

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IDA COX and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Louisville, KY

*Docket No. 99-947; Submitted on the Record;
Issued December 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant received a \$3,469.04 overpayment of compensation; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$300.00 a month from appellant's compensation benefits.

On August 27, 1981 appellant, then a 50-year-old nurse, sustained an employment-related low back strain and permanent aggravation of degenerative disc disease. Appellant received compensation disability.¹ By decision dated October 13, 1998, the Office finalized its April 27, 1998 preliminary determination that appellant received a \$3,469.04, overpayment and was not at fault in the creation of the overpayment. The Office indicated that the overpayment occurred because premiums for family life insurance (option c) were not deducted from March 16, 1986 to July 4, 1987 and premiums for basic life insurance were not deducted July 2, 1989 to June 21, 1997. The Office determined that the overpayment was not subject to waiver because recovery would not defeat the purpose of the Federal Employees' Compensation Act, or be against equity and good conscience.

The Board finds that appellant received a \$3,469.04 overpayment of compensation.

The record shows that premiums for family life insurance (option c) for basic life insurance were not deducted from appellant's disability payments for the month in question. Appellant was enrolled in these programs during these periods and should not have received the \$3,469.04, which was not deducted. Therefore, the Office properly determined that appellant received a \$3,469.04 overpayment.

¹ Appellant was separated from the employing establishment on October 16, 1984 but returned to the employing establishment on March 27, 1989 in a light-duty job. She stopped work on May 22, 1989 and was separated from the employing establishment on April 19, 1992.

The Board further finds that the Office acted within its discretion in refusing to waive recovery of the overpayment.

The Office's waiver or refusal to waive an overpayment of compensation rests within the Office's discretion pursuant to statutory guidelines.² These statutory guidelines are found in section 8129(b) of the Act, which states:

Since the Office found appellant to be without fault in the matter of the \$3,469.04 overpayment, then, in accordance with section 8129(b), the Office may recover the overpayment only 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 her 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 \$3,753.00, in monthly income, \$3,177.00, in

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

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 she needs substantially all of her current income to meet ordinary and necessary living expenses and that her 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 her current income to meet ordinary and necessary living expenses if her 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 6.200.6a(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.

monthly expenses and assets of \$40,995.00.⁶ Appellant's monthly income exceeds her monthly ordinary and necessary expenses by approximately \$576.00.

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.⁸

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 debt,⁹ or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁰

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 Board further finds that the Office properly required repayment of the overpayment by deducting \$300.00 from appellant's compensation every four weeks.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual."¹¹

The record supports that, in requiring repayment of the overpayment by deducting \$300.00 from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in

⁶ Figures have been rounded to the nearest dollar. Appellant initially completed an overpayment questionnaire and then adjusted her figures by means of a September 23, 1998 conference and additional communications with the Office.

⁷ See *supra* note 5 and accompanying text.

⁸ It should be noted, however, that appellant's assets of \$40,995.00 well exceed the allowable resource base.

⁹ 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 6 and accompanying text.

¹⁰ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹¹ 20 C.F.R. § 10.321(a). See *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$300.00 from appellant's compensation every four weeks.

The decision of the Office of Workers' Compensation Programs dated October 13, 1998 is hereby affirmed.

Dated, Washington, DC
December 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member