

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE LARKIN and DEPARTMENT OF COMMERCE,
BUREAU OF CENSUS, Van Nuys, Calif.

*Docket No. 97-916; Submitted on the Record;
Issued December 3, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$2,299.55 for the period January 13, 1991 to August 17, 1996; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$75.00 every four weeks from appellant's continuing compensation.

On May 15, 1990 appellant, then a 49-year-old part-time census enumerator, sustained an employment-related back injury for which she later underwent authorized surgery. She was placed on the periodic roll effective September 23, 1990, based on a weekly pay rate of \$155.25. By letter dated January 17, 1991, the Office informed appellant that compensation should have been based on a pay rate of \$129.38 per week and, therefore, an overpayment in the amount of \$540.31 had been created. In a decision dated March 8, 1991, the Office waived the overpayment and her compensation was changed to reflect the correct amount. By letter dated August 1, 1996, the employing establishment informed the Office that appellant's date-of-injury weekly pay rate was \$121.88.

On August 21, 1996 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,299.55, which arose because during the period January 13, 1991 to August 17, 1996 she had received compensation based on an incorrect weekly pay rate. The Office calculated the amount of the overpayment by subtracting the amount appellant should have received for this period, \$37,823.70, from the amount actually paid, \$40,123.25. The Office also preliminarily found that appellant was not at fault in the creation of the overpayment. The Office informed her that she had 30 days, in which to respond and sent an overpayment recovery questionnaire for appellant to complete. By decision dated September 23, 1996, the Office found that appellant received an overpayment of compensation in the amount of \$2,299.55, that she was without fault in the creation of this overpayment but that waiver was not warranted as she did not reply to the August 21, 1996 letter. The Office

informed appellant that \$75.00 would be withheld each payment period from her continuing compensation.

The Board finds that appellant received an overpayment of compensation in the amount of \$2,299.55.

The record contains evidence, which shows that appellant received compensation based on an incorrect pay rate per week for the period January 13, 1991 to August 17, 1996. Appellant has not shown, nor does the record otherwise establish, that the Office erred in calculating the amount of the overpayment. Therefore, an overpayment in compensation in the amount of \$2,299.55 was created.

The Board further finds that the Office properly refused to waive repayment of the overpayment in the amount of \$2,299.55.

Section 10.321(h) of the Office's regulations¹ provides that if additional financial evidence is not submitted or a prerecoupment hearing is not requested within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. Section 10.324 of the Office's regulations provides that in requesting waiver of an overpayment, the overpaid individual has the responsibility of providing the required financial and other information needed to make a decision on waiver; that failure to furnish the information within 30 days of the request shall result in denial of waiver; and that no further requests for waiver shall be entertained until such time as the requested information is furnished.²

In the present case, the Office issued its preliminary overpayment decision on August 21, 1996, and allotted appellant 30 days to request a waiver and furnish financial information requested on a questionnaire accompanying the preliminary decision. Appellant did not request waiver or submit any financial information prior to the Office's issuance of its final overpayment decision on September 23, 1996.³ Thus, the Office properly refused to waive repayment of the overpayment under these circumstances.

The Board also finds that that the Office properly required repayment by withholding \$75.00 per month from appellant's continuing compensation.

¹ 20 C.F.R. § 10.321(h).

² 20 C.F.R. § 10.324.

³ The Board notes that following issuance of the Office's September 23, 1996 decision appellant submitted additional information to the Office in support of her request for waiver. As this evidence was not before the Office at the time of the September 23, 1996 decision, it may not be reviewed for the first time on appeal. 20 C.F.R. § 501.2(c).

The Office's implementing 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.”⁴

The record establishes that appellant failed to timely submit an overpayment recovery questionnaire or any other evidence, from which the Office could determine what amount she could afford to repay out of her continuing compensation benefits. Therefore, the Board finds that the Office did not abuse its discretion in deciding to withhold \$75.00 per month from appellant's continuing compensation in order to facilitate recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs dated September 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 3, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ 20 C.F.R. § 10.321(a); *see Roger Seay*, 39 ECAB 441 (1988).