

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SELECE COMER-MATTHEWS and DEPARTMENT OF VETERANS
AFFAIRS, WESTSIDE MEDICAL CENTER, Chicago, IL

*Docket No. 98-2077; Submitted on the Record;
Issued July 18, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$6,202.12 for the period January 7, 1996 to March 28, 1998; (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 \$100.00 every four weeks from her continuing compensation.

On April 22, 1993 appellant, then a 42-year-old social worker, sustained an employment-related cervical strain when she was involved in a motor vehicle accident. She returned to work intermittently, sustained a recurrence of disability on June 10, 1994 and has not worked since that time. On September 19, 1994 the Office expanded the accepted conditions to include fibromyalgia and myofascial pain syndrome.¹ On April 9, 1998 the Office issued a preliminary determination that an overpayment of compensation in the amount of \$6,202.12 occurred in appellant's case because incorrect deductions were made for health benefits for the period January 7, 1996 to March 28, 1998. The Office found that appellant was without fault in the creation of the overpayment, informed her of the right to a prerecoumpment hearing and enclosed an overpayment recovery questionnaire, which she returned on April 23, 1998. By decision dated May 18, 1998, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$6,202.12, that she was without fault in the creation of this overpayment but that waiver was not warranted as her monthly income exceeded her necessary living expenses. The Office informed appellant that \$100.00 would be withheld from her continuing compensation each payment period.

The Board finds that appellant received an overpayment in compensation in the amount of \$6,202.12.

¹ By decision dated November 1, 1995, the Office denied that appellant sustained a recurrence of disability. In a June 3, 1997 decision, the Office reinstated appellant's compensation benefits but denied that she sustained employment-related carpal tunnel syndrome.

An overpayment in 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.²

The record in the present case indicates that effective January 7, 1996 appellant enrolled in health benefits under enrollment code 102. Deductions from her wage-loss compensation for the period January 7, 1996 to March 28, 1998 were, however, made under enrollment code 105, which yielded an underdeduction for health benefits in the amount of \$6,202.12. The Office, therefore, properly determined that this underdeduction constituted an overpayment of compensation in the amount of \$6,202.12.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, she is not entitled to waiver.

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation is 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 the individual is entitled.³ Section 8129(b) provides the only exception to this mandatory adjustment:

“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 Act or would be against equity and good conscience.”⁴

In the present case, the Office has determined that appellant was without fault in the creation of the overpayment. Because appellant is without fault in the matter of the overpayment, the Office must adjust later payments only if adjustment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.322(a) of Title 20 of the Code of Federal Regulations⁵ 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

² See FECA Bulletin No. 85-31 (issued June 4, 1985); *James Lloyd Otte*, 48 ECAB 334 (1997); *Glen B. Cox*, 42 ECAB 703 (1991).

³ 5 U.S.C. § 8129(a).

⁴ *Id.* at § 8129(b).

⁵ 20 C.F.R. § 10.322(a).

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.”⁶

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 \$50.00.⁷

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 domicile, or income-producing property if the income from such property has been included in comparing income and expenses.⁸ 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.⁹

Following appellant's request for waiver, the Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act. Based on the overpayment questionnaire submitted by appellant, the Office properly found that her income exceeded monthly expenses by at least \$450.00. This exceeds the limits for disposable current income and is sufficient to support the Office's finding that recovery will not defeat the purpose of the Act.

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

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.a(1) (September 1994).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.a(4).

⁹ *Supra* note 6.

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 or her position for the worse.

Appellant, however, has submitted no evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines. The issue on appeal, therefore, is whether the Office’s denial of waiver constituted an abuse of discretion.¹⁰ As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion.

Lastly, the Board finds that the Office properly required repayment by withholding \$100.00 from appellant’s continuing compensation.

Section 10.321(a) provides that 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.¹¹ In establishing the initial collection strategy, the Office must weigh the individual’s income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations above.¹²

On the overpayment questionnaire submitted by appellant, she listed her monthly income as \$4,491.13¹³ with expenses totaling \$4,016.49, which would indicate that she had at least \$450.00 in monthly household income above her monthly expenses. The Board finds that the Office gave due regard to appellant’s financial circumstances in determining the rate of repayment in this case and, thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$100.00 every four weeks from appellant’s compensation.

¹⁰ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

¹¹ 20 C.F.R. § 10.321(a).

¹² Federal (FECA) Procedure Manual, Part -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(a).

¹³ At the time of the May 18, 1998 decision, appellant received \$2,152.82 in compensation every four weeks. The monthly amount of compensation would be greater by one-twelfth, that is \$2,332.22.

The decision of the Office of Workers' Compensation Programs dated May 18, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 18, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member