

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCISCO C. NOVERO and U.S. POSTAL SERVICE,
POST OFFICE, Las Vegas, NV

*Docket No. 97-2075; Submitted on the Record;
Issued November 26, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant received a \$3,462.75 overpayment of compensation for the period March 1, 1993 to November 9, 1996; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every four weeks.

The Board finds that appellant received a \$3,462.75 overpayment of compensation for the period March 1, 1993 to November 9, 1996.

In the present case, the Office did not deduct basic life insurance and postretirement life insurance premiums from appellant's compensation payments for the period March 1, 1993 to November 9, 1996.¹ The evidence of record which shows that \$3,462.75 of these premiums were not deducted during the period March 1, 1993 to November 9, 1996 despite the fact that appellant received the benefit of the insurance policies.² Therefore, the Office properly determined that appellant received a \$3,462.75 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.³ These statutory

¹ Appellant had been receiving Office compensation for various back injuries he sustained at work on January 14, 1994. By decision dated April 20, 1997, the Office determined that appellant received a \$3,462.75 overpayment which was not subject to waiver and that the overpayment should be repaid by deducting \$200.00 from appellant's compensation payments every four weeks.

² See *Glen B. Cox*, 42 ECAB 701 (1991).

³ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."⁴ Since the Office found appellant to be without fault in the matter of the \$3,462.75 overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁵

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 in sections 10.322 and 10.323, respectively, 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, plus \$600.00 for each additional dependent).⁶ Section 10.323 provides, generally, 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 section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.⁷

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. Appellant completed an overpayment questionnaire and the record reveals that appellant has monthly income of \$3,378.00 and monthly ordinary and necessary expenses of \$2,967.00.⁸ In determining appellant's monthly ordinary and necessary expenses, the Office

⁴ 5 U.S.C. § 8129(b).

⁵ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁶ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholtz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

⁷ 20 C.F.R. § 10.323.

⁸ The Office mistakenly listed appellant's monthly income as being \$3,447.00. The correct figure of \$3,378.00 is derived by multiplying \$2,153.00 (appellant's Office compensation every 4 weeks) times the 13 4-week pay periods of the year, dividing that figure by the 12 months of the year, and then adding \$872.00 (the monthly salary of

deducted various claimed expenses because they were not adequately documented or otherwise shown to be ordinary and necessary. These claimed expenses include \$300.00 for unexplained “allowances” for his wife, son and himself; \$85.00 of a \$135.00 telephone bill; \$70.00 for an “intermind educational back-up”; and \$71.00 for cable television. The Board notes that the Office properly determined that these claimed expenses were not adequately documented as ordinary and necessary.

Therefore, appellant’s monthly income exceeds his monthly ordinary and necessary expenses by approximately \$411.00. As appellant’s current income exceeds his current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.⁹ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant’s assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt¹⁰ or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹¹ Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$200.00 from appellant’s compensation payments every four weeks.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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,

appellant’s wife) and \$174.00 (appellant’s monthly veteran benefits). Appellant mistakenly listed his Office compensation every 4 weeks as being \$2,135.00 rather than \$2,153.00. The figures for appellant’s finances have been rounded to the nearest dollar.

⁹ See *supra* note 5 and accompanying text.

¹⁰ Whether a claimant experiences severe financial hardship in attempting to repay an overpayment is determined by using the same criteria set forth in 20 C.F.R. § 10.322; see *supra* note 5 and accompanying text.

¹¹ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”¹²

The record supports that, in requiring repayment of the overpayment by deducting \$200.00 from appellant’s compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$200.00 from appellant’s compensation payments every four weeks.

The decision of the Office of Workers’ Compensation Programs dated April 29, 1997 is affirmed.

Dated, Washington, D.C.
November 26, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹² 20 C.F.R. § 10.321(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).