

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ARTHUR CORDOVA and DEPARTMENT OF THE AIR FORCE,  
HILL AIR FORCE BASE, UT

*Docket No. 98-376; Submitted on the Record;  
Issued September 21, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to waive an overpayment of compensation in the amount of \$7,567.90.

The Board has duly reviewed the record on appeal and finds that the Office did not abuse its discretion.

On July 14, 1988 appellant, then a 63-year-old aircraft mechanic, sustained an employment-related herniated nucleus pulposa and exacerbation of degenerative disc disease of the cervical and lumbar spines, for which he received appropriate continuation of pay and compensation. He retired on June 2, 1989 and elected to receive benefits under the Federal Employees' Compensation Act.<sup>1</sup> On September 18, 1997 the Office issued a preliminary determination that an overpayment of compensation occurred in appellant's case in the amount of \$7,567.90, which resulted because deductions were not made for health benefits for the period September 6, 1988 to April 27, 1996 and for optional life insurance for the period September 12, 1992 to August 17, 1996. The Office found that appellant was without fault in the creation of the overpayment, informed him of the right to a prerecoumpt hearing and enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived. He was given 30 days in which to respond. Appellant submitted nothing further,<sup>2</sup> and by decision dated October 23, 1997, the Office finalized its preliminary determination.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> The Board notes that on November 14, 1997 appellant submitted a completed overpayment questionnaire and supporting documentation and requested both a review of the written record and a prerecoumpt hearing. This evidence was, however, submitted subsequent to the Office's decision dated October 23, 1997 and appellant's appeal to the Board submitted on November 7, 1997. Thus, the Board cannot consider this evidence as it's review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

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>3</sup>

In the present case, the record reveals that appellant was enrolled in health benefits and optional life insurance programs. The record further reflects that for the period September 6, 1988 to April 27, 1996, deductions for health benefits in the amount of \$7,172.36 were not made and that deductions for optional life insurance in the amount of \$395.54 were not made for the period September 12, 1992 to August 17, 1996. Accordingly, the Board finds that the Office properly determined that this underdeduction constituted an overpayment of compensation in the amount of \$7,567.90, based on the nondeduction of health and life insurance premiums.

Regarding waiver, section 10.322(a) of Title 20 of the Code of Federal Regulations<sup>4</sup> 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. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

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

“(b) 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.”<sup>5</sup>

Under the first criterion, 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.<sup>6</sup>

Under the second criterion, an individual’s assets include: (a) liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and (b) nonliquid assets, such as the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings or supplies therein, any vehicles above the two allowed per immediate family, jewelry and art work. Assets do not include the value of household furnishings in the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family

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<sup>3</sup> See FECA Bulletin No. 85-31 (issued June 4, 1985); *James Lloyd Otte*, 48 ECAB \_\_\_\_ (Docket No. 95-672, issued February 14, 1997); *Glen B. Cox*, 42 ECAB 703 (1991).

<sup>4</sup> 20 C.F.R. § 10.322(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 2.0200.6(a)(1) (September 1994).

<sup>6</sup> *Id.*

domicile, or income-producing property if the income from such property has been included in comparing income and expenses.<sup>7</sup> 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.<sup>8</sup>

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits 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.<sup>9</sup>

In the instant case, as appellant provided no financial information to the Office, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Furthermore, he has not shown that recovery would “defeat the purpose of the Act” or “be against equity and good conscience.” The Board, therefore, finds that the Office properly denied waiver of recovery of the overpayment.

The decision of the Office of Workers’ Compensation Programs dated October 23, 1997 is hereby affirmed.

Dated, Washington, D.C.  
September 21, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(4) (September 1994).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> 20 C.F.R. § 10.323. In a rare third situation, recovery is considered to be against equity and good conscience when the individual against whom the overpayment is charged derived no personal gain from the incorrect payments and had no knowledge of the compensation benefits that were paid. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(b) (September 1994). In this case, however, the incorrect payments were paid directly to the employee, who thereby derived a personal gain.