

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAY M. BURNINGHAM and DEPARTMENT OF THE NAVY
NAVAL STATION, Everett, WA

*Docket No. 01-1635; Submitted on the Record;
Issued September 10, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of \$2,317.50; (2) whether the Office abused its discretion in denying waiver of recovery of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by deducting \$150.00 every four weeks from his disability compensation.

Appellant's claim, filed on July 8, 1996 after he wrenched his back while carrying a telephone booth assembly, was accepted for a lumbosacral strain. He underwent a laminectomy on February 8, 1997 and subsequently developed an infection, which prolonged his recovery and required further surgery.

The Office accepted sciatica and a prolapsed disc as work related and appellant returned to light-duty work intermittently. On May 24, 1999 appellant filed a recurrence of disability claim stating that he could not "function with the constant pain any more." On July 16, 1999 the Office determined that appellant's condition had worsened since its June 11, 1998 decision on loss of wage-earning capacity and approved total disability compensation from that date.¹

On July 21, 1999 the Office informed appellant that he would receive \$2,287.82 in wage-loss compensation after deductions for health benefits and optional life insurance premiums. The Office's letter showed no deductions for basic life insurance.² On April 24, 2001 the Office informed appellant that it had failed to deduct the monthly premium for his basic life insurance

¹ Appellant underwent further surgery for lumbar fusion and removal of scar tissue on July 20, 1999.

² A similar letter on September 7, 1997 informed appellant that he would receive \$1,934.14 in wage-loss compensation every four weeks, which included deductions for health benefits and optional life insurance. No deduction was made for basic life insurance.

and would begin to do so. The Office calculated an overpayment of \$2,317.50 from June 3, 1999 through April 21, 2001.

On April 24, 2001 the Office issued a preliminary notice of overpayment and found appellant to be without fault in its creation. Appellant requested a waiver. The Office determined on May 11, 2001 that appellant was not entitled to waiver because he had failed to submit any financial information as requested and that \$150.00 would be deducted from his ongoing compensation every four weeks.

The Board finds that the Office properly determined the amount of the overpayment.

The basic rate of compensation under the Federal Employees' Compensation Act³ is 66 2/3 percent of the injured employee's monthly pay.⁴ When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation augmented at eight and one-third percent.⁵ The total amount of compensation paid every four weeks is reduced by deductions made for health and life insurance.

In this case, appellant was paid the augmented rate and deductions for health insurance and optional life insurance were made, but no deductions were made for basic life insurance premiums. The Office was informed by the Office of Personnel Management, to whom appellant had applied for disability retirement, that it had failed to withhold the proper premiums for post-retirement and basic life insurance coverage. The Office calculated a total premium for basic life coverage from April 25 to June 3, 1999 of \$328.26 and for post-retirement life coverage of \$1,989.24 from June 3, 1999 to April 21, 2001, a total of \$2,317.50.⁶ The Board finds that this amount was properly computed.

The Board further finds that the Office properly denied waiver of recovery of the overpayment.

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, 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

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8105(a).

⁵ 5 U.S.C. § 8105(b).

⁶ The premiums for optional life insurance \$27.92 had been deducted.

“(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.”⁷

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.

(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.”⁸

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.⁹ The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁰

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 expenses and that his assets do not exceed a specific resource base. An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income

⁷ 20 C.F.R. § 10.436.

⁸ 20 C.F.R. § 10.437.

⁹ *Linda Hilton*, 52 ECAB ___ (Docket No. 00-2711, issued August 20, 2001).

¹⁰ *Rudolph A. Geci*, 51 ECAB ___ (Docket No. 98-1791, issued March 29, 2000).

does not exceed monthly expenses by more than \$50.00.¹¹ However, the finding that a type of expense is ordinary and necessary does not mean that the amount claimed is also ordinary and necessary.¹²

In this case, appellant requested a waiver of recovery of the overpayment and stated that his only income was his wage-loss benefits. The preliminary notice issued on April 24, 2001 informed appellant that he needed to explain his reasons for seeking a waiver, complete the recovery questionnaire form and submit documents such as income tax returns, bank statements, bills, canceled checks, pay slips and other records to support his claimed income and expenses. However, appellant failed to complete the recovery questionnaire or submit any financial documents showing his monthly income and expenses. Nor did he argue that he would suffer financial hardship in trying to repay the debt.

Further, 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 payment of compensation. To demonstrate detrimental reliance under section 10.437(b), appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹³ He did not allege any substantial reliance on the overpayment of compensation. Nor did he show detrimental reliance. Therefore, the Office acted within its discretion in denying waiver of recovery of the overpayment.

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$150.00 every four weeks from his continuing compensation.

Section 10.441(a) states in relevant part:

“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 factors, so as to minimize any hardship.”¹⁴

In this case, appellant failed to provide the Office with the financial information necessary to determine how much he could afford to repay from the net of \$2,262.82 in wage-loss compensation he received every four weeks. Given the lack of information about

¹¹ *Jan K. Fitzgerald*, 51 ECAB ___ (Docket No. 98-2007, issued September 13, 2000); see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (September 1994).

¹³ *Howard R. Nahikian*, 53 ECAB ___ (Docket No. 01-138, issued March 4, 2002).

¹⁴ 20 C.F.R. § 10.441(a) (1999).

appellant's financial situation and the need to recover the overpayment during a reasonable period of time, the Office determined that \$150.00 would be deducted every four weeks. The Board finds this to be a reasonable amount, absent any evidence of financial hardship in the record.

The May 11, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 10, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member