

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. KERLEY and DEPARTMENT OF THE NAVY,
NAVAL SEA SYSTEMS COMMAND, Keyport, WA

*Docket No. 02-167; Submitted on the Record;
Issued August 28, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying waiver of the overpayment of compensation in the amount of \$4,849.02 which the Board had previously determined that appellant had received in overpayment compensation benefits; and (2) whether the Office properly required repayment of the overpayment by withholding \$150.00 every four weeks from appellant's continuing compensation.

This case is before the Board for a third time. Previously, the Board found that the Office properly reduced appellant's compensation effective August 15, 1999 based on appellant's actual earnings and that appellant had received an overpayment of compensation benefits in the amount of \$4,849.02 from February 20, 1995 through August 14, 1999. The Board, however, found that the Office improperly determined that appellant was not without fault in the creation of the overpayment in the amount of \$4,849.02 and remanded the case for a waiver determination.¹

By letter dated July 5, 2001, the Office requested that appellant complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof so that it may make a determination regarding appellant's entitlement to waiver of his existing overpayment. The Office indicated that the financial information would be used to determine whether appellant was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. On July 12, 2001 the Office received appellant's overpayment questionnaire. Appellant provided no supporting financial information.

By decision dated September 8, 2001, the Office finalized the overpayment decision. The Office determined that, while appellant was not at fault, the circumstances of appellant's case did not warrant waiver of recovery of the overpayment. The Office determined that

¹ Docket No. 00-791 (issued May 22, 2001).

recovery of the overpayment would be made from appellant's continuing compensation at a rate of \$150.00 every 28 days.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in the amount of \$4,849.02 after finding that appellant was without fault with respect to that overpayment.

Section 8129 of the Federal Employees' Compensation 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." 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 10.436³ and 10.437⁴ 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 [Act] 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."

² 5 U.S.C. §§ 8129(a), (b).

³ 20 C.F.R. § 10.436.

⁴ 20 C.F.R. § 10.437.

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. 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 regulations⁵ provides:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act], or be against equity and good conscience. This information will also be 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 did not submit any information regarding his financial situation in response to the Office’s July 5, 2001 letter, regarding his overpayment of compensation.⁶ The Office noted that the undocumented figures provided by appellant on the Form OWCP-20 reflect a monthly income of \$3,762.00 and monthly expenses of \$3,133.00. Appellant additionally identified his wife as a dependent and a savings account balance of

⁵ 20 C.F.R. § 10.438.

⁶ After the Office issued its September 8, 2001 decision, appellant, in a letter dated September 23, 2001, provided some information regarding his health and expenses paid since his work-related accident. The Board, however, does not have jurisdiction to review appellant’s contentions. 20 C.F.R. § 501.2(c).

\$5,800.00. Appellant's monthly income and assets clearly exceeds the specified resource base.⁷ Appellant thus failed to submit sufficient evidence showing that he needs substantially all of the current monthly income to meet living expenses, as requested by the Office in its July 5, 2001 letter. Therefore, he does not qualify for waiver under the "defeat the purpose of the Act" standard.⁸ 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 February 20, 1995 through August 14, 1999. Accordingly, the Office properly found that appellant's failure to respond to its July 5, 2001 letter by submitting the requested financial information after informing him that he had 30 days, in which to respond and submit evidence supporting a waiver, was sufficient grounds to find that he does not qualify for waiver. Pursuant to its regulations, the Office, therefore, did not abuse its discretion by issuing its September 8, 2001 final decision denying waiver of recovery of the overpayment in the amount of \$4,849.02.

Lastly, the Board finds that the Office properly required repayment by withholding \$150.00 from appellant's continuing compensation.

With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account 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 hardship."⁹

When, as in this case an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁰ The Board finds that the Office did not abuse its discretion in following those guidelines in this case.

⁷ *Gail M. Roe*, 47 ECAB 268 (1995).

⁸ *See Nina D. Newborn*, 47 ECAB 132 (1995).

⁹ 20 C.F.R. § 10.441(a) (1999).

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(b) (September 1994).

The September 8, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 28, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member