

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. CURRY and DEPARTMENT OF AGRICULTURE,
BITTERROOT NATIONAL FOREST, Hamilton, MT

*Docket No. 03-1082; Submitted on the Record;
Issued July 7, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by failing to consider waiver of recovery of the overpayment.

This case has previously been on appeal before the Board. By decision dated July 10, 2002, the Board set aside the Office's December 19, 1999 decision and remanded the case for recalculation of appellant's average weekly rate of pay to determine whether he had received an overpayment of compensation.¹ In view of the Board's finding on whether appellant received an overpayment of compensation, the Board noted that it would not address the waiver issue. The facts and the circumstances of the case are contained in the Board's prior decision and are incorporated herein by reference.

Upon remand, the Office totaled the amount of appellant's gross pay during the year prior to April 14, 1988, the date of injury, and arrived at \$22,828.84 as a total with 222 workdays. The Office referred to this figure as appellant's "annual rate of pay." It then divided that number by 222 workdays to find his average daily rate of pay. The Office then multiplied this amount by 260 which equaled \$27,736.50. This amount was then divided by 52 weeks in a year which resulted in a determination of appellant's weekly rate of pay as \$514.16. Using this pay rate, the Office determined that appellant received an overpayment in the amount of \$3,015.52, for the period November 18, 1988 through July 4, 1998. The Office also determined that appellant received an underpayment of compensation in the amount of \$1,755.71 for the period July 5, 1998 through July 25, 2003. The Office subtracted this amount to reduce the overpayment to \$1,259.61. Then, the Office noted that appellant had been making payments in the amount of \$200.00 since March 22, 2000 which resulted in a payment of \$6,000.00 to the Office. The Office subtracted the overpayment of \$1,259.61 from the \$6,000.00 appellant had previously paid, to find that the Office owed appellant \$4,740.39. Lastly, the Office noted that the issue of waiver was not considered and instructed the district Office to issue a check in the amount of

¹ Docket No. 00-1407 (issued July 10, 2002).

\$4,740.39 to appellant. The Office transmitted the above information to appellant by a February 4, 2003 letter, which stated that the Office had complied with the Board's July 10, 2002 decision, that the enclosed memorandum contained the findings, conclusion and actions taken by the Office, and that, if he disagreed with this decision, his appeal rights were attached.

The Board finds that the case is not in posture for decision with respect to the issue of whether the Office abused its discretion by refusing to consider waiver of 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.² 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."³ Since the Office, in its prior decision regarding the overpayment, found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover 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.

Section 10.436 of the Office's regulations⁴ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: "(a) [t]he 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) [t]he beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics." Section 10.437⁵ states that recovery of an overpayment is also considered to be against equity and good conscience if the 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 the present case, the Office concluded that appellant had received an overpayment of compensation in the amount of \$3,015.52 for the period November 18, 1988 through July 4, 1998 because his compensation had been based upon an incorrect pay rate. The Office also found that appellant received an underpayment in the amount of \$1,755.71 for the period July 5, 1998 through July 25, 2003 and that he had previously repaid \$6,000.00 to the Office. The Office then subtracted these amounts from the overpayment amount to find that appellant was owed \$4,740.39.

² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.436.

⁵ 20 C.F.R. § 10.437.

Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁶ In *Califano v. Yamasaki*,⁷ the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act and the Director has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Federal Employees' Compensation Act.⁸

The Office's offset practice, as exercised in the October 13, 2000 decision, precludes the proper consideration of waiver of the overpayment, which in this case is \$3,015.52. The Office specifically stated it had not considered waiver as it had found appellant was owed money by the Office. The Office's practice permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441.⁹ The Board finds that such a practice denies administrative due process with respect to the amount offset.¹⁰

⁶ See generally FECA Circular No. 82-48, "Overpayments and Waiver" (issued December 1, 1982).

⁷ 442 U.S. 682 (1979).

⁸ This policy was announced in FECA Bulletin No. 80-35 (issued October 20, 1989) and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994).

⁹ This section states that, in collecting an overpayment of compensation, 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 relevant factors, so as to minimize any hardship."

¹⁰ *Diana L. Booth*, 52 ECAB 370 (2001); *Michael A. Grossman*, 51 ECAB 673 (2000).

The February 4, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development, including consideration of waiver of the overpayment in the amount of \$3,015.52.

Dated, Washington, DC
July 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member