

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RONALD J. WADE and DEPARTMENT OF THE ARMY,  
RED RIVER ARMY DEPOT, Texarkana, Tex.

*Docket No. 96-1052; Submitted on the Record;  
Issued June 16, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of a \$2,475.05 overpayment; and (2) whether the Office properly required repayment of the overpayment by deducting \$369.23 every four weeks from appellant's continuing compensation.

In the present case the Office accepted that appellant sustained a herniated nucleus pulposus at L4-5 and L5-S1 in the performance of duty on January 23, 1987. By letter dated December 16, 1994, the Office advised appellant that it had made a preliminary determination that an overpayment of \$2,475.05 occurred during the period June 1, 1989 to June 25, 1994 because deductions for post retirement life insurance were not made. The Office also determined that appellant was not at fault in the creation of the overpayment. Appellant requested a hearing with regard to waiver of the overpayment, and a hearing was held on November 8, 1995. By decision dated January 17, 1996, the hearing representative finalized the overpayment, denied waiver, and required repayment by deducting \$369.23 every four weeks from continuing compensation.

The Board has reviewed the record and finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act<sup>1</sup> provides: "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."<sup>2</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8129(b).

recovery would neither defeat the purpose of the Act nor be against equity and good conscience. 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, respectively, in sections 10.322 and 10.323 of Title 20 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 (or \$5,000 if the individual has a spouse or one dependent).<sup>3</sup> Section 10.323 provides 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 criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

In the present case the record indicates that the Office should have begun withholding premiums for post retirement life insurance as of June 1, 1989. Appellant does not dispute that the Office failed to make the deductions, resulting in a \$2,475.05 overpayment. The issue is whether appellant was entitled to waiver of the overpayment. Appellant provided financial information in the form of an overpayment recovery questionnaire and accompanying attachment, as well as testimony at the November 8, 1995 hearing. With respect to income, appellant indicated that both he and his wife received compensation under the Act. The hearing representative found that appellant received compensation of \$1,414.28 every four weeks, and that appellant's spouse received \$1,315.00, resulting in a equivalent monthly income of \$2,957.15.<sup>4</sup> With regard to expenses, appellant provided an attachment to the Form OWCP-20, and additional testimony was provided at the hearing. The hearing representative made specific findings as to ordinary and necessary living expenses, resulting in a total of \$1,767.87 per month. This is in accord with the evidence presented and the Board finds that the Office hearing representative properly calculated appellant's monthly income and expenses. Since appellant had over \$1,000.00 monthly income in excess of necessary living expenses, the Board finds that recovery of the overpayment would not defeat the purpose of the Act under 20 C.F.R. § 10.322(a). With respect to the "against equity and good conscience" standard, there is no evidence that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment.<sup>5</sup>

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<sup>3</sup> To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; *see Robert E. Wenzholz*, 38 ECAB 311 (1986).

<sup>4</sup> Appellant reported his wife's income as \$529.00 per month on the overpayment questionnaire, but testimony at the hearing indicated that his wife's compensation payments were \$1315.00 every four weeks. The four week compensation is multiplied by 13 to determine the annual income, then divided by 12 to calculate monthly income.

<sup>5</sup> An example of detrimental reliance would be a decision to enroll in college based on the award of benefits; *see* 20 C.F.R. § 10.323(b).

The record therefore does not establish that under 5 U.S.C. § 8129(b) recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Accordingly, appellant is not entitled to waiver of the overpayment.

The Board further finds that the Office properly required repayment by deducting \$369.23 every four weeks from continuing compensation.

Section 10.321 of the Office's regulations provides:

“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.”<sup>6</sup>

In determining the rate of repayment, the hearing representative discussed appellant's financial circumstances, noting the income in excess of expenses. She noted that by deducting \$369.23 every four weeks, appellant would still have over \$700.00 in excess monthly income. The Board finds the Office gave due regard to the factors under section 10.3321 in setting the rate of repayment in this case.

The decision of the Office of Workers' Compensation Programs dated January 17, 1996 is affirmed.

Dated, Washington, D.C.  
June 16, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.321.