

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KEVIN C. McGROGAN and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 95-1469; Submitted on the Record;  
Issued January 13, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of the overpayment that occurred in this case.

On September 20, 1994 the Office made a preliminary determination that an overpayment of \$3,596.52 occurred in appellant's case because health benefit premiums were not deducted from compensation payments for the period January 12, 1992 to March 5, 1994. The Office found that appellant was without fault in the creation of the overpayment and requested that he complete an overpayment recovery questionnaire. In a decision dated December 12, 1994, the Office finalized its preliminary determination and found that appellant was not entitled to waiver of the overpayment. The Office compared appellant's total household monthly income to his total household monthly expenses, as represented on the overpayment recovery questionnaire and supporting documentation and found that, as the former exceeded the latter by \$495.00, recovery of the overpayment would not create a financial hardship. To minimize the effect of recovery, however, the Office ordered that \$100.00 be deducted from continuing compensation until the overpayment was recovered.

Following the Office's final decision, appellant explained that he incorrectly completed the original overpayment recovery questionnaire by underestimating his monthly expenses. He resubmitted a corrected questionnaire and asked the Office to review the matter. The Office advised, however, that there is no provision allowing the Office to review the formal decision rendered and that to pursue the matter appellant must appeal to the Board.

The Office's final decision concerning an overpayment is not subject to the hearing provision of 5 U.S.C. § 8124(b) or the reconsideration provision of 5 U.S.C. § 8128(a).<sup>1</sup> An individual aggrieved or adversely affected by a decision concerning an overpayment may request review by the Board, but the Board's jurisdiction is limited to reviewing the evidence that was

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<sup>1</sup> 20 C.F.R. § 10.321(h).

before the Office at the time of its final decision.<sup>2</sup> Thus, although the Board may review the Office's final decision concerning the overpayment, it has no jurisdiction to review appellant's corrected overpayment recovery questionnaire or to make a new decision on the issue of waiver.

The Board noted federal regulations support that, following a final decision concerning an overpayment, a claimant may submit to the Office a further request for waiver supported by such additional information as the Office may require to make a decision with respect thereto.<sup>3</sup> By taking appellant's corrected questionnaire as a request for reconsideration and referring him to the Board, this evidence cannot be reviewed for the first time on appeal. The Board will exercise its jurisdiction to review the Office's December 12, 1994 decision.

The Board finds that the Office did not abuse its discretion in denying waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>4</sup> provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. Section 8129(b) provides the only exception to this mandatory adjustment:

"Adjustment or recovery by the United States may not be made when incorrect payment had 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>5</sup>

Because appellant is without fault in the matter of the overpayment, the Office must adjust later payments only if adjustment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.322(a) of Title 20 of the Code of Federal Regulations<sup>6</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

"(a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses, and

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<sup>2</sup> *Id.* § 501.2(c).

<sup>3</sup> *Id.* § 10.324.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* § 8129(b).

<sup>6</sup> 20 C.F.R. § 10.322(a).

“(b) The individual’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.”<sup>7</sup>

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.<sup>8</sup>

The Office accepted appellant’s expenses as he reported them on the overpayment recovery questionnaire. Because monthly income exceeded these expenses by \$495.00, appellant does not need substantially all of his current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses and therefore recovery would not defeat the purpose of the Act.<sup>9</sup>

Recovery of an overpayment is considered to be against equity and good conscience if an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.322 above, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.<sup>10</sup>

As appellant’s disposable current income, as represented on his initial questionnaire, fails to establish a severe financial hardship in repaying the debt and as he has made no argument to support that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation, recovery of the overpayment would not be against equity or good conscience.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines.<sup>11</sup> As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion.

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(1) (September 1994).

<sup>8</sup> *Id.*

<sup>9</sup> When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time. *Id.*, Chapter 6.0200.6(a)(1).

<sup>10</sup> 20 C.F.R. § 10.323. In a rare third situation, recovery is considered to be against equity and good conscience when the individual against whom the overpayment is charged derived no personal gain from the incorrect payments and had no knowledge of the compensation benefits that were paid. Procedure Manual, Chapter 6.0200.6(b). In this case, however, the incorrect payments were paid directly to the employee, who thereby derived a personal gain.

<sup>11</sup> *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

The Board also finds that the Office did not abuse its discretion in setting the rate of recovery.

Office regulations provide:

“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.”<sup>12</sup>

In its December 12, 1994 decision, the Office took into consideration appellant’s financial status as reported by him and sought to minimize the effect of recovery by leaving him with \$395.00 in disposable monthly income. As the Office properly took into consideration the relevant factors cited in 20 C.F.R. § 10.321(a), the Board finds that it did not abuse its discretion in setting the rate of recovery.<sup>13</sup>

The December 12, 1994 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, D.C.  
January 13, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>12</sup> 20 C.F.R. § 10.321(a).

<sup>13</sup> See *Robert C. Schenck*, 38 ECAB 531 (1987).