

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES M. HRUSKA and DEPARTMENT OF THE ARMY,  
USACML, Fort McClellan, AL

*Docket No. 99-2029; Submitted on the Record;  
Issued October 19, 2000*

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DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$2,471.50 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for waiver of recovery of the overpayment; and (4) whether the Office properly determined that \$200.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for aggravation of post-traumatic stress disorder and depression with psychotic features. In a preliminary determination dated November 24, 1998, the Office found that appellant received an overpayment of \$2,741.50 because effective February 5, 1998 appellant's dependent status changed from a compensation rate of 75 percent with dependents to 66 2/3 percent without dependents, but he continued to be paid through November 7, 1998 at the maximum compensation rate. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act<sup>1</sup> to recover the overpayment.

By decision dated January 15, 1999, the Office finalized the November 24, 1998 preliminary determination that appellant received an overpayment of \$2,471.50 and was without fault in the creation of the overpayment. The Office also found that appellant was not entitled to waiver of recovery of the overpayment. Further, the Office determined that \$200.00 a month should be deducted from appellant's continuing compensation payments.

The Board finds that appellant received an overpayment in the amount of \$2,471.50.

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<sup>1</sup> 5 U.S.C. §§ 8101 *et seq.*

The Office found in its November 24, 1998 preliminary determination that appellant received an overpayment of \$2,471.50 because he had no dependent effective February 5, 1998 but received additional compensation on behalf of a dependent for the period from February 5 through November 7, 1998. On a Form EN-1032 dated April 5, 1998, appellant indicated that on February 5, 1998 he no longer had a dependent because he was divorced. Using computer printouts from the Employment Standards Administration, the Office calculated that the excess compensation appellant received from February 5 through November 7, 1998 totaled \$2,471.50. The Office's determination of the amount of the overpayment is proper and is supported by the evidence of record.

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Act<sup>2</sup> provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.<sup>3</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>4</sup>

The implementing regulation<sup>5</sup> provides that a claimant is at fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.

In this case, appellant informed the Office in April 1998 that he no longer had a dependent as of February 5, 1998 due to his divorce. He also stated in his overpayment recovery questionnaire dated December 5, 1998 that he informed the Office on February 5, 1998 of the change of the dependent status and forwarded statements to the Office at least twice prior to March 1, 1998 informing the Office of the change. Appellant, therefore, meets none of the above criteria as he timely informed the Office of the change in the dependent status. The Office properly found that appellant was without fault in the creation of the overpayment.

The Board further finds that the Office properly determined that appellant was not entitled to waiver of the overpayment.

Section 8129(a) of the Act<sup>6</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later

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<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> See *James H. Hopkins*, 8 ECAB 281, 287 (1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>4</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> 5 U.S.C. § 8129(a).

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): “Adjustments or recovery by the United States may not be made when incorrect payments 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.”<sup>7</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>8</sup> The Office must 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 10.434-.437 of the implementing federal regulations.

Section 10.436<sup>9</sup> provides that 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 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 the beneficiary’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. For waiver under the “defeat the purpose of the Act” standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.<sup>10</sup>

In determining that appellant was not entitled to waiver of the overpayment, the Office obtained figures from appellant’s overpayment recovery questionnaire dated December 3, 1998. The Office determined that appellant had a total monthly income of \$3,043.52, consisting of \$154.00 in social security benefits, \$717.00 in veterans benefits and \$2,172.52 in workers’ compensation benefits. The Office determined that appellant’s monthly expenses totaled \$2,623.99, based on his rent or mortgage of \$1,283.73, his property taxes of \$98.59, \$550.00 for food and clothing, \$91.67 for insurance, \$250.00 for utilities and \$350 for miscellaneous. The Office further found that appellant had a checking account balance of \$1,300.00, a savings account balance of \$3,642.24 and other personal property and funds totaling \$15,000.00. The Office determined that since appellant’s monthly income of \$3,043.52 exceeded his monthly expenses of \$2,623.99 by \$419.53, appellant did not need substantially all of his current income to meet ordinary and necessary living expenses and thus was not entitled to waiver of recovery of the overpayment. The Office’s analysis is reasonable and proper and its finding that appellant is not entitled to waiver of the overpayment is affirmed.

The Board further finds that the Office properly deducted \$200.00 a month from appellant’s continuing compensation payments.

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<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>9</sup> 20 C.F.R. § 10.436.

<sup>10</sup> *James Lloyd Otte*, *supra* note 8; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

Section 10.441(a) provides if an overpayment has been made to an individual who is entitled to further payments and 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 circumstance of the individual and any other relevant factors, so as to minimize any hardship.”<sup>11</sup>

In this case, the Office considered appellant’s income and expenses and found that appellant’s monthly income exceeded his living expenses by \$419.53 and that appellant had a total savings of approximately \$20,000.00. In ordering that \$200.00 be withheld every 28 days from appellant’s continuing compensation benefits, the Office implicitly found that recovery of the overpayment would not cause undue hardship. The Office’s finding is reasonable.

The decision of the Office of Workers’ Compensation Programs dated January 15, 1999 is hereby affirmed.

Dated, Washington, DC  
October 19, 2000

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>11</sup> 20 C.F.R. § 10.441(a).