

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE R. RUYBAL and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Monte Vista, CO

*Docket No. 97-2104; Submitted on the Record;
Issued December 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,101.87 because basic life insurance premiums were not withheld from his monthly compensation between January 23, 1994 and February 3, 1996; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly required repayment by deducting \$85.00 every four weeks from continuing compensation.

On June 9, 1986 appellant, then a 37-year-old forestry technician, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sprained his right ankle while coming down a hill.

By letter dated February 14, 1996, the Office advised appellant that it had not been withholding the proper amount for basic and postretirement life insurance beginning January 23, 1994.

A telephone conference was held on September 5, 1996.

By letter dated October 8, 1996, the Office advised appellant that additional information was required in order to consider a waiver of the overpayment.

By decision dated May 7, 1997, the Office found that appellant was not entitled to waiver and that the overpayment would be recovered in his compensation checks. In a memorandum accompanying the decision, the Office found that appellant was without fault in the creation of the overpayment. Next, the Office, based upon a work sheet comparing assets and income/expenses,

determined that appellant had income of \$1,848.68 per month and expenses of \$1,612.00, which resulted in an excess of \$236.68 per month.¹ The Office stated that the amount of \$85.00 would be withheld from his continuing compensation payments effective April 27, 1997 until approximately May 23, 1998.²

The Board has reviewed the record and finds that the Office properly found that an overpayment of \$1,101.87 was created.

In this case, there does not appear to be any dispute that deductions for life insurance were not taken from appellant's compensation payments during the period January 23, 1994 to February 3, 1996. The record shows that the deductions for basic life insurance premiums should have been deducted from his continuing workers' compensation benefits commencing January 23, 1994 and that the Office committed an administrative error of which it did not become aware until February 3, 1996. As appellant received compensation without these deductions during that period, the Office properly found that he received an overpayment of compensation in the stated amount during that period.

In the present case, the record indicates that the Office should have begun withholding premiums for postretirement life insurance as of January 23, 1994. Appellant does not dispute that the Office failed to make the deductions, resulting in a \$1,101.87 overpayment.

Next, the Board finds that the Office did not abuse its discretion by denying waiver of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act³ 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."⁴ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if

¹ In the memorandum of conference, it was noted that appellant owed over \$17,000.00 to Social Security due to his receiving dual benefits from both the Office and Social Security. The Office also noted that appellant had deposited the checks in an account which was transferred to his wife's name and had a balance of \$16,984.62. The record contains a letter dated April 28, 1998 from Social Security advising appellant that he had been overpaid \$17,993.40. In addition, the record shows that the account appellant deposited the dual checks into indicates that after a withdrawal of \$5,000.00 on August 29, 1996 there remained \$16,984.62 in the account. In calculating the expenses, the Office did not include the amount owed to Social Security nor did it include the \$16,984.62 remaining in the account or the price of appellant's home. Any error in failing to consider this in its determination is harmless as appellant has an excess of \$236.68 and appellant has not received a final determination from Social Security as to whether this overpayment will be waived.

² The Board notes that subsequent to appellant's appeal to the Board on June 3, 1997, the Office issued a notice of proposal to terminate benefits. The Board is without jurisdiction to consider this issue as it occurred subsequent to appellant's appeal and the Office has not yet issued a final decision on whether to terminate appellant's benefits; *see* 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193.

⁴ 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 \$3,000.00 or \$5,000.00 if the individual has a spouse or one dependent.⁵ 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.

Appellant provided financial information in the form of an overpayment recovery questionnaire and an accompanying attachment and provided additional information in the telephone conference held on September 5, 1996. The Office found that appellant received compensation of \$1,018.48 every four weeks plus income from other sources of \$548.08 and \$197.25, resulting in an equivalent monthly income of \$1,848.68. With regard to expenses, appellant provided an attachment to the Form OWCP-20. The Office made specific findings as to ordinary and necessary living expenses, resulting in a total of \$1,612.00 per month. This is in accord with the evidence presented and the Board finds that the Office claims examiner properly calculated appellant's monthly income and expenses. Since appellant had over \$236.00 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.⁶

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 \$85.00 every four weeks from continuing compensation.

⁵ 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).

⁶ 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).

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.”⁷

In determining the rate of repayment, the Office claims examiner discussed appellant's financial circumstances, noting the income in excess of expenses. The Office claims examiner noted that by deducting \$85.00 every four weeks, appellant would still have over \$100.00 in excess monthly income. The Board finds the Office gave due regard to the factors under section 10.321 in setting the rate of repayment in this case.

The decision of the Office of Workers' Compensation Programs dated May 7, 1997 is affirmed.

Dated, Washington, D.C.
December 17, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁷ 20 C.F.R. § 10. 321.