

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROL WALTERS-SCHAEWE and DEPARTMENT OF HEALTH &  
HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION,  
Arlington Heights, Ill.

*Docket No. 95-2315; Submitted on the Record;  
Issued March 16, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to waiver of a \$4,598.20 overpayment.

The case has been before the Board on a prior appeal. In a decision dated January 14, 1994, the Board affirmed a finding that an overpayment of \$4,598.20 had been created during the period February 10, 1986 to February 1, 1989.<sup>1</sup> On the issue of fault, the case was remanded to the Office. The Board noted that the Office had made a preliminary determination that appellant was not at fault in the creation of the overpayment and yet the final decision had found appellant to be at fault, without providing appellant proper notice and an opportunity to be heard on the issue. The history of the case is contained in the prior Board decision and is incorporated herein by reference.

By letter dated July 13, 1994, the Office advised appellant that a preliminary determination had been made that she was at fault in the creation of the overpayment. Appellant requested a hearing on the issue of fault and waiver and a hearing was held before an Office hearing representative on January 24, 1995. By decision dated April 10, 1995, the hearing representative determined that appellant was not at fault in the creation of the overpayment. On the issue of waiver, the hearing representative found that appellant was not entitled to waiver of the overpayment.

The Board has reviewed the record and finds that the Office properly determined that appellant was not entitled to waiver of the overpayment.

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<sup>1</sup> Docket No. 93-40.

Section 8129(b) of the Federal Employees' Compensation Act<sup>2</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>3</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if 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 \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent).<sup>4</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 this case, appellant has not provided information regarding her monthly income and expenses. It is the overpaid individual's burden to submit evidence that recovery of the overpayment would cause financial hardship of a nature sufficient to justify waiver.<sup>5</sup> The record indicates that the hearing representative sent a copy of an overpayment recovery questionnaire (Form OWCP-20) to appellant's representative and a Form OWCP-20 was also included with the July 13, 1994 preliminary determination as to fault. Appellant did not complete the questionnaire, nor did she provide other relevant financial information.<sup>6</sup> The Board accordingly finds that the Office properly determined that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

With respect to the "against equity and good conscience" standard, appellant has not argued, nor does that evidence support, that she relinquished a valuable right or changed her position for the worse in reliance on the overpayment. The Board therefore finds that appellant

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</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. Wenholz*, 38 ECAB 311 (1986).

<sup>5</sup> *See Gail M. Roe*, 47 ECAB \_\_\_\_ (Docket No. 94-764, issued December 12, 1995); *see also* 20 C.F.R. 10.324.

<sup>6</sup> On appeal, appellant submitted additional evidence which was not before the Office hearing representative at the time of his decision. The Board cannot review this evidence on appeal, since it is limited to the evidence that was before the Office at the time of the April 10, 1995 decision; *see* 20 C.F.R. § 501.2(c).

has not established any basis for waiver of the overpayment and the Office properly denied waiver of the \$4,598.20 overpayment.

The decision of the Office of Workers' Compensation Programs dated April 10, 1995 is affirmed.

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

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member