

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PHILIP R. WASHINGTON and DEPARTMENT OF THE ARMY,  
CORPS OF ENGINEERS, Arlington, Va.

*Docket No. 96-1031; Submitted on the Record;  
Issued September 21, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant received an overpayment of compensation in the amount of \$2,567.94, and, if so, whether the Office of Workers' Compensation Programs properly refused to waive recovery of this overpayment.

The Office, in its December 11, 1995 decision, determined that appellant received an overpayment of compensation in the amount of \$2,567.94 that occurred because "premium deductions for health insurance were not taken from August 30, 1987 through January 7, 1995." The Office further determined that appellant was without fault in the matter of the overpayment, but that waiver of recovery of the overpayment was not warranted.

The Board finds that appellant received an overpayment of compensation in the amount of \$2,567.94, and that the Office properly refused to waive recovery of this overpayment.

The record shows that the Office correctly determined that premiums for health insurance were not deducted from August 30, 1987 to January 7, 1995, and that the amount of these premiums was \$2,567.94. The Board has recognized that an underwithholding of health insurance premiums constitutes an overpayment of compensation because the Office must pay the full premium to the Office of Personnel Management (OPM) when the error is discovered.<sup>1</sup>

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment 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): "Adjustment 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

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<sup>1</sup> See *Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

would defeat the purpose of the Act or would be against equity and good conscience.”<sup>2</sup> No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

Section 10.322(a) of the Office’s regulations<sup>3</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (2) the individual’s 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. This base includes all of the claimant’s assets not exempted from recoupment.

Section 10.322(c) of the Office’s regulations<sup>4</sup> states that an individual’s ordinary and necessary living expenses include: (1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, transportation, insurance; (2) Medical, hospitalization, and other similar expenses; (3) Expenses for the support of others for whom the individual is responsible; (4) Church and charitable contributions made on regular basis; and (5) Miscellaneous expenses (*e.g.*, newspaper, haircuts) not to exceed \$25.00 per month.

The Office determined that appellant was without fault in the matter of the overpayment. After a telephone conference between appellant and the Office on November 3, 1995, appellant submitted a list of his monthly household expenses: \$501.43 for food, \$150.00 for clothing, \$27.34 to J.C. Penney, \$21.51 to Sears, \$650.00 for rent, \$43.36 for telephone, \$15.00 to State Farm for insurance, \$477.00 to his credit union for an automobile loan, \$253.57 to Amoco, \$281.14 for automobile maintenance (including a \$1,250.00 down payment loan from the credit union), \$136.15 to Nationwide Insurance, \$229.00 for charitable contributions, \$260.00 to Shaw’s Jewelers, \$17.00 to Service Merchandise, and \$10.44 for a pager. Appellant also submitted a copy of a statement from a dental group showing \$880.00 in charges, paid by check, for his daughter and wife during the period from May 1, 1994 to November 20, 1995. The Office disallowed some of these expenses as unsubstantiated, but even if it had allowed them all, appellant’s total ordinary and necessary monthly living expense would amount to a total of \$3,121.83. When compared to his monthly household income of \$3,435.34, consisting of his compensation payments and his wife’s salary, it is apparent that repayment of the overpayment would not defeat the purpose of the Act by depriving him of the resources needed for his ordinary and necessary living expense. It is also apparent that deducting \$125.00 per month from his continuing periodic compensation checks would not constitute an undue hardship.

The decision of the Office of Workers’ Compensation Programs dated December 11, 1995 is affirmed.

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<sup>2</sup> 5 U.S.C. § 8129.

<sup>3</sup> 20 C.F.R. § 10.322(a).

<sup>4</sup> 20 C.F.R. § 10.322(c).

Dated, Washington, D.C.  
September 21, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member