

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA A. HAERTEL and U.S. POSTAL SERVICE,
POST OFFICE, Alhambra, Calif.

*Docket No. 96-1629; Submitted on the Record;
Issued October 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received a \$1,526.70 overpayment of compensation for the period December 14, 1989 to October 15, 1994; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

The Board finds that appellant received \$1,526.70 overpayment of compensation for the period December 14, 1989 to October 15, 1994.

In the present case, appellant received compensation for the period December 14, 1989 to October 15, 1994 but did not have the proper amounts deducted for health benefit premiums during this period. The record contains evidence which shows that the employing establishment failed to deduct \$1,526.70 in such premiums. Therefore, the Office properly determined that appellant received a \$1,526.70 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] 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."² Since the Office found appellant to be without fault in the matter of the \$1,526.70 overpayment, then, in accordance with section 8129(b), the Office may only recover

¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

² 5 U.S.C. § 8129(b).

the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.³

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).⁴ Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.⁵

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. The record reveals that appellant has \$3,600.00 in monthly income and \$3,089.00 in monthly expenses.⁶ Therefore, appellant's monthly income exceeds her monthly ordinary and necessary expenses by \$511.00. As appellant's current income exceeds her current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.⁷ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

³ Appellant argued that the overpayment should be waived because she was not found to be at fault in its creation but she would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁴ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

⁵ 20 C.F.R. § 10.323.

⁶ In its March 29, 1996 overpayment decision, the Office carefully itemized appellant's income and expenses.

⁷ *See supra* note 4 and accompanying text. On appeal, appellant indicated that she had substantial new medical expenses, but the Office cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt⁸ or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.⁹

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, she has failed to show that the Office abused its discretion by refusing to waive the overpayment.

The decision of the Office of Workers' Compensation Programs dated March 29, 1996 is affirmed.

Dated, Washington, D.C.
October 20, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁸ Whether a claimant experiences severe financial hardship in attempting to repay an overpayment is determined by using the same criteria set forth in 20 C.F.R. § 10.322; *see supra* note 5 and accompanying text.

⁹ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).