

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REX L. ROBINSON and U.S. POSTAL SERVICE,
POST OFFICE, Lamoni, IA

*Docket No. 97-1455; Submitted on the Record;
Issued February 7, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$10,506.86 because health benefit premiums were not deducted from his monthly compensation; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$175.00 every four weeks from his continuing compensation.

In the present case, the Office accepted that appellant sustained low back strain, aggravation of a preexisting condition, in the performance of duty on July 12, 1974. The Office authorized back surgery and later accepted genitourinary disorder manifested by impotence. The Office also authorized back surgery. Appellant began receiving compensation for temporary total disability and was placed on disability retirement commencing December 8, 1976. The record indicates that the Office did not withhold any amount for health benefits coverage for the period June 18, 1981 to May 25, 1996.

By letter dated November 15, 1996, the Office advised appellant that it had made a preliminary determination that he received a \$10,506.86 overpayment of compensation because the Office failed to deduct premiums for his health benefits, resulting in unpaid premiums for the period June 18, 1981 to May 25, 1996. The Office advised appellant that it found him without fault in the creation of the overpayment and that he could submit additional evidence if he disagreed with the fact or amount of the overpayment. The Office noted that, because appellant was not at fault in the creation of the overpayment, recovery of the overpayment could not be made if it would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office advised appellant of his right to a prerecoumpment hearing and requested him to complete an overpayment recovery questionnaire.

In response to the November 15, 1996 letter, appellant checked a box on an Office form requesting waiver of his overpayment and a telephone conference. Appellant also submitted a

completed overpayment recovery questionnaire which was received by the Office on December 9, 1996. In the overpayment recovery questionnaire, appellant indicated that his monthly family income totaled \$2,521.86¹ and that his monthly expenses totaled \$1,989.06. He indicated that he had total assets of \$10,415.00 consisting of \$400.00 in his checking account and \$10,415.00² in his savings account. Under expenses, appellant noted that he spent \$400.00 per month on food, \$50.00 per month on clothes, \$370.54 on his monthly mortgage,³ \$125.00 per month for utilities, \$60.00 per month for his telephone bill, \$50.00 per month for home maintenance, \$140.00 per month for gas and oil for his car, \$50.00 per month for maintenance on his car, \$100.00 per month for automobile insurance, \$100.00 for Christmas and birthday gifts, \$215.00 for medical expenses not reimbursed, \$75.00 for charitable contributions, \$159.52 insurance not withheld in his income, \$94.00 for yard maintenance, newspaper and magazine subscriptions and trash removal resulting in total expenses of \$1,989.06. Accompanying this form, appellant submitted documentation of his financial state which included a November 1996 checking account statement, a January 16, 1996 letter from the Internal Revenue Service stating that appellant might not have to file a tax return, certificate maturity notices for three accounts in the name of appellant's wife and an October 2, 1996 deposit voucher.

By final decision dated January 28, 1997,⁴ the Office determined that an overpayment had occurred in appellant's case in the amount of \$10,506.86 and that appellant was not at fault in the creation of the overpayment but that waiver was not appropriate in appellant's case. The Office directed repayment at the rate of \$175.00 per month from continuing compensation payments commencing February 1997 until the overpayment was absorbed. The Office noted that appellant's total monthly income was \$2,651.25 with monthly expenses totaling \$1,989.06 and an excess of \$662.19 per month.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$10,506.86 because health benefit premiums were not deducted from his monthly compensation.

In this case, there does not appear to be any dispute that deductions for health insurance were not taken from appellant's compensation payments during the period June 18, 1981 to May 25, 1996. The computer records indicate no deductions were made and no contrary evidence was submitted. An employee is responsible for payment of his share of the cost of enrollment for health benefits coverage, and there was no indication that appellant had elected to

¹ In its January 28, 1997 decision, the Office determined that appellant's monthly income was \$2,641.25. The Office determined that appellant's compensation of \$1,953.46 converted to a monthly income of \$2,116.25. Appellant on his form noted a monthly annuity check in the amount of \$1,986.86 and social security checks in the amount of \$196.00 for appellant and \$339.00 for his wife.

² Appellant had written the amount \$4,015.00 under the column for name of bank, location. Appellant had crossed this amount out in two different spots before noting it under credit union accounts. The other amount was listed as \$6,000.00 in savings or certificates of deposit.

³ Appellant indicated that the mortgage would be paid off in 2022.

⁴ The attached memorandum is dated February 5, 1997.

cancel enrollment.⁵ The Board therefore finds that an overpayment was created in this case. For the period June 18, 1981 to May 25, 1996, the Office calculated that the amount of the overpayment was \$10,506.86.

The Board finds that the Office properly found that appellant was without fault in the creation of the overpayment and did not abuse its discretion by denying waiver of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office's refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.⁶

Section 8129 of the Act⁷ provides that an overpayment of compensation 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 this subchapter [Act] or would be against equity and good conscience."⁸ (Emphasis added.) Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the [Act]" or the "against equity and good conscience" standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office's regulations respectively.⁹

With regard to the "defeat the purpose of the Act" standard, section 10.322(a) of the regulations provides in relevant part:

"(a) 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:

- (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

⁵ See *Leticia C. Taylor*, 47 ECAB 198 (1995).

⁶ *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8129(b).

⁹ *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. § 10.322-23.

(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."¹⁰

For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹¹ An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹²

In this case, the evidence shows that appellant's monthly income exceeds his monthly expenses. The record establishes that appellant had a monthly income of \$2,641.25 while his monthly expenses totaled \$1,989.06. Appellant thus had an excess of \$662.19 per month and, therefore, does not need substantially all of his current income to meet ordinary and necessary living expenses and waiver of recovery would not "defeat the purpose of the Act" standard.

With regard to the "against equity and good conscience" standard, section 10.323(b) of the regulations provides:

"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."¹³

The evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision

¹⁰ 20 C.F.R. § 10.322(a).

¹¹ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (September 1994).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹³ 20 C.F.R. § 10.323(b).

resulted in a loss.¹⁴ Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown.

The Board therefore finds that the Office did not abuse its discretion in denying waiver of the overpayment of compensation in this case.

The Board further finds that the Office did not abuse its discretion in requiring repayment of the overpayment by withholding \$175.00 from appellant's continuing monthly compensation benefits.

Section 10.321(a) of the regulations provides:

“Whenever an overpayment of compensation has been made to an individual who is entitled to future 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.”¹⁵

Based on appellant's information regarding his income, assets and expenses, the Office's decision to withhold \$175.00 every four weeks from appellant's continuing compensation payments was made with due regard to appellant's monthly household income and expenses, and is therefore appropriate under the circumstances of the case. Therefore, the Board finds that recovery of the overpayment by withholding \$175.00 every four weeks from appellant's periodic compensation does not constitute an abuse of discretion.

¹⁴ *Forrest E. Brown, II, supra* note 11 at 285-86; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1994).

¹⁵ 20 C.F.R. § 10.321(a).

The decision of the Office of Workers' Compensation Programs dated February 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 7, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member