

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELORES M. FINGER and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Indianapolis, Ind.

*Docket No. 96-1350; Submitted on the Record;
Issued March 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issues: (1) are whether the Office of Workers' Compensation Programs properly found an overpayment of \$1,222.99; (2) denied waiver of recovery of the overpayment under section 8129(a) of the Federal Employees' Compensation Act;¹ and (3) set a repayment schedule of \$30.00 a month to recover the overpayment.

On March 2, 1990 appellant, then a 58-year-old nursing assistant, filed a notice of traumatic injury, claiming that she hurt her back while lifting a patient out of bed. The Office accepted a low back strain and paid appropriate compensation.

On February 22, 1995 the Office issued a preliminary determination that an overpayment of compensation had occurred because appellant was paid at the augmented rate of 75 percent from October 23, 1993, when her dependent husband had died, through June 26, 1994. The Office found that appellant was without fault, noting that she had informed the Office on February 24, 1994 that she had no eligible dependents, but that the Office had not adjusted her compensation rate to 66 2/3 percent until June 26, 1994.

On March 6, 1995 appellant completed an overpayment recovery questionnaire, indicating that she received \$1,105.38 per month in compensation benefits and had expenses of \$1,000.28. The record also contains a memorandum of an April 24, 1995 telephone call from appellant to the Office, in which she reported that she had three other monthly bills she had neglected to list on the recovery form. The Office instructed appellant to submit these expenses immediately.

On May 12, 1995 the Office issued a decision finding that appellant had incurred an overpayment of \$1,222.99 and was not entitled to waiver of recovery of the overpayment. The Office noted that because appellant's monthly income exceeded her monthly expenses by

¹ 5 U.S.C. § 8129(a); 5 U.S.C. §§ 8101-8193. (1974).

\$105.10, she did not need all her income to meet expenses and thus recovery of the overpayment would not defeat the purpose of the Act. The Office set a repayment schedule of \$30.00 per month.

The Board finds that the Office properly determined that appellant received an overpayment of \$1,222.99 due to being paid compensation at the augmented rate of 75 percent from October 23, 1993 through June 25, 1994. The Office correctly calculated the amount of benefits actually due to appellant and there is no evidence in the record contradicting this sum. The Board also finds that the Office properly denied waiver of recovery of the overpayment and set the amount of repayment at \$30.00 per month.

Section 8129(a)² of the Act provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

Adjustment or recovery 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 the Act or would be against equity and good conscience.” (Emphasis added.)³

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁴ The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.322 and 10.323 of the implementing federal regulations.⁵

Section 10.322 provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses when the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses, and 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.

For waiver under the “defeat the purpose of the Act” standard, appellant must show both that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base of \$3,000.00.⁶ An individual

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁵ 20 C.F.R. §§ 10.322-23; *James M. Albers, Jr.*, 36 ECAB 340, 345 (1984).

⁶ *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.⁷

In this case, the Office accepted appellant's financial statement and determined that her income exceeded her expenses by \$105.10, which is more than twice the \$50.00 guideline. Appellant informed the Office that she had more expenses than she had listed on the recovery questionnaire, but failed to provide these to the Office. Thus, appellant has not met her burden of proof in establishing that she needs substantially all of her current income to meet living expenses.⁸ Therefore, she is not entitled to waiver of recovery of the overpayment under the defeat the purpose of the Act standard.

Appellant argues on appeal that she had no idea that her compensation checks were inaccurate and that she cashed them in good conscience. However, the Act and its implementing regulations are clear that entitlement to waiver is not established solely by a finding that appellant is without fault in creating the overpayment.⁹ Rather, such a finding entitles appellant only to the opportunity to establish a basis for granting waiver of the recovery of the overpayment pursuant to section 8129.

Section 10.323 of the regulations provides that recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. To establish that a valuable right was relinquished, the individual must show that the right was valuable, that it cannot be regained, and the action taken was based chiefly or solely on the payments or notice of such payments.¹⁰

To establish a change in position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.¹¹ In making such a decision, the individual's present ability to repay the overpayment is not considered.¹²

There is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received in 1993 to 1994 due to the lack of withholding health insurance premiums. The Board,

⁷ *Carroll R. Davis*, 46 ECAB ____ (Docket No. 93-1765, issued December 23, 1994).

⁸ See *Katie L. Summers*, 46 ECAB ____ (Docket No. 93-2381, issued July 21, 1995) (finding that appellant's financial circumstances did not entitle her to waiver of recovery of the overpayment where monthly income exceeded expenses by more than \$50.00).

⁹ See *William J. Murphy*, *supra* note 4.

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1989). *Katie L. Summers*, *supra* note 3.

¹¹ *John B. Moore*, 44 ECAB 709, 711 (1993).

¹² *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).

therefore, finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.¹³

The May 12, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

¹³ Appellant's notice of appeal states that she elected retirement benefits on April 1, 1995, but her monthly check is only \$400.00, and her expenses are \$1,240.00. Appellant submitted a listing of these expenses, but the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *William A. Couch*, 41 ECAB 548, 553 (1990). Thus, the new evidence dated July 12, 1995 cannot be considered by the Board because it post-dates the Office's final decision dated May 12, 1995.