

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. DePOTO and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, West Haven, Conn.

*Docket No. 97-1376; Submitted on the Record;
Issued May 26, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant received overpayments in the amounts of \$824.35 and \$774.11 because health benefit premiums were not deducted from her monthly compensation between July 28, 1994 and January 6, 1996 and because postretirement insurance premiums were not deducted between September 20, 1992 and February 3, 1996; and (2) whether the Office abused its discretion by denying waiver of the overpayment.

On July 28, 1992 appellant, then a 38-year-old food service worker, filed a notice of traumatic injury alleging that she injured her head in the course of her federal employment on that same date. Following the development of the medical evidence, the Office accepted the claim for a contusion of the scalp and post-concussion syndrome, and provided appellant with compensation for total temporary disability

On a basic life worksheet, the Office calculated that it failed to make deductions in the amount of \$176.32 for basic life insurance premiums from appellant's compensation from September 20, 1992 through February 3, 1996. Similarly, the Office calculated on a disability benefit payment worksheet that it did not make health benefit premium deductions from appellant's compensation from July 28, 1994 through January 6, 1996 in the amount of \$774.11. On a separate disability benefit payment worksheet the Office calculated that it did not make deductions for postretirement insurance from September 20, 1993 through February 3, 1996 in the amount of \$824.35.

On February 23, 1996 the Office made a preliminary determination that an overpayment of \$176.32 existed because it failed to deduct for basic life insurance for the period of September 20, 1992 through February 3, 1996. In a separate letter of the same date, the Office made a preliminary determination that an overpayment of \$774.11 existed because it failed to deduct for health benefit premiums for the period of July 28, 1994 through January 6, 1996. The Office also issued a letter dated February 23, 1996 indicating that it made a preliminary

determination that it failed to deduct for postretirement insurance from September 20, 1992 through February 3, 1996. The Office advised appellant in each letter that it found her without fault in the creation of the overpayment and that she could submit additional evidence if she disagreed with the fact or the amount of the overpayment. The Office noted that, because appellant was not at fault in the creation of the overpayment, recovery of the overpayment could not be made if it would defeat the purposes of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office advised appellant of her right to a precoupment hearing and requested that she complete an overpayment recovery questionnaire.

On October 30, 1996 the Office indicated that it would not collect the \$176.32 overpayment for basic life insurance because the cost of recovery outweighed the return. It therefore wrote off that overpayment.

On March 22, 1996 appellant requested waiver and provided a completed overpayment recovery form. Appellant reported that her monthly income was \$629.00 which came solely from her compensation benefits. With regard to assets, appellant indicated that she had \$1,308.44 in her checking account and that she had a savings account balance of \$29,910.03. Appellant stated that the savings account balance was held in trust for her should her mother die and not be able to care for her. Appellant noted that she is moderately retarded and lives with her elderly mother who supports the household with her social security benefits. Appellant stated that her monthly expenses totaled \$1,150.00. This amount included \$360.00 for rent or mortgage, \$250.00 for food, \$50.00 for clothing, \$165.00 for utilities, and \$325.00 in other expenses.

By decision dated February 6, 1997, the Office found that an overpayment of \$774.11 existed because the Office failed to deduct health benefit premiums from appellant's compensation from July 28, 1994 through January 6, 1996. In a separate decision dated February 6, 1997 the Office found that an overpayment of \$824.35 existed because the Office failed to deduct postretirement insurance premiums from September 20, 1992 through February 3, 1996. In both decisions, the Office found that waiver of the overpayment was not warranted. In an accompanying memorandum, the Office indicated that because appellant's resource base exceeded \$3,000.00, recovery of the overpayments would not defeat the purposes of the Act. The Office also indicated that because appellant failed to demonstrate financial hardship, lack of knowledge, and detrimental reliance she also failed to establish that recovery would be against equity and good conscience. The Office therefore determined that waiver of these overpayments should be denied.

The Board initially finds that the Office properly determined the amount of appellant's overpayments.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying a modification of compensation benefits.¹

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

In the instant case, the Office calculated on a disability benefit payment worksheet, that it did not make health benefit premium deductions from appellant's compensation from July 28, 1994 through January 6, 1996 in the amount of \$774.11. In a separate disability benefit payment worksheet the Office calculated that it did not make deductions for postretirement insurance from September 20, 1993 through February 3, 1996 in the amount of \$824.35. Neither appellant or her representative dispute the amount or occurrence of these overpayments. Moreover, the record contains no evidence indicating that the amounts calculated on the disability benefit payment worksheets are incorrect. The Office therefore properly found that an overpayment of \$774.11 existed for unpaid health benefit premium deduction and that an overpayment of \$824.35 existed for unpaid postretirement insurance premiums.

The Board further finds that appellant was without fault in the creation of the overpayment and that the Office did not abuse its discretion by denying waiver of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within the discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office's refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.²

Section 8129 of the Act³ provides that an overpayment of compensation must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of this subchapter [Act] or would be against equity and good conscience."⁴ Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the [Act]" or the "against equity and good conscience" standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office's regulations respectively.⁵

With regard to the "defeat the purpose of the Act" standard, section 10.322(a) of the regulations provides in relevant part:

"(a) ... Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the

² *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(b).

⁵ *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. §§ 10.322-23.

criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent:

- (1) 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
- (2) 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
- (3) \$600.00 for each additional dependent.”⁶

For waiver under this 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 \$3,000.00.⁷ In the present case, appellant indicated that she had bank account assets totaling \$31,218.47. Because this amount clearly exceeds a resource base of \$3,000.00, appellant does not qualify for waiver under the “defeat the purpose of the Act” standard.⁸

With regard to the “against equity and good conscience” standard, section 10.323(b) of the regulations provides:

“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. In making such a decision, the individual's present ability to repay the overpayment is not considered....”⁹

The evidence in this case does not establish that appellant relinquished a valuable right or changed her position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that she made a decision she otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹⁰ Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown. The Board therefore finds that

⁶ 20 C.F.R. § 10.322(a).

⁷ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

⁸ 20 C.F.R. § 10.323(b).

⁹ *Id.*

¹⁰ *Forrest E. Brown, II*, *supra* note 7 at 285-86; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1994).

the Office did not abuse its discretion in denying waiver of the overpayment of compensation in this case.¹¹

The decisions of the Office of Workers' Compensation Programs dated February 6, 1997 are affirmed.

Dated, Washington, D.C.
May 26, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ Inasmuch as appellant agreed to repay the overpayment in monthly installments of \$130.00, the method of recovery is not at issue in this case.