

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OTTO A. FERNANDEZ and U.S. POSTAL SERVICE,
SNAPPER WEST ANNEX, Miami, FL

*Docket No. 03-1942; Submitted on the Record;
Issued May 27, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,486.59; and (2) whether the Office properly denied waiver of recovery of the overpayment.

On May 3, 1999 appellant, then a 47-year-old carrier, filed a traumatic injury claim alleging that on that date his small and ring finger next to it got jammed and became swollen when his left hand became entangled with the steering wheel while he was maneuvering to avoid an aggressive driver.

By letter dated May 24, 1999, the Office accepted appellant's claim for a contusion of the left fourth and fifth fingers.

On August 8, 2002 the Office issued a preliminary determination that appellant received an overpayment in the amount of \$1,486.59 because appellant was paid compensation for total disability during the period April 1 to 20, 2002 when he was only entitled to 77 hours of compensation. The Office found that appellant was without fault in the creation of the overpayment and informed appellant of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods: (1) request a telephone conference; (2) request a written review of the record; or (3) request a recoupment hearing. If appellant wished to request a waiver of the overpayment, he was specifically directed to submit

financial information by completing an Office overpayment recovery questionnaire. The Office did not receive a response from appellant regarding his disagreement with the amount of the overpayment, a request for waiver or the requested financial information.¹

By decision dated December 9, 2002, the Office finalized its preliminary findings and denied waiver of the overpayment. On December 12, 2002 appellant submitted a completed overpayment questionnaire regarding his income, expenses and assets, and requested a hearing. The overpayment questionnaire indicated that appellant had a monthly income of "\$20.00/H." It also indicated that appellant had the following monthly expenses: \$1,252.00 for mortgage; \$400.00 for food; \$100.00 for clothing; \$400.00 for utilities; \$500.00 for other expenses; and \$1,079.00 for mortgage of other valuable property or real estate. Appellant indicated that he had a checking account balance of \$300.00.

By letter dated February 7, 2003, the Office advised appellant that his request for a hearing was received after the final decision dated December 9, 2002 and if he wished to dispute this decision, he had to follow the appeal rights which accompanied the decision. The Office explained that the only appeal right afforded appellant in the December 9, 2002 decision was a review by the Board. The Office also explained that appellant's right to a hearing expired at the time the final decision was issued, and thus, it could not take any action at that time.

In a February 20, 2003 letter, appellant requested a "review" of the Office's overpayment decision. By letter dated March 21, 2003, Robert W. Barnes, Chief of the Office's Branch of Hearings and Review, advised appellant that he had 30 days from the date of the Office's August 8, 2002 preliminary determination that an overpayment had been created to request a hearing on the issue of fault and waiver of the overpayment. Mr. Barnes stated that the Office did not receive such a request from appellant on the preliminary review. He noted that the December 9, 2002 decision was not subject to the hearing provision in 5 U.S.C. § 8124(b) and advised appellant that he may appeal this case to the Board within 90 days.

Prior to the Office's March 21, 2003 letter, the Office received a completed overpayment recovery questionnaire on March 13, 2003 indicating that appellant had a monthly income of "\$20.00/HRx1601." This overpayment questionnaire also contained the same information concerning appellant's monthly expenses and checking account balance as provided in his December 12, 2002 overpayment questionnaire.

The Office issued a decision on April 8, 2003 amending its prior December 9, 2002 decision because it did not contain the reasons why appellant's request for waiver of the overpayment was denied. The Office reviewed appellant's December 12, 2002 and March 13,

¹ The record reveals that the Office made several attempts to contact appellant regarding the preliminary overpayment finding. In an October 31, 2002 letter, the Office advised appellant to telephone or write about its preliminary determination that an overpayment had been created. The Office informed appellant that, if a response was not received within five days from the date of the letter, a determination would be made based on the evidence of record. On November 18 and 21, 2002 the Office attempted to return appellant's telephone calls made on November 8 and 12, 2000 regarding the preliminary overpayment letter but, was unsuccessful in that appellant did not return its telephone messages. By letter dated December 5, 2002, the Office advised appellant about its previous attempts to contact him. The Office further advised appellant to make contact within the next 15 days or a final decision would be issued regarding the overpayment.

2003 overpayment recovery questionnaires and noted that they indicated a monthly income in the amount of "\$20.00/H" and "\$20.00/HRx1601," respectively. The Office found no additional evidence of record that supported this income, which it inferred meant that appellant received \$20.00 per hour. The Office further found that it was unknown as to what "1601" referred to and there was no evidence of record to support that appellant worked 1601 hours per month. The Office, therefore, accepted the information provided by appellant on his October 25, 2002 claim for compensation (Form CA-7), which revealed that he earned \$44,446.00 per year as of August 1, 2002. The Office divided this figure by 12 and found that appellant's "gross monthly salary is \$3,703.83." In addition, the Office determined that appellant had monthly expenses in the amount of \$2,652.00 excluding the amount of \$1,079.00 for the mortgage of his additional property and subtracted this figure from his monthly income of \$3,703.83. The Office determined that appellant's monthly income exceeded his expenses by more than \$50.00, in the amount of \$1,051.83. Regarding appellant's assets, the Office found that appellant had a checking account balance of \$300.00. The Office stated that, although appellant did not provide the estimated market value of his additional property which he paid a monthly mortgage of \$1,079.00, it was reasonable to conclude that the estimated market value of this property exceeded the \$5,600.00 maximum limit for an individual with a spouse and one additional dependent which constituted appellant's newborn child. As the Office accepted that appellant's assets exceeded \$5,600.00, it found that appellant did not qualify for waiver of the overpayment. Further, based on appellant's excess monthly income and assets, the Office ordered appellant to repay the overpayment in full.

In letters dated April 13, 2003, appellant advised the Office that he wished to appeal the Office's decision based on Mr. Barnes' March 21, 2003 letter. In an April 29, 2003 response letter, the Office advised appellant to follow the course of action outlined in the appeal rights attached to the April 8, 2003 decision which informed appellant that he could request an appeal before the Board.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$1,486.59.²

Appellant does not contest the fact of overpayment or amount of the overpayment. The record supports that the overpayment occurred in that it demonstrates that appellant received compensation in the amount of \$2,698.80 for total disability during the period April 1 to 30,

² On appeal, appellant references an Office decision dated February 7, 2003. As previously noted by the Board, the record contains a February 7, 2003 letter in which the Office advised appellant that he was not entitled to a hearing and that his only appeal right was a review by the Board. Mr. Barnes, Chief of the Office's Branch and Hearings and Review, reiterated this information to appellant in his March 21, 2003 letter. The Board finds that since the Office's February 7, 2003 letter was purely informational in nature, it does not constitute a final Office decision from which appellant may properly appeal. *See generally* 20 C.F.R. § 10.126 (1999).

2002 while he was only entitled to compensation in the amount of \$1,212.21 for 77 hours of leave without pay (LWOP).³ Therefore, appellant received an overpayment in the amount of \$1,486.59.

The Board, however, finds that the case is not in posture for decision as to the issue whether the Office properly denied waiver of recovery of the overpayment.

Regarding waiver, section 10.434 of the Office's regulations provides that, if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purposes of the [Federal Employees' Compensation Act⁴], or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”⁵

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purposes of the Act if the beneficiary needs substantially all his current income to meet current ordinary and necessary living expenses⁶ and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁷ Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.⁸

The Office found that recovery of the overpayment would not defeat the purposes of the Act because appellant's monthly income of \$3,703.83 exceeded his monthly expenses of \$2,652.00 by \$1,051.83. The Office determined that appellant had a total of \$2,652.00 in monthly expenses, including a mortgage payment, food, clothing, utilities and other expenses. The Office calculated appellant's monthly income based on the annual income listed on his

³ It appears that the Office, in its August 8, 2002 letter, regarding its preliminary finding that an overpayment had been created and that appellant was without fault in the creation of the overpayment, inadvertently indicated that the overpayment period was from April 1 to 20, 2002 rather than April 1 to 30, 2002 inasmuch as it calculated the amount of the overpayment based on the compensation appellant received and the hours of LWOP during the period April 1 to 30, 2002.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.434.

⁶ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB 659, 661 (2000).

⁷ 20 C.F.R. § 10.436. This amount has been considered to be \$3,000.00 for an individual. *Jan K. Fitzgerald*, *supra* note 6.

⁸ 20 C.F.R. § 10.437. This amount has been considered to be \$3,000.00 for an individual. *Jan K. Fitzgerald*, *supra* note 6.

October 25, 2002 Form CA-7. The Office found that appellant's annual income of \$44,446.00, divided by 12 equated to \$3,703.83 per month. The Office then subtracted the stated expenses of \$2,652.00 from appellant's total monthly income equaling a disposable income of \$1,051.83 and found that this amount along with assets in excess of \$5,600.00 were available for debt repayment. The Office, therefore, concluded that it was reasonable for appellant to repay his debt in full.

The Office's procedure manual provides: "The individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source."⁹ In this case, the Office did not specifically state and it is unclear from the record whether the annual salary of \$44,446.00 reported by appellant on the October 25, 2002 Form CA-7 constituted his gross or net annual salary. If appellant reported his gross annual income, then his pretax income cannot be said to be available for his use.

Because the Office failed to develop the evidence on whether \$44,446.00 constituted appellant's gross or net annual salary, the Board finds that the Office abused its discretion in determining that recovery of the overpayment would not defeat the purpose of the Act.¹⁰

Regarding appellant's assets, the Office accepted that appellant had a current checking account balance of \$300.00 and he owned additional property and/or real estate as reported on both of his overpayment recovery questionnaires. The Office noted that, while appellant did not provide the estimated market value of the indicated property, he did indicate that his monthly mortgage on this property was \$1,079.00. The Office stated that it was reasonable to conclude that based on the monthly mortgage payment, the estimated market value of appellant's additional property exceeded the \$5,600.00 maximum limit for an individual with a spouse and one additional eligible dependent, his newborn child. The Office found that, since it was accepting that appellant's assets exceeded \$5,600.00, he did not qualify for waiver of the overpayment based on limited resources.

The Office's determination that recovery of the overpayment would not defeat the purposes of the Act on the basis of appellant's assets is incorrect. As provided by the Office's procedure manual,¹¹ assets include "the fair market value of an owner's equity in property such as a ... second home...." The Office's April 8, 2003 decision did not assess appellant's equity in the second home, which would be the value less any outstanding mortgage, but rather relied on the amount of the monthly mortgage.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(2) (September 1994).

¹⁰ *Thomas Lee James*, 48 ECAB 666 (1997) (the Office abused its discretion in finding that recovery of the overpayment would not defeat the purposes of the Act as it failed to develop the evidence on whether the income earned by appellant's son could reasonably be considered available for appellant's use).

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200a(4) (September 1994).

Further, the resource base is no longer defined in the Office's regulations as \$5,000.00 for an individual with a dependent and \$600.00 for each additional dependent, as it was before the regulations were amended effective January 4, 1999. The new regulations, which are applicable to this overpayment, set the resource base as "a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics."¹² By relying on the old regulations and not ascertaining the amount determined by the Office as the resource base under the new regulations, the Office did not properly consider waiver in conformance with the applicable regulations.

As the Office abused its discretion in refusing to waive recovery of appellant's overpayment of compensation, the Board will set aside the Office's decision on the issue of waiver and remand the case to the Office for recalculation of appellant's monthly income and expenses and to determine whether waiver of recovery of the overpayment is appropriate.¹³ After such further development as the Office deems necessary, it should issue an appropriate decision.

The December 9, 2002 and April 8, 2003 decisions of the Office of Workers' Compensation Programs are affirmed with regard to the amount of the overpayment of compensation and set aside with regard to the Office's refusal to waive recovery of the overpayment and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
May 27, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² 20 C.F.R. § 10.436(b).

¹³ See *Linda D. Lane*, 46 ECAB 727 (1995).