

<sup>1</sup> Docket No. 08-1058 (issued October 8, 2008).

however, that the Office improperly determined that he was at fault in creating this overpayment. The Board remanded the case to the Office to determine whether appellant was entitled to waiver of recovery of the overpayment.<sup>2</sup>

By decision dated October 14, 2008, the Office denied waiver of recovery of the overpayment, finding that appellant had monthly income of \$7,174.00 and expenses of \$3,240.00, which established that his monthly income exceeded his monthly expenses.<sup>3</sup> It directed recovery of the overpayment at the rate of \$100.00 per month.

### **LEGAL PRECEDENT**

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.<sup>4</sup> Section 8129(b) of the Federal Employees' Compensation Act<sup>5</sup> provides that an overpayment of compensation shall be recovered by the Office unless 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.<sup>6</sup>

Section 10.436 of the implementing regulations<sup>7</sup> provide 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: the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.<sup>8</sup> An individual is deemed to need substantially all of his or her income to meet current

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<sup>2</sup> On February 22, 2006 appellant, then a 32-year-old shipfitter, filed a traumatic injury claim alleging that he hurt his back while carrying a heavy hangar foundation on that date. He stopped work on the date of injury. The Office accepted appellant's claim for lumbar strain, displacement of the lumbar intervertebral disc without myelopathy and spondyloschisis. He returned to full-time full-duty work on January 6, 2007.

<sup>3</sup> In an October 15, 2007 overpayment recovery questionnaire (Form OWCP-20) and during a January 23, 2008 telephone conference, appellant stated that his monthly income was \$4,174.00 and his wife's monthly income was \$3,000.00. His expenses included \$1,300.00 for rent or mortgage, \$400.00 for food, \$100.00 for clothing, \$450.00 for utilities, \$540.00 for other expenses and credit debts of \$150.00 to Citibank, \$100.00 to Sears and \$200.00 to Home Depot. Appellant's assets included \$50.00 in a savings account.

<sup>4</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>7</sup> 20 C.F.R. § 10.436.

<sup>8</sup> An individual assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (October 2004).

ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>9</sup>

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 in 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.<sup>10</sup>

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.<sup>11</sup>

### ANALYSIS

In denying waiver of recovery of the overpayment, the Office reviewed appellant's income, expenses and assets as listed in his October 15, 2007 OWCP-20 form and reported during the January 23, 2008 telephone conference. Appellant had monthly income of \$7,174.00,<sup>12</sup> monthly expenses of \$3,240.00 and assets of \$50.00 in a savings account. The Board finds that, as his monthly income of \$7,174.00 exceeds his monthly expenses of \$3,240.00 by \$3,934.00, which is more than the \$50.00 minimum. Appellant does not substantially need all of his income to meet current ordinary and necessary expenses. The Board finds, therefore, that he is not entitled to waiver under the defeat the purpose of the Act standard.<sup>13</sup>

There is no evidence in this case and appellant did not allege that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received after returning to work on January 6, 2007. The Board finds that, pursuant to its

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<sup>9</sup> See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>10</sup> 20 C.F.R. § 10.437.

<sup>11</sup> *Id.* at § 10.438.

<sup>12</sup> The Office included spouse, income as appellant and his spouse lived together at the time the overpayment was created (\$4,174.00 plus & 3,000.00 spousal income).

<sup>13</sup> See *supra* note 5; *George A. Rodriguez*, 57 ECAB 224 (2005) (Office procedures state that 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 monthly expenses by more than \$50.00); *Nina D. Newborn*, 47 ECAB 132 (1995).

regulations, the Office properly exercised its discretion in finding that recovery of the overpayment would not be against equity or good conscience.<sup>14</sup>

On appeal, appellant contended that during the January 23, 2008 telephone conference, the Office hearing representative denied him the opportunity to submit further financial testimony to correct the amounts listed for his expenses. He stated that the Office determined that he was at fault in creation of the overpayment and, thus, ineligible for waiver. A review of a January 30, 2008 memorandum of the telephone conference indicates that appellant provided his wife's monthly income of \$3,000.00 as requested by the Office. The memorandum does not, however, establish that he was denied an opportunity to provide any other additional financial information. The Board finds that appellant's contention is not supported by the evidence of record.

### **CONCLUSION**

The Board finds that the Office properly denied waiver of recovery of the overpayment in the amount of \$1,049.50 for the period January 6 through 20, 2007.

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<sup>14</sup> With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act. As appellant is no longer receiving wage-loss compensation in this case, the Board does not have jurisdiction with respect to recovery of the overpayment. *Ricky Greenwood*, 57 ECAB 462 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board