 each month from appellant's continuing compensation payments.

The method by which the Office may recover overpayments is defined by regulation at section 10.441(a), which provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, 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."¹⁴

The Board finds that appellant has not established financial hardship if repayment of the overpayment was ordered to be deducted from his continuing compensation benefits at the rate of 10 percent or \$237.00 per month. As previously mentioned, appellant's assets and savings render his financial situation sufficiently secure to manage with reduced compensation on a monthly basis until the debt is repaid. The Board acknowledges that appellant has alleged that his monthly expenses exceed his compensation pay each month; however, appellant should be able to manage to cover his expenses by utilizing his savings account. Accordingly, the Board finds that the Office hearing representative correctly ordered repayment of the overpayment amount of \$3,840.71 to be deducted from appellant's continuing compensation at the rate of \$237.00 per month.

¹¹ If an individual uses his entire schedule award, for example, to make a down payment on a larger home, and it is later found that he was never entitled to a schedule award, he has not met his burden to show that he changed his position for the worse because he has not established that he suffered a loss. He has simply converted the money into a different form and has not lost it. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.b(3) (September 1994) (Example 4).

¹² *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).

¹³ *Carroll R. Davis*, 46 ECAB 361 (1994).

¹⁴ 20 C.F.R. § 10.441(a) (1999).

The decision of the Office of Workers' Compensation Programs dated March 3, 2003 is hereby affirmed.

Dated, Washington, DC
October 22, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member