

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LENNIS E. LARSON and DEPARTMENT OF VETERANS AFFAIRS,  
FARGO MEDICAL CENTER, Fargo, N.D.

*Docket No. 96-1811; Submitted on the Record;  
Issued November 24, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to waive \$1,854.42 of the overpayment.

On June 28, 1990 appellant then a 33-year-old electrician, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained an electrical burn to his left forearm and hand and possible nerve or muscle damage when his left arm touched a high voltage piece of equipment.<sup>1</sup> The Office accepted the claim for electrical burns to left forearm, hand, bilateral hearing loss, depression and post-traumatic stress disorder. Appellant was placed on the periodic rolls for temporary disability on October 20, 1991. The Office approved appellant for disability retirement on December 29, 1992.

Appellant filed a claim for a schedule award on June 25, 1991. On June 1, 1994 appellant was awarded a schedule award for 80 percent permanent binaural hearing loss. The period of the award was from May 1, 1994 through May 24, 1997 with a monthly check in the amount of \$1,634.00.

The record indicates that for the period January 9, 1993 through August 20, 1994, deductions for health benefits were not made. The Office calculated that health benefit premiums for this period amounted to \$1,854.42.<sup>2</sup> By letter dated February 1, 1995, the Office advised appellant that it had determined that an overpayment of \$1,854.42 had occurred due to the failure to deduct premiums for health benefits.

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<sup>1</sup> The record numbered 1 through 564 will be denoted as "R" and the record numbered 1 through 307 will be noted as "A."

<sup>2</sup> By letter dated October 3, 1994, the Office advised appellant that it had determined that an overpayment of \$2,225.54 had occurred due to the failure to deduct premiums for health benefits.

Appellant submitted a detailed list of his monthly expenses, totaling \$3,415.01. He listed total income as \$1,743.05.

In a decision dated February 1, 1995, the Office finalized the finding of an overpayment of \$1,854.42 but found that appellant was without fault in the creation of the overpayment. With respect to waiver of the overpayment, the Office found that appellant's ordinary and necessary monthly expenses totaled \$3,080.01<sup>3</sup> per month. The Office noted that appellant showed a total income of \$1,743.05, but that appellant failed to include the compensation he received for a schedule award.<sup>4</sup> The Office determined that appellant received \$1,770.17 per month for his schedule award which gave appellant a total monthly income of \$3,513.22. The Office also noted that appellant listed owning two vehicles on his report, but has insurance statements for three vehicles. The Office thus found that appellant's income exceeds his expenses by \$433.21.<sup>5</sup> The Office then determined that appellant was financially able to repay the overpayment and set his monthly payments as \$150.00 per compensation check.

The Board finds that the Office properly refused to waive \$1,854.42 of the overpayment.

An overpayment of compensation based on underwithholding of health insurance or optional life insurance is subject to the waiver provisions of 5 U.S.C. § 8129, as well as other statutes and regulations relative to overpayments and collection of debts.<sup>6</sup>

Section 8129(b) of the Federal Employees' Compensation Act<sup>7</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>8</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

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<sup>3</sup> The Office found that appellant's expenses for clothes and utilities were above the norm based upon the Bureau of Labor Statistics tables. The Office thus reduced appellant's expenses for clothes from \$275.00 to \$120.33 and for utilities from \$307.60 to \$172.33. The Office in its calculations did not include \$52.00 appellant noted as a monthly expense for two children in a lunch program.

<sup>4</sup> Appellant was awarded a schedule award for \$1,634.00

<sup>5</sup> The Board notes that since the Office did not include the \$52.00 expense for lunch programs for two children that appellant's income exceeds his expenses by \$381.21.

<sup>6</sup> See FECA Bulletin No. 85-31 (issued June 4, 1985).

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> 5 U.S.C. § 8129(b).

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 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. With respect to the "against equity and good conscience" standard, 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.

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.<sup>9</sup> In this case, the Office determined that appellant did not need all of his income to meet his ordinary and necessary living expenses as his income exceeded his expenses by \$381.21. Recovery of \$1,854.42 would therefore not "defeat the purpose of the Act" under the appropriate regulations. In addition, there is no indication that recovery of \$1,854.42 would be against equity and good conscience, as no evidence was presented that appellant relinquished a valuable right or changed his position for the worse in reliance on receiving a \$1,854.42 overpayment. Accordingly, the Board finds no evidence that the Office abused its discretion in refusing to waive \$1,854.42 of the overpayment in this case.

The decision of the Office of Workers' Compensation Programs dated February 1, 1995 is affirmed.

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

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Forrest E. Brown, II*, 44 ECAB 278 (1992).