

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEO R. MAKSYMCHOCK and U.S. POSTAL SERVICE,
POST OFFICE, Capitol Heights, MD

*Docket No. 00-48; Submitted on the Record;
Issued January 4, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received a \$1,968.51 overpayment of compensation for the period April 17 to May 15, 1992; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

In April 1992, the Office accepted that appellant, then a 34-year-old distribution clerk, sustained employment-related epicondylitis of his left elbow. Appellant claimed entitlement to compensation for wage loss beginning in mid 1991. He received four compensation checks totalling \$2,945.51 for wage loss during the period April 17 to May 15, 1992.¹ By preliminary determination dated June 14, 1993, the Office determined that appellant received a \$1,968.51 overpayment of compensation for the period April 17 to May 15, 1992. The Office determined that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver. By decision dated January 9, 1995 and finalized January 13, 1995, an Office hearing representative determined that appellant received a \$1,968.51 overpayment and modified the preliminary overpayment determination to reflect that appellant was not at fault in the creation of the overpayment. The Office hearing representative found that waiver of the overpayment was not justified on the basis that recovery would defeat the purpose of the Federal Employees' Compensation Act.

By decision dated November 19, 1997, the Board set aside the Office's January 9, 1995 decision and remanded the case to the Office for further proceedings. The Board determined that the Office did not adequately explain why appellant did not need substantially all of his current income to meet ordinary and necessary living expenses or why his assets exceeded the applicable resource base. After the Board's decision, appellant submitted current financial information, including a completed overpayment questionnaire form. By decision dated May 24, 1999 and finalized May 26, 1999, an Office hearing representative finalized the Office's preliminary determination that appellant had received a \$1,968.51 overpayment for the period April 17 to

¹ Two of the checks were dated October 2, 1992 and two were dated October 9, 1992.

May 15, 1992. The Office hearing representative modified the preliminary determination to reflect that appellant was not at fault in the creation of the overpayment, but found that waiver of the overpayment was not justified on the basis that recovery would defeat the purpose of the Act. The Office hearing representative found that appellant's monthly income of \$2,067.00 exceeded his monthly expenses of \$1,639.00 by \$428.00.² She further found that the overpayment should be repaid by deducting \$75.00 from appellant's compensation payments every month.

The Board finds that appellant received a \$1,968.51 overpayment of compensation for the period April 17 to May 15, 1992.

In the present case, appellant received \$2,945.51 of wage-loss compensation for the period April 17 to May 15, 1992 despite the fact that he was only entitled to receive \$997.00 for this period. The record contains evidence which shows that appellant should have received \$997.00 of compensation for 94.5 hours of lost wages during the period April 17 to May 15, 1992 rather than the \$2,945.51 he actually received. Therefore, the Office properly determined that appellant received a \$1,968.51 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

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.³ These statutory guidelines are found in section 8129(b) of the 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 who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁴ Since the Office ultimately found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁵

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.436 and 10.437, respectively, of the Code of Federal Regulations. Section 10.436 provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary from whom the Office seeks recovery needs substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses; and the beneficiary's assets do not exceed a specified amount as

² Appellant's financial figures have been rounded to the nearest dollar.

³ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁴ 5 U.S.C. § 8129(b).

⁵ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

determined by the Office from data furnished by the Bureau of Labor Statistics.⁶ Section 10.437 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt; or (2) the individual, in reliance on the payments which created the overpayment or on notice that such payments would be made, gave up a valuable right or changed his position for the worse.⁷

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The Office hearing representative properly found that appellant's monthly income of \$2,067.00 exceeded his monthly expenses of \$1,639.00 by \$428.00. In her calculation of appellant's monthly expenses, the Office hearing representative included figures for such items as food, clothing, mortgage payments, utilities, car payments, unreimbursed medical expenses and insurance and charitable contributions. She also properly calculated prorated figures for claimed condominium fees and educational and professional fees. Appellant listed figures for repayments of credit card debt, but the Office hearing representative properly noted that appellant did not document these expenses or show that they were not already included in other listed and accepted monthly expenses. She also correctly indicated appellant did show that a claimed estimated tax liability of \$150.00 and a vehicular inspection and licensing fee of \$25.00 constituted ordinary and necessary expenses.⁸

As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.⁹ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base. Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in

⁶ 20 C.F.R. § 10.436. For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994).

⁷ 20 C.F.R. § 10.437. The criteria in determining "severe financial hardship" are the same as in determining whether the purpose of the Act has been defeated; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6b(1) (September 1994).

⁸ Appellant was familiar with the need to document claimed monthly expenses and was provided with the opportunity to do so.

⁹ *See supra* note 6 and accompanying text.

attempting to repay the debt¹⁰ or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹¹

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.¹²

The decision of the Office of Workers' Compensation Programs dated and finalized May 24, 1999 is affirmed.

Dated, Washington, DC
January 4, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

¹⁰ Whether a claimant experiences severe financial hardship in attempting to repay an overpayment is determined by using the same criteria set forth for determining whether the purpose of the Act has been defeated; *see supra* note 7 and accompanying text.

¹¹ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹² As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).