

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARION F. HARRIS and GOVERNMENT PRINTING OFFICE,
OCCUPATIONAL HEALTH DIVISION, Washington, DC

*Docket No. 99-567; Submitted on the Record;
Issued January 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$6,375.42 overpayment of compensation from January 23, 1997 through April 25, 1998; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly recovered the overpayment by withholding \$250.00 from continuing compensation payments.

On November 18, 1986 appellant, then a 60-year-old pressman, injured his back when he slipped on oil and fell into the frame of a press and landed on his back. The Office accepted appellant's claim for a contusion of the lower back, herniated disc at L4-5 and a rotator cuff injury to the right shoulder. The Office authorized the following procedures: a hemilaminotomy L4-5 with an L4-5 discectomy and extended foraminotomy which was performed on April 8, 1987; a acromioplasty and repair of the right rotator cuff which was performed on January 27, 1988 and a revision of the lumbar laminectomy which was performed on November 16, 1989.

Appellant worked intermittently from November 18, 1986 until June 9, 1987 and did not return to work thereafter. He began receiving wage-loss compensation at the augmented three-fourths rate since he claimed his wife as a dependent.

On May 25, 1997 appellant completed a CA-1032 and indicated that his spouse died January 27, 1997.

By letter dated May 13, 1998, the Office notified appellant that his compensation would be reduced from three-fourths augmented rate to the two-thirds rate effective April 26, 1998. The Office indicated that compensation amount allocated for appellant's dependent spouse was no longer permitted as appellant's dependent spouse died on January 27, 1997.

In a September 2, 1998 overpayment worksheet, the Office calculated that appellant received \$57,306.14, based on the augmented three fourths rate, from January 23, 1997 to April 25, 1998. The Office also calculated that, at the two thirds basic rate, appellant should

have received \$50,930.72 during this period. The Office calculated that this resulted in a \$6,375.42 overpayment.

On September 14, 1998 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$6,375.42. The Office noted that the overpayment occurred because appellant's spouse passed away on January 22, 1997, but appellant continued to receive compensation at the higher three-fourths rate instead of the two-thirds rate for the period of January 23, 1997 through April 25, 1998. The Office also determined appellant was without fault in the matter of the overpayment. The Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.

By decision dated October 19, 1998, the Office found that appellant received a \$6,375.42 overpayment of compensation from January 23, 1997 to April 25, 1998 for which he was without fault in creating. In an accompanying memorandum, the Office indicated that no additional financial evidence or argument was submitted by appellant to support eligibility for waiver and, therefore, waiver of overpayment was not granted. The Office advised that the overpayment would be recovered by deducting \$250.00 from appellant's continuing compensation payments every four weeks.

The Board finds that appellant received an overpayment of \$6,375.42 in compensation from January 23, 1997 to April 25, 1998.

The record indicates that appellant continued to receive compensation at the augmented three-fourths rate after his wife died on January 22, 1997 until April 25, 1998. The record does not indicate that appellant had a dependent from January 23, 1997 to April 25, 1998. Consequently appellant received an overpayment for this period as compensation should have been paid at the basic two-thirds rate.¹ The Office properly determined that for the period of January 23, 1997 to April 25, 1998 appellant received an overpayment of \$6,375.42. Appellant does not dispute that he received the overpayment in question and the Board finds that the Office properly determined the amount of the overpayment that covered the period of January 23, 1997 to April 25, 1998.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment and setting the rate of recovery at \$250.00 per month from his continuing compensation benefits.

Section 8129 of the Act² provides that an overpayment 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 the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether

¹ See 5 U.S.C. §§ 8105(a), 8110(b).

² 5 U.S.C. § 8129(a)(6).

recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.³

Section 10.322 of the implementing federal regulations⁴ provides that “[r]ecovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section,” and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.” Section 10.324 of the regulations⁵ provides: “[i]n requesting waiver of an overpayment ... the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of the request shall result in denial of waiver.”

Appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on September 14, 1998 if he wanted to request waiver. He, however, did not respond to the preliminary overpayment notification. In his November 12, 1998 appeal letter before the Board, appellant provided a letter delineating his correspondence to the Office, however, a copy of the OWCP-20 form was not among the materials noted. Even if it were, the Board cannot review such evidence for the first time on appeal.⁶ As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.⁷ With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the federal regulations provides that “[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant has not alleged and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. The Office properly denied waiver of recovery of the overpayment.

The Board further finds that the Office properly recovered the overpayment by withholding the \$250.00 from appellant’s continuing compensation payments every four weeks.

The Offices implementing regulations provide:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent

³ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁴ 20 C.F.R. § 10.322.

⁵ 20 C.F.R. § 10.324.

⁶ 20 C.F.R. § 501.2(c).

⁷ See 20 C.F.R. § 10.324 (1998) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

payments of compensation having due regard to 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 resulting hardship upon such individual.”⁸

The record establishes that appellant failed to submit an overpayment recovery questionnaire or any other evidence from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits.⁹ The Office, therefore, considered the total amount of compensation appellant was receiving and determined that a \$250.00 withholding every four weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant.

The decision of the Office of Workers’ Compensation Programs dated October 19, 1998 is affirmed.

Dated, Washington, DC
January 9, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

⁸ 20 C.F.R. § 10.321(a). *See Fred A. Cooper, Jr.* 44 ECAB 498 (1993); *Roger Seay*, 39 ECAB 441 (1988).

⁹ *See* 20 C.F.R. § 10.321(h) which provides that if additional financial information is not submitted or a prerecoumpment hearing is not requested, within 30 days of the Office’s preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The overpaid individual has the responsibility for providing the financial information as the Office may require. *See Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).