

**United States Department of Labor
Employees' Compensation Appeals Board**

MICHAEL A. GRANITZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Allentown, PA, Employer**

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**Docket No. 04-313
Issued: March 25, 2004**

Appearances:
Michael A. Granitz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 17, 2003 appellant filed a timely appeal from a November 3, 2003 decision of the Office of Workers' Compensation Programs' finding an overpayment of compensation in the amount of \$531.30. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction of the overpayment issue.¹

¹ This case was previously before the Board. The Board reviewed an Office May 14, 2003 decision, which found that appellant was not entitled to waiver of an overpayment in the amount of \$531.30. By order dated September 4, 2003, the Board found that the record was incomplete, as it did not include a complete copy of the Office's May 14, 2003 decision, and remanded the case for reconstruction of the record and the issuance of an appropriate decision to protect appellant's appeal rights. Docket No. 03-1655 (issued September 4, 2003). On remand, the Office reconstructed the case record and issued a decision dated November 3, 2003, which is the subject of the instant appeal.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of compensation in the amount of \$531.30 was created; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On October 10, 2002 appellant, then a 50-year-old letter carrier, injured his left arm while lifting a tub of mail in the performance of duty. The Office accepted his claim for left supraspinatus tendon tear and paid compensation for temporary total disability on the periodic compensation rolls.

Effective February 17, 2003 appellant returned to full-time work.² In a preliminary determination dated March 6, 2003, the Office found that an overpayment in the amount of \$531.30 had occurred from February 7 through 22, 2003 because appellant returned to work effective February 7, 2003 but received compensation benefits for total disability through February 22, 2003. The Office found that appellant was without fault in the creation of the overpayment, as it was due to an administrative error. It informed appellant that, if he disagreed with the fact or the amount of the overpayment, he could submit new evidence to support his contention or he could request a waiver of recoupment within 30 days of receipt of the Office's letter and submit appropriate evidence to justify his request.

In response, appellant submitted a completed overpayment questionnaire which noted that the Office had incorrectly stated that he had returned to work on February 7, 2003, when he did not begin to work until February 18, 2003. He stated that, while there was "no hardship involved," he felt that the overpayment was due to the use of this incorrect date by the Office, and that, therefore, he should not be required to repay the overpaid amount.

By letter dated April 1, 2003, the Office informed appellant that the preliminary decision had contained a typographical error, and was intended to reflect appellant's return to work effective February 17, 2003.

At appellant's request, a telephone conference was held on April 4, 2003. Following the conference, by letter dated April 7, 2003, the Office provided appellant a copy of the memorandum of conference which reflected the monthly income, expenses and monetary assets provided by appellant. The memorandum noted that appellant reported a total monthly income of \$1,966.80, including his wife's income, and itemized monthly expenses totaling \$2,957.46. In addition, appellant reported that he had a savings account balance of \$2,254.00, a checking account balance of \$1,836.00 and credit union savings of \$2,254.00.

In response, appellant stated that he had reviewed the memorandum of conference and listed some additional monthly expenses that were not reflected by the document. By letter dated April 28, 2003, the Office informed appellant that the memorandum of conference had been

² As February 17, 2003 was a federal holiday, appellant's actual first day back at work was February 18, 2003. However, appellant received holiday pay for February 17, 2003.

corrected to reflect the additional expenses provided, but noted that, as appellant now claimed an income in the amount of \$1,966.80 and monthly expenses of \$5,787.62, it was necessary that he submit documentary proof of such expenses.

Appellant submitted receipts and bills in support of his claimed monthly expenses, as well as a savings account statement showing a balance of \$1,836.28, and a copy of his wife's paycheck. In a letter dated May 21, 2003, appellant stated that he contested the Office's determination that he had income of \$3,408.85 during February 2003, and asserted that his income during that time was only approximately \$2,100.00.

By decision dated November 3, 2003, the Office finalized the overpayment determinations. The Office found that appellant was without fault in the creation of the overpayment that occurred from February 17 through 22, 2003 because he received both compensation for wage loss and his regular salary during this time due to administrative error. The Office reviewed appellant's income, expenses and assets information, as set forth in the updated memorandum of conference, and determined that, while appellant's monthly expenses exceeded his income, as appellant had a resource base greater than the \$5,600.00 allowed for a claimant with a wife and one child, he was not eligible for waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

When an employee returns to work and ceases to have any loss of wages, compensation for wage loss is no longer payable.³ Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.⁴

ANALYSIS -- ISSUE 1

In this case, there is no dispute that the Office issued payments for wage-loss compensation after appellant had returned to full-time work effective February 17, 2003. Therefore an overpayment was created. The record contains evidence that appellant received compensation from the Office for the period February 17 through 22, 2003, and also received pay from the employing establishment for the same period. In addition, the Office properly determined that as appellant's weekly pay rate was \$846.80, and as he was paid at a compensation rate of 75 percent, or \$635.10 per week, for the six days in question, with appropriate deductions, appellant received an overpayment in the amount of \$531.30.

³ *Steven A. Berndt*, 51 ECAB 402 (2000); *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁴ *Albert Pineiro*, 51 ECAB 310 (2000).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁵ provides that where an overpayment of compensation has been made because of an error of fact or law, "[a]djustment 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 this subchapter or would be against equity and good conscience."⁶ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.⁷

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436 of the Office's regulations, provides:

"(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."⁸

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

"(a) Recovery of an overpayment is considered 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 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.

⁵ 5 U.S.C. § 8129(b).

⁶ *Id.*

⁷ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

⁸ 20 C.F.R. § 10.436.

“(2) To establish that an individual’s position has changed for the worst, 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.”⁹

ANALYSIS

In this case, appellant was found to be without fault in creating the overpayment. However, the fact that a claimant is without fault in creating the overpayment does not preclude the Office from recovering all or part of the overpayment. The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁰ The Office must exercise its discretion in determining whether waiver is warranted under either of the two standards discussed above.¹¹

For waiver under the first standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses¹² and that his assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.¹³

Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses, and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁴ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office will result in denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹⁵

In this case, appellant submitted information regarding his income, assets and expenses both during and subsequent to the telephone conference held on April 4, 2003. Based on the information provided by appellant, the Office properly found that appellant’s monthly expenses actually exceed his monthly income. The Office properly found, however, that, based on appellant’s savings account balance of \$2,254.00, checking account balance of \$1,836.00¹⁶ and

⁹ 20 C.F.R. § 10.437.

¹⁰ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹¹ *Linda Hilton*, 52 ECAB 476 (2001).

¹² An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00

¹³ *Jan K. Fitzgerald*, 51 ECAB 659 (2000); see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹⁴ 20 C.F.R. § 10.438(a).

¹⁵ 20 C.F.R. § 10.438(b).

¹⁶ The Board notes that the record reflects that the amount of \$1,836.00 is actually contained in a savings account, not a checking account.

credit union savings of \$2,254.00, his resource base exceeded the amount allowable resource base under the Office's procedures. Appellant was given an opportunity to review and correct the information contained in the memorandum of conference, and while he did supply additional information regarding his monthly expenses, he did not contest the Office's finding that he has a resource base of \$6,344.00, which is in excess of the \$5,600.00 allowed.¹⁷

Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment, nor did appellant claim any lost right or detrimental reliance.¹⁸ For this reason, the Office properly denied waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$531.30 and further finds that the Office acted within its discretion in denying waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ The record reflects that appellant is married and has a dependent son, born May 15, 1989.

¹⁸ See *Christine P. Burgess*, 50 ECAB 444, 449 (1999).