

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. GLOWCZAK and DEPARTMENT OF THE NAVY,
NAVAL PUBLIC WORKS CENTER, Norfolk, Va.

*Docket No. 96-599; Submitted on the Record;
Issued April 24, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$3,428.20 overpayment in compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

In the present case, the Office accepted that appellant sustained low back strain and a recurrent herniated nucleus pulposus at L4-5 on the left side. The Office paid appellant compensation for total wage-loss disability following his employment injury.

By notice dated November 7, 1995, the Office advised appellant of its preliminary determination that he received a \$3,428.20 overpayment of compensation which occurred when the Office deducted the wrong health insurance premiums from March 12, 1989 to September 16, 1995. The Office further advised appellant that it had made a preliminary determination that he was without fault in the creation of the overpayment. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment and asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office informed appellant that the financial information would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. The Office enclosed a worksheet detailing its calculation of the \$3,428.20 overpayment.

Appellant did not respond to the Office's notice of preliminary determination of overpayment or submit the Form OWCP-20 as requested by the Office.

By decision dated December 14, 1995, the Office finalized its preliminary determination that appellant had received a \$3,428.20 overpayment and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment and noted that appellant's failure to

provide the requested financial information did not allow for a finding that recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.

The Board finds that appellant received a \$3,428.20 overpayment in compensation.

The record contains evidence which shows that the Office deducted health premiums from appellant under code 451 rather than code 452 from March 12, 1989 through September 16, 1995. Appellant has not disputed that an overpayment occurred in the amount of \$3,428.20 because the Office incorrectly deducted his health premiums or submitted evidence to show that he did not receive an overpayment for this period. The Office thus properly found that he received such an overpayment.

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 results within the Office's discretion pursuant to statutory guidelines.¹ These statutory guidelines are found in section 8129(b) of the 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."² 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 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.³

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).⁴ Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same

¹ See *Robert Atchison*, 41 ECAB 83 (1989).

² 5 U.S.C. § 8129(b).

³ 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.

⁴ 20 C.F.R. § 10.322(a).

criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed position for the worse.⁵

Although appellant was found to be without fault in the matter of the overpayment, he nevertheless bears responsibility for providing the requisite information to support waiver of the overpayment. In this regard, section 10.324 of Title 20 of the Code of Federal Regulations provides:

“In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished.”⁶

In the present case, appellant failed to meet his responsibility for providing the requisite financial information to support waiver of the overpayment. The Office requested that appellant submit a Form OWCP-20 for the purpose of determining his entitlement to waiver of the overpayment and to submit the information within the 30 days allotted by the Office. On appeal, appellant argues that he did not understand that the Office needed financial information from him in view of the Office’s finding in a memorandum accompanying the November 7, 1995 preliminary notice that he was without fault in the creation of the overpayment. However, the Office clearly advised appellant of his responsibility to submit such information and of the consequences of failing to submit the requested information. Appellant submitted additional evidence after the Office’s December 14, 1995 decision but the Board cannot consider such evidence for the first time on appeal.⁷

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has failed to submit financial information showing that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base. He also has not established that recovery of the overpayment would be against equity and good conscience because he has failed to submit financial information showing that he would experience severe financial hardship in attempting to repay the debt and has failed to submit evidence that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.⁸ Thus, appellant has failed to show that the Office abused its discretion by refusing to waive recovery of the overpayment.

⁵ 20 C.F.R. § 10.323.

⁶ 20 C.F.R. § 10.324; *see John B. Moore*, 41 ECAB 804 (1990).

⁷ *See* 20 C.F.R. § 501.2(c).

⁸ *See William J. Murphy*, 41 ECAB 569 (1989).

The decision of the Office of Workers' Compensation Programs dated December 14, 1995 is hereby affirmed.

Dated, Washington, D.C.
April 24, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member