

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUE D. MURSZEWski and DEPARTMENT OF VETERANS AFFAIRS,
REGIONAL OFFICE, Buffalo, N.Y.

*Docket No. 97-791; Submitted on the Record;
Issued November 16, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$2,793.44 for the period March 1, 1992 through June 25, 1994 because basic and postretirement life insurance premiums were not withheld from her compensation benefits; (2) whether the Office abused its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment; and (3) whether the Office properly required repayment by withholding \$100.00 every four weeks from her continuing compensation.

On April 4, 1991 appellant, a retired 56-year-old rating board specialist, filed a Form CA-2 claim for occupational disease, claiming that she suffered from major depression, and that she first became aware that this condition was caused by employment factors on March 27, 1991.¹ The Office accepted appellant's claim for major depression, agoraphobia, by letter dated October 8, 1991.

On October 7, 1994 an Office claims examiner calculated that basic and postretirement life insurance premiums had not been withheld from appellant's compensation benefits from January 6, 1990 through June 25, 1994 and that she had received an overpayment in the amount of \$5,179.85.

On November 18, 1994 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$5,179.85 for the period January 6, 1990 through June 25, 1994. The Office found that appellant was without fault in the matter because due to an administrative error, there was no indication that appellant knew or should have known that deductions for basic and postretirement basic life insurance premiums should have been deducted from her continuing workers' compensation benefits commencing January 6, 1990.²

¹ Appellant was involuntarily terminated from her job with the employing establishment on January 5, 1990.

² The Office stated that the Office of Personnel Management (OPM) notified the Office that basic life insurance

The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised appellant that when she was found without fault in the creation of the overpayment, recovery might not be made if it can be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience.

In addition, the Office informed appellant that if she felt entitled to a waiver instead of repaying the overpayment, she could request a preredemption hearing with the Branch of Hearings and Review, or she could make his request directly with the Office. The Office further informed appellant that she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire, and attach any supporting documents in his possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that pursuant to 20 C.F.R. § 10.324, the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment, and that no further request for waiver would be considered until the requested information was furnished.

In a decision finalized on August 20, 1996, the Office found that appellant was not entitled to waiver, and that the overpayment would be recovered in her compensation checks. In a memorandum accompanying the decision, the Office stated that the amount of \$100.00 would be withheld from her continuing compensation payments effective September 14, 1996, until approximately January 30, 2001. The Office stated that appellant was given 30 days to respond to the November 18, 1994 preliminary decision, but as of that date appellant had not responded.

In a letter to the Office dated August 26, 1996, appellant's husband, acting as her representative, responded to the findings in the Office's August 20, 1996 letter that she had failed to respond to the Office's November 18, 1994 preliminary overpayment finding. Appellant's husband asserted that he had responded to the Office's preliminary finding with a letter to the senior claims examiner, dated December 8, 1994, wherein he requested: (a) a review of the records as the preliminary findings concluded there was an administrative error; and (b) waiver if an overpayment was found. Appellant's husband attached a copy of the December 8, 1994 letter, and stated that because he received no reply he could only conclude that the Office did not receive a copy or that the letter was lost in transit.

In response to the letter from appellant's husband, the Office issued a letter/preliminary findings dated November 1, 1996 indicating that, based on the information contained in the

premiums should be withheld from continuing workers' compensation payments for all employees who retired on or after January 1, 1990, that this group must make a contribution to continue their basic life insurance coverage after retirement, and that deductions should begin as of January 6, 1990. The Office noted that the Automated Compensation Payment System was changed, effective June 26, 1994, to reflect deductions for Basic and Post-Retirement Basic Life Insurance Premiums. The Office calculated that an overpayment based on deductions for Basic and Post-Retirement Basic Life Insurance premiums, in the amount of \$5,179.85 had resulted from January 6, 1990 through June 25, 1994.

letters from appellant's husband, the Office had made an error in calculating the overpayment, and that its records indicated that OPM had notified the Office to begin deducting premiums effective March 1, 1992. The Office stated that, based on the corrected date, the correct, adjusted amount of appellant's overpayment was \$2,793.44. The Office stated it would formally notify appellant of its decision within two weeks, and that if she disagreed with the decision she could follow her appeal rights as indicated in the decision.

In a decision dated November 22, 1996, the Office found that appellant's overpayment had been adjusted to \$2,793.44, and that the overpayment would be recovered in the manner described in the enclosed Form EN2225. The Office stated that the amount of \$100.00 would be withheld from her continuing compensation payments effective September 14, 1996, until approximately November 30, 1998.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,793.44 for the period March 1, 1992 through June 25, 1994. The record shows that the deductions for basic and postretirement basic life insurance premiums should have been deducted from her continuing workers' compensation benefits commencing March 1, 1992, and that the Office committed an administrative error of which it did not become aware until June 25, 1994. As appellant received augmented compensation during that period, the Office properly found that she received an overpayment of compensation in the stated amount during that period.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment in the amount of \$2,793.44 after finding that appellant was without fault with respect to that overpayment.

In his December 4, 1996 letter to the Board, appellant's husband states that he was never informed of the reasons for denial of waiver in the Office's November 22, 1996 decision, and that he never received the worksheet forms indicating how the overpayment amount was calculated, which were supposed to be attached to the decision.

Section 8129 of the Federal Employees' Compensation Act³ provides that an overpayment must be recovered unless "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." Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.322-10.323 of the implementing federal regulations.⁴

³ 5 U.S.C. § 8129(a)-(b).

⁴ 20 C.F.R. §§ 10.322-23; see *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

With regard to the “defeat the purpose of the Act” standard, section 10.322 of the regulations⁵ provides:

“(a) *General.* Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(2) The individual’s assets do not exceed the 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. This base includes all of the claimant’s assets not exempted from recoupment in paragraph (d) of this section. The first \$3,000[.00] or more depending on the number of the claimant’s dependents is also exempted from recoupment.”

With regard to the “against equity and good conscience” standard, section 10.323 of the regulations⁶ provides:

“(b) Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual’s present ability to repay the overpayment is not considered....”

However, section 10.321(h) of the Office’s regulations⁷ 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 regulations⁸ provides that in requesting waiver of an overpayment, 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 on waiver; that failure to furnish the information within 30 days of request shall result in denial of

⁵ 20 C.F.R. § 10.322(b).

⁶ 20 C.F.R. § 10.323(b).

⁷ 20 C.F.R. § 10.321(h).

⁸ 20 C.F.R. § 10.324.

waiver; and that no further requests for waiver shall be entertained until such time as the requested information is furnished.

In the instant case, the case record contains no response from appellant to the Office's November 1, 1996 preliminary determination on her overpayment of compensation. Appellant failed to submit any evidence showing that she needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed, although the letter indicated that she had the right to inspect and copy the Office's records with respect to this debt, and to dispute any information contained in those records concerning the debt. Therefore, she does not qualify for waiver under the "defeat the purpose of the Act" standard.⁹ Further, there is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received from March 1, 1992 through June 25, 1994. Finally, contrary to his assertion in his letter to the Board, appellant's husband was fully informed of his appeal rights in both the November 18, 1994 preliminary decision and attachments and the November 1, 1996 decision. Pursuant to its regulations, therefore, the Office did not abuse its discretion by issuing its November 1, 1996 final decision denying waiver of recovery of the overpayment in the amount of \$2,793.44.

The decision of the Office of Workers' Compensation Programs dated November 22, 1996 is hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁹ See *Nina D. Newborn*, 47 ECAB ____ (Docket No. 93-2445, issued October 12, 1995) (finding that recovery of the overpayment in a lump sum was proper because appellant failed to complete the recovery questionnaire).