

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PRISCILLA B. MOORE and DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE, Falls Church, VA

*Docket No. 97-2295; Submitted on the Record;
Issued December 17, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant abandoned her request for a prerecoupment hearing in relation to its preliminary determination of an overpayment of compensation; (2) whether the Office properly determined that appellant received an overpayment in the amount of \$929.00 for the period April 26, 1993 through March 30, 1996 because basic and postretirement life insurance premiums were not withheld from her compensation benefits; (3) 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 (4) whether the Office properly required repayment by withholding \$100.00 every four weeks from her continuing compensation.

On June 19, 1986 appellant sustained a contusion to her right wrist and acute tendinitis of her left foot in the performance of her federal employment. The Office later accepted the claim for a right wrist sprain, arthroscopy of the left knee and aggravation of arthritis of the left knee. Appellant subsequently received compensation for total temporary disability.

On April 10, 1996 the Office determined that basic and postretirement life insurance premiums had not been withheld from appellant's compensation benefits from April 26, 1993 through March 30, 1996 and that she had received an overpayment in the amount of \$929.00.

On August 14, 1996 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$929.00 for the period April 26, 1993 through March 30, 1996. The Office found that appellant was without fault in the matter. The Office advised appellant that if she disagreed with the fact or the 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 prerecoument hearing with the Branch of Hearings and Review, or she could make the 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 her possession. The Office specifically requested 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 overpayment and that no further request for waiver would be considered until that information was furnished. The Office also informed appellant that she could request a hearing within 30 days of its letter and that it would notify her of the hearing no later than 10 days prior to the scheduled date.

On August 19, 1996 appellant wrote indicating that she was not eligible for life insurance for the period April 26, 1993 through March 30, 1996 and that, consequently, deductions for this insurance were not properly taken out of her compensation.

On August 20, 1996 appellant completed an overpayment recovery questionnaire and indicated that she had a total monthly income of \$1,832.00 based on \$1,432.00 in Social Security Benefits¹ and \$400.00 from a source listed as “father sen[t] for grandchildren.” She further indicated that she had \$628.00 in her checking account. Appellant also indicated that her monthly expenses totaled \$1,605.00 based on \$455.00 for her mortgage, \$265.00 for food, \$120.00 for clothing, \$200.00 for utilities, \$200.00 for other expenses and \$365.00 for credit card payments.

Appellant subsequently requested a waiver of the overpayment and indicated that she wanted a hearing with the Branch of Hearings and Review.

On December 5, 1996 the Office hearing representative advised appellant that her hearing would be scheduled in the near future. The hearing representative noted the issues involved and the burden of proof appellant would be required to meet.

On January 4, 1997 the Office notified appellant by letter to her current address that her prerecoument hearing would be held on March 5, 1997 in Washington D.C., at the Department of Labor. Appellant failed to attend the hearing.

By decision dated March 25, 1997, the Office hearing representative found that appellant abandoned her request for a prerecoument hearing, that an overpayment of \$929.00 existed because life insurance deductions were not made from appellant’s compensation for the period April 26, 1993 through March 30, 1996, that appellant was not entitled to waiver despite her lack of fault and that the overpayment should be recovered by monthly deductions of \$100.00 from her continuing compensation.

¹ This amount appears to represent appellant’s benefits under the Federal Employees’ Compensation Act.

The Board initially finds that the Office properly determined that appellant abandoned her request for a prerecoupment hearing.

Pursuant to section 10.137(c) of the Act's² implementing regulations:

“A claimant who fails to appear at a scheduled hearing may request in writing within ten days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within ten days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing....”³

In this case, appellant failed to appear at the scheduled hearing and failed to request in writing within ten days after the date set for the hearing that another hearing be scheduled. She, therefore, abandoned her request for a hearing pursuant to 20 C.F.R. § 10.137(c).

The Board further finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$929.00 for the period April 26, 1993 through March 30, 1996.

The record shows that the deductions for basic and postretirement life insurance premiums should have been deducted from her continuing compensation commencing April 26, 1993 as appellant received this insurance benefit and that the Office committed an administrative error of which it did not become aware until March 30, 1996. 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 properly determined that appellant was not entitled to waiver of recovery of the overpayment and that the overpayment would be recovered by withholding \$100.00 per four weeks from appellant's continuing compensation.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office 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.”⁴ Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.137(c).

⁴ 5 U.S.C. § 8129.

Section 10.320 of the implementing federal regulations provides the following:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁵

In this case, the Office properly determined that appellant was not at fault in the creation of the overpayment under any one of these circumstances, as the overpayment occurred because of an Office error in benefit deductions which appellant would not have been expected to know or to recognize. However, the fact that an individual is without fault in the matter of an overpayment does not, by itself, preclude the Office from adjusting later payments or recovering the overpayment amount.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 10.321(b) of Title 20 of the Federal Code of Regulations provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or her attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. Section 8129(b) describes the only exception to the Office’s right to adjust later payments or to recover overpaid compensation:

“Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the FECA or would be against equity and good conscience.”⁶

This section prohibits adjustment or recovery when the individual is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. Thus, because appellant is without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b), adjust later payments or recover the overpaid amount only if adjustment or recovery would neither defeat the purpose of the Act nor be against

⁵ 20 C.F.R. § 10.320.

⁶ 5 U.S.C. § 8129(b).

equity and good conscience. The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses.⁷ Recovery would cause such hardship if:

“(a) the individual from whom recovery is sought needs substantially all of his/her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses and

“(b) the individual’s nonexempted assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 if the individual has a spouse or one dependent....”

The Office’s procedure manual explains: “Both conditions in (a) and (b) above must be met to defeat the purpose of the Act. When an individual exceeds the limits for either disposable current income or assets, on the face of it, this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.”⁸

An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.⁹ Appellant’s reported monthly income on her overpayment recovery questionnaire totals \$1,832.00. Her reported ordinary and necessary monthly living expenses on that same report total \$1,605.00. Because this leaves \$227.00 in monthly funds available for debt repayment, the Board finds that appellant does not need substantially all of her current income to meet current ordinary and necessary living expenses. Accordingly, the Board finds that recovery will not defeat the purpose of the Act.

Section 10.323 provides that recovery of an overpayment is considered to be against equity and good conscience if an the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.322 above, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.¹⁰

⁷ 20 C.F.R § 10.322(a).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (September 1994).

⁹ *Id.*

¹⁰ 20 C.F.R.. § 10.323.

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹¹ As the evidence in this case does not establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience and as appellant neither argued nor submitted evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation, the Board finds that recovery of the overpayment will not be against equity or good conscience and that the Office did not abuse its discretion by denying waiver of recovery.

The Office's regulations at 20 C.F.R. § 10.321(a) provide that whenever an overpayment of compensation has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent compensation payments having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances and other relevant factors, such that any resulting hardship upon the individual is minimized.¹² With respect to the \$100.00 withheld from appellant's continuing compensation payments to recover the amount of the overpayment, the Board notes that the amount of adjustment lies within the Office's discretion,¹³ and finds that the Office properly exercised that discretion in this case. The Office correctly considered the factors enumerated in section 10.321(a) and it is clear after \$100.00 is withheld, appellant's monthly income will still exceed her expenses. This will not cause appellant to suffer any significant hardship. Therefore, the Board finds that the Office did not abuse its discretion by withholding \$100.00 from appellant's continuing compensation payments.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹⁴ No such evidence of abuse of discretion has been demonstrated in this case.

¹¹ See *William J. Murphy*, 40 ECAB 569 (1989).

¹² *Norman R. Moon*, 42 ECAB 947 (1991); *Lucille Peacock*, 42 ECAB 470 (1991).

¹³ See 20 C.F.R. § 10.321(a).

¹⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 25, 1997 is hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member