

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE R. FORNERO and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Page, AZ

*Docket No. 99-875; Submitted on the Record;
Issued January 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant received an overpayment of \$1,768.50 in compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

On February 13, 1989 appellant, then a 40-year-old plant mechanic, filed an occupational disease claim, alleging that factors of employment caused bilateral median and left ulnar nerve compression. These conditions were accepted by the Office on May 17, 1989. After a period of temporary total disability, he returned to light duty as a supply clerk on July 24, 1990. In an August 21, 1990 decision, the Office determined that this position represented his wage-earning capacity and he began receiving appropriate compensation representing a 50 percent loss of wage-earning capacity.

By notice dated June 9, 1998, the Office advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,768.50 which occurred because he was paid at an incorrect rate from October 16, 1996 through February 11, 1998. The Office explained that appellant was paid full compensation for time lost from work because of medical appointments rather than the rate reflected by his loss of wage-earning capacity. The Office further advised appellant that he was not at fault in the creation of the overpayment. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or request waiver of the overpayment on an attached Office form.¹

¹ The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and, (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

In response, by fax on July 7, 1998 appellant requested an extension of time to submit evidence regarding waiver. The request was granted and, by letter dated July 20, 1998, appellant requested waiver and submitted a completed overpayment recovery questionnaire and copies of bills. He also submitted an Office form in which he checked the box indicating that he was requesting waiver of the overpayment and a telephone conference in this regard. All were date-stamped as received by the Office on July 31, 1998.

By decision dated November 19, 1998, the Office finalized its preliminary determination that appellant received an overpayment in the amount of \$1,768.50 and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment as his monthly income exceeded his expenses by \$199.87. The Office determined that recovery of the overpayment would be made from appellant's continuing compensation at a rate of \$55.00 every 28 days.

The Board finds that appellant received an overpayment of compensation in the amount \$1,768.50.

The record in this case indicates that from October 16, 1996 through February 11, 1998 appellant received compensation at the full rate rather than the rate reflected by his loss of wage-earning capacity. He has not shown, nor does the record otherwise establish, that the Office erred in calculating the amount of the overpayment. Therefore, an overpayment in compensation in the amount of \$1,768.50 was created.

The Board further finds that the case is not in posture for decision regarding whether the Office properly refused to waive recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act² provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery 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 [the Act] or would be against equity and good conscience."³

In this case, appellant completed an Office form in which he requested a telephone conference to address his request for a waiver of his overpayment. The Office, however, did not conduct a telephone conference before denying appellant's request for waiver. The Board therefore finds that appellant was not provided the opportunity to present testimonial evidence regarding his requested waiver. Consequently, the case must be remanded for the Office to consider appellant's request for a telephone conference regarding waiver of the overpayment. Following this and such other development as deemed necessary, the Office shall issue an appropriate decision regarding this aspect of the claim.

² 5 U.S.C. § 8101 *et seq.*; § 8129(a).

³ 5 U.S.C. § 8129(b).

The November 19, 1998 decision of the Office of Workers' Compensation Programs is affirmed with regard to the fact and amount of the overpayment in compensation; the decision is set aside for further development with regard to waiver of the overpayment.

Dated, Washington, DC
January 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member