U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. WHEELER and FEDERAL EMERGENCY MANAGEMENT AGENCY, Sanger, TX

Docket No. 03-274; Submitted on the Record;
Issued December 11, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON
MICHAEL E. GROOM

The issues are: (1) whether appellant received a $5,514.04 overpayment of compensation for the period August 20, 1995 through November 3, 2001; (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 $650.00 from appellant's compensation payments every four weeks.

On February 19, 1991 appellant, then a 53-year-old utility service repair operator, filed a notice of traumatic injury and claim for compensation (Form CA-i), alleging that he injured his back when he fell, while in the performance of his federal duties. The claim was accepted for a lumbosacral strain and later a disc displacement. The Office also authorized a laminectomy. Appellant was placed on total disability. He later worked part time as a school bus driver.

In a December 5, 2001 preliminary decision, the Office found an overpayment of $5,514.04 had occurred as the Office did not deduct the correct amount for appellant's health insurance premiums.[1] The Office found that appellant was not at fault in creating the overpayment. He was advised of his opportunity to request a prerecoupment hearing and provided a financial information form to complete if he sought a waiver of the overpayment.

In a December 19, 2001 letter, appellant requested a waiver and a hearing. At the hearing he testified that paying back the overpayment would cause a hardship. Appellant indicated that his monthly household income consisted of $2,000.00 in disability compensation, approximately $500.00 as a part-time school bus driver and approximately $497.00 that his wife received in

[1] Appellant had elected and received family coverage but the premium deductions were based on single person rate.

disability payments for a total of $2,997.00. He submitted documentation of monthly expenses in the amount of $2,565.00 as follows:

Monthly Amount	Type of Expense
$800.00	groceries, household and personal hygiene
$100.00	clothing
$434.00	mortgage
$610.00	utilities
$309.00	transportation (2 cars, gas, insurance etc.)
$65.00	medical and other insurance
$247.00	credit card debt
$2,565.00	

Appellant testified that he owned a second home, but his mother lived in the home rent-free and she paid the taxes. Although he had $46,116.00 in an investment account, he stated that approximately $11,400.00 belonged to his father and was being held for his burial expenses. Appellant indicated that he was holding approximately $5,000.00 to $6,000.00 for his mother for the same reason and that he had $5,700.00 in a checking account. He added that recovery of the overpayment would be a hardship because he would be retiring at age 60 and, since he could not receive social security until age 62, he would need all his savings for living expenses.

In a September 19, 2002 decision, the hearing representative found that an overpayment of $5,514.04 did occur, that appellant was not at fault in the creation of the overpayment, but denied waiver. The hearing representative found that appellant's monthly expenses for telephone, groceries and utilities were "somewhat excessive" and that his monthly payment should be $650.00 a month.

The Board finds that appellant received an overpayment of compensation in the amount of $5,514.04 for the period August 20, 1995 to November 3, 2001.

The record reflects that the Office paid insurance premiums at the rate for a single individual while appellant elected to receive family coverage. The record contains evidence which shows that for the period of August 20, 1995 to November 3, 2001 appellant paid $4,039.72 in insurance premiums when he should have paid $9,553.76. Therefore, the Office properly determined that a $5,514.04 overpayment due to the failure to deduct the proper premiums.[2]

[2] Appellant was found without fault in the creation of the overpayment due to the under withholding of insurance premiums. *See Ian Manson Graham*, 40 ECAB 1103 (1989). An employee entitled to disability compensation may continue his or her health insurance with deductions from compensation.

The Board further finds that the Office did not abuse its discretion by refusing to waive 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.[3] 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."[4] Since the Office 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.[5]

Section 10.436 of the Office's regulations[6] 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.[7] An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed expenses by more then $50.00.[8]

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience, when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an 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.[9]

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[3] *See Robert Atchison,* 41 ECAB 83, 87 (1989).

[4] 5 U.S.C. § 8 129(b).

[5] Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation, but he 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. The fact that a claimant is without fault in creating an overpayment does not preclude the Office from recovering all or part of the overpayment. *See Marlow G. Massey,* 49 ECAB *650* (1989).

[6] 20 C.F.R. § 10.436 (1999).

[7] An individual's assets must exceed a 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 individual's assets not exempt from recoupment; *see Robert F. Kenney,* 42 ECAB 297, 301 (1991).

[8] *See Leticia C. Taylor,* 47 ECAB 198, 203 (1995).

[9] 20 C.F.R. § 10.437. The standard for determining whether an individual would experience severe financial hardship attempting to repay the debt is the same for determining whether recovery would defeat the purpose of the Act.

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. Appellant's monthly income exceeds his monthly ordinary and necessary expenses by approximately $435.00. As his current income exceeds his current ordinary and necessary living expenses by more than $50.00, appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses. In addition, the record shows that he owns a second home and has more than $57,000.00 in investments and checking accounts. Even though appellant has testified and submitted documentation establishing that he is holding approximately $11,400.00 for his father and $5,000.00 for his mother that still leaves over $40,000.00 in his investment account. Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse, in reliance on the payment which created the overpayment.[10] Because he has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he 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 $650.00 from appellant's compensation payments every four weeks.

Section 10.44 1(a) of Title 20 of the Code of Federal Regulations provides in pertinent 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 the 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 relevant factors, so as to minimize any hardship."[11]

The record supports that, in requiring repayment of the overpayment by deducting $650.00 from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by him as well as the factors set forth in section 10.32 1 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 $650.00 from appellant's compensation payments every four weeks.

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[10] *See William J. Murphy,* 41 ECAB *569, 57* 1-72 (1989).

[11] 20 C.F.R. § 10.441(a); *see DonaldR. Schueler, 39* ECAB 1056, 1062 (1988).

The September 19, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 11, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member