

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARCEL P. FORETTE and DEPARTMENT OF THE ARMY,  
WATERVLIET ARSENAL, Watervliet, NY

*Docket No. 00-1135; Submitted on the Record;  
Issued July 9, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
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 \$5,365.60 for the period July 16, 1995 through June 21, 1997 because he received augmented compensation without having any dependents; and (2) whether the Office abused its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

On September 22, 1986 appellant, a 30-year-old machine tool operator, injured his lower back when he stood up after sitting in a chair. He filed a claim for benefits on September 24, 1986, which was accepted by the Office for low back strain. The Office paid him appropriate compensation for intermittent periods of partial and total disability. Appellant stopped working on December 20, 1986 and the Office placed him on the periodic rolls.

The Office periodically requested that appellant submit a Form CA-1032 confirming that he had not returned to work and that he continued to have dependents for augmented compensation purposes. Appellant indicated annually on the forms that his son continued to reside with him and that his date of birth was July 15, 1977. The forms specifically stated that dependents could be a "husband, wife or dependent child who does not live with you if a court has ordered you to pay support to that person." In addition the form indicated that compensation could be claimed for an "unmarried child under 18 or ... an unmarried child between 18 and 23 who is a full-time student even if that person does not live with you, as long as you make regular direct payments for his or her support." Appellant continued to claim his son as a dependent on the form signed on May 22, 1995.

By letter dated June 17, 1997, the Office noted that in the most recent Form CA-1032 appellant submitted, dated May 19, 1997, he indicated that as of May 31, 1997 he was no longer claiming augmented compensation because he had stated that his son "lives on his own." The Office advised appellant that its records indicated his son reached his 18<sup>th</sup> birthday on July 15, 1995 and that it had no documentation in the record regarding whether his son would have

qualified as a dependent after his 18<sup>th</sup> birthday. The Office further informed appellant that in order to qualify as a dependent after the age of 18, his son must have been unmarried and either a full-time student or incapable of self-support due to mental or physical disability. Therefore, the Office requested that appellant submit additional information regarding his son's status after he turned eighteen on July 15, 1995.

By letter dated June 23, 1997, appellant informed the Office that because his son continued to reside at home and because he continued to support him, he mistakenly believed he could continue to count him as a dependent. He stated that his son was neither married nor attending college, and he acknowledged that he had erred by accepting compensation checks at the augmented 3/4 rate after his son reached his 18<sup>th</sup> birthday on July 15, 1995, instead of the basic 2/3 rate to which he was entitled. Appellant requested that the Office advise him of the amount it needed to deduct from his monthly compensation checks in recovering his overpayment.

By letter dated January 21, 1999, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$5,365.60, covering the period from July 16, 1995 through June 21, 1997 as a result of being paid augmented compensation. The Office found that appellant was at fault in creating the overpayment because he had accepted payment that he knew or should have known was incorrect. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office or request a prerecoupment hearing with the Branch of Hearings and Review. The Office further informed appellant that he should submit a detailed explanation of his reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire, and attach any supporting documents in his possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that, pursuant to 20 C.F.R. § 10.438,<sup>1</sup> failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment and that no further request for waiver would be considered until the requested information was furnished.

By letter to the Office dated February 2, 1999, appellant requested additional information regarding his overpayment status. He reiterated that he had inadvertently erred by claiming his son as a dependent and acknowledged that he was responsible for repaying the overpayment in his compensation. Appellant, however, contested the period of the overpayment and questioned why the Office did not notice the error on its own based on the date of birth listed on the CA-1032 forms he had submitted. He stated he did not possess copies of his CA-1032 forms from 1995 through 1997 and requested copies of these documents from the Office.

In a Form CA-1032 received by the Office on March 3, 1999, appellant requested a prerecoupment hearing.

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<sup>1</sup> 20 C.F.R. § 10.438.

The recoupment hearing was held on October 28, 1999; appellant appeared *pro se*. Appellant stated that for 23 years he had lived with Kim Forette, who appeared at the hearing and also testified, although he indicated that he was not legally married to her because common law marriages were not recognized in the state of New York. Ms. Forette testified that she completed the Form CA-1032 for appellant every year and stated that when they received the form in May 1995 his son was not yet 18 years old. She stated that they did not receive a form in 1996 and that in 1997 she advised the Office that appellant was no longer claiming his son as a dependent, as he had moved out in May 1997. Appellant requested proof that he had received an overpayment and testified that he was not informed by the Office he would receive augmented compensation for being married or having children. Appellant further stated that he was unable to read or write, and Ms. Forette indicated that she took care of managing all the financial documents in the household, including all of the paperwork connected with his disability status. He testified that his son became 18 in July 1995 and stated that he continued to live with them, aside from one brief period, and then moved out permanently in May 1997. Appellant reiterated that he should not be required to repay the overpayment, as the error was made by the Office.

In addition, appellant submitted at the hearing copies of his bills and expenses for the previous 12 months. In a typewritten worksheet accompanying these documents, appellant calculated that the total amount of his average monthly expenses was \$2,103.31. Appellant stated at the hearing that he owned two homes, the one he lived in and a second home worth approximately \$8,000.00. He also stated that he owned a camper worth approximately \$56,000.00. In addition, Ms. Forette asserted that some of the bills and expenses; *e.g.*, a cable bill for \$47.85, were in her name and that she paid these bills. However, when asked to submit a complete list of all the household expenses for which she was responsible, so that the hearing representative could determine the extent to which she financially contributed to and supported the whole household, she and appellant refused to provide specific information regarding her income or expenses.

In a decision dated April 29, 1999, the hearing representative found that an overpayment of compensation in the amount of \$5,365.60 for the period July 16, 1995 through June 21, 1997 had occurred. The hearing representative stated that appellant was paid as of July 16, 1995 a total of \$47,979.28 at the augmented 3/4 rate, counting his son erroneously as a dependent, but was only entitled to \$42,613.68, based on a single compensation rate of 2/3. The hearing representative found that appellant was not at fault in the creation of the overpayment, however, stating that the forms appellant completed were accurate based on the information current at the time he completed them, and that appellant was unable to read or write. The hearing representative further found that there was no evidence that appellant was aware or had been advised that he could no longer claim his son as a dependent after age 18, so that augmented compensation could be discontinued, and no evidence that appellant made an incorrect statement or failed to furnish information he knew was material.<sup>2</sup>

The hearing representative also found, however, that a waiver was not warranted in the instant case because, pursuant to section 10.437(b)(1), appellant did not provide sufficient

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<sup>2</sup> The hearing representative stated that, although this advisory is clearly written on the Form CA-1032, appellant was unable to read this information because he is illiterate.

information for the Office to make a reasonable finding as to his expenses and income to support his claim of financial hardship. The hearing representative noted that appellant submitted information concerning his income, expenses and assets, but refused to divulge any information concerning the income expenses of Ms. Forette, with whom he has shared a residence for 23 years and who acknowledged responsibility for at least part of the monthly bills and expenses. Based on this evidence that the household expenses were shared and on Ms. Forette's refusal to indicate whether she contributed any income toward the household, the hearing representative found that appellant did not provide sufficient evidence indicating that recovery of the overpayment would not be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act.

The hearing representative then found pursuant to section 10.436(a) that recovery of the overpayment would not defeat the purpose of the Act. The hearing representative stated that, under section 10.436(a), if the individual's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics, recovery of the overpayment will not defeat the purpose of the Act. The hearing representative stated that, since the record indicated that appellant has assets in excess of \$60,000.00, recovery of the overpayment would not defeat the purpose of the Act.

Lastly, the hearing representative found that the overpayment could be recovered by deductions from appellant's continuing compensation benefit payments, which would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,365.60 for the period July 16, 1995 through June 21, 1997 because he received augmented compensation without having any dependents. The record shows that the Office incorrectly continued to pay appellant augmented compensation at the 3/4 rate rather than the statutory 2/3 rate for the period from July 16, 1995 through June 21, 1997 because appellant was not aware that he could no longer count his son as a dependent after his 18<sup>th</sup> birthday. The hearing representative stated that appellant was paid as of July 16, 1995 a total of \$47,979.28 at the augmented 3/4 rate, counting his son erroneously as a dependent, but was only entitled to \$42,613.68, based on a single compensation rate of 2/3. The record indicates that appellant failed to inform the Office that he had no allowable dependents during that period. As appellant received augmented compensation, yet had no allowable dependents during that period, the Office properly found that he received an overpayment of compensation in the amount of \$5,365.60 during that period.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,365.60 for the period July 16, 1995 through June 21, 1997.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

Section 8129 of the Act<sup>3</sup> 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 is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.436<sup>4</sup> and 10.437<sup>5</sup> of the implementing federal regulations.

With regard to the “defeat the purpose of the Act” standard, section 10.436 of the regulations provides:

“Recovery of an overpayment will defeat the purpose of the FECA 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 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. A higher amount is specified for a beneficiary with one or more dependents.”

With regard to the “against equity and good conscience” standard, section 10.437 of the regulations provides:

“(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.

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<sup>3</sup> 5 U.S.C. § 8129(a)-(b).

<sup>4</sup> 20 C.F.R. § 10.436.

<sup>5</sup> 20 C.F.R. § 10.437.

Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.”

Finally, section 10.438 of the Office’s regulations<sup>6</sup> provides:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the FECA, or be against equity and good conscience. This information will also used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of the waiver, and no further request for waiver shall be considered until the requested information is furnished.”

In the instant case, appellant submitted insufficient information regarding his financial situation, because his live-in companion of 23 years, Ms. Forette, refused to submit information regarding her specific contributions to the income and expenses of the household. He thus failed to submit sufficient evidence showing that he needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed, as requested by the Office in its January 21, 1999 letter. Therefore, he does not qualify for waiver under the “defeat the purpose of the Act” standard.<sup>7</sup> Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from July 16, 1995 through June 21, 1997. Pursuant to its regulations, the Office therefore did not abuse its discretion by issuing its December 23, 1999 final decision denying waiver of recovery of the overpayment in the amount of \$5,365.60.<sup>8</sup>

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<sup>6</sup> 20 C.F.R. § 10.438.

<sup>7</sup> See *Nina D. Newborn*, 47 ECAB 132 (1995).

<sup>8</sup> The hearing representative did not base his denial of waiver on the refusal of appellant to accede to his request for additional financial information from his live-in companion of 23 years, Ms. Forette. This fact, however, could have been used as an additional basis to deny waiver.

The decision of the Office of Workers' Compensation Programs dated December 23, 1999 is hereby affirmed.

Dated, Washington, DC  
July 9, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member