

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ODELL HOLLOWAY and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Alameda, CA

*Docket No. 98-1995; Submitted on the Record;
Issued June 21, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment of \$1,842.39 was created due to the failure to deduct life insurance premiums; and (2) whether the Office properly denied waiver of the overpayment.

In the present case, the Office accepted that appellant sustained a right heel fracture with post-traumatic arthritis. By letter dated April 9, 1998, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation of \$1842.39 had been created because premiums for life insurance had not been deducted during the period May 28, 1994 to February 28, 1998. The Office also made a preliminary determination that appellant was at fault in creating the overpayment. In a memorandum dated April 29, 1998, an Office claims examiner indicated that based on appellant's statements, he was found not to be at fault in creating the overpayment.

By decision dated June 2, 1998, the Office finalized an overpayment of \$1,842.39 and determined that appellant was not entitled to waiver of the overpayment.

The Board has reviewed the record and finds that the Office properly found an overpayment of \$1,842.39 was created.

In this case, appellant had received a schedule award for an 18 percent permanent impairment to the right leg, which ran from May 30, 1993 to May 27, 1994. Following the expiration of the schedule award, the Office resumed compensation payments, without deducting a life insurance premium. The Office determined that for the period May 28, 1994 to February 28, 1998, \$1,842.39 should have been deducted for life insurance premiums. On appeal appellant does not appear to contest the fact or amount of the overpayment, but contends that the overpayment should have been waived.

The Board finds that based on the financial information provided, the Office properly denied waiver of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act¹ provides: "Adjustment or recovery 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 the Act or would be against equity and good conscience."² Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. 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, respectively, in sections 10.322 and 10.323 of Title 20 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).³ Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if 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 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

In this case, the Office found that recovery of the overpayment would not deprive appellant of income and resources needed for ordinary and necessary living expenses and that his assets exceeded the resource base. With respect to income and expenses, the Office provided appellant with a worksheet that outlined his household income and expenses, based on his responses to an overpayment recovery questionnaire (OWCP-20) and information provided at the April 29, 1998 telephone conference. The worksheet indicated that appellant had \$983.82 in excess monthly income over expenses. The Board notes that the Office properly includes the income of appellant's spouse in calculating household income.⁴ With respect to assets, the worksheet listed \$5,533.75 in liquid assets from appellant's bank accounts and cash on hand.⁵

Appellant responded by reporting additional credit card debt; he also indicated there was an additional \$32.50 a month in insurance expenses and noted a \$327.00 annual car registration

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8129(b).

³ To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses and that his assets do not exceed the established resource base; *see Robert E. Wenholz*, 38 ECAB 311 (1986).

⁴ *See Earl C. Poppell*, 39 ECAB 1455 (1988).

⁵ Assets belonging solely to the spouse are not included in determining nonexcludable assets; *see Id.*

fee. As to liquid assets, appellant indicated a checking account had been reduced to \$12.00, for a total of \$5,014.75 in liquid assets.

Based on the financial information provided, the Board finds that appellant has not established that he needs substantially all of his income for necessary living expenses. Even if the minimum monthly payments on the additional credit cards are added (approximately \$712.00) and the additional insurance and car registration (\$59.75) appellant continued to have approximately \$212.00 in household income exceeding expenses. Under these circumstances, appellant has not shown that he needs substantially all of his current monthly income to meet living expenses.⁶ Moreover, the liquid assets reported by appellant exceed the \$5,000.00 resource base set forth in section 10.322(a), even if only by a small degree. Accordingly, the Board finds that denial of waiver would not defeat the purpose of the Act. With respect to the equity and good conscience standard of section 10.323, appellant has not shown that he relinquished a valuable right or change in position for the worse in reliance on the excess compensation payments.

Accordingly, the Board finds that the Office properly found that appellant was not entitled to waiver of the overpayment in this case.

The decision of the Office of Workers' Compensation Programs dated June 2, 1998 is affirmed.

Dated, Washington, D.C.
June 21, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Carroll R. Davis*, 46 ECAB 361 (1994) (an individual needs substantially all his income to meet current living expenses if monthly income does not exceed expenses by more than \$50.00); *see also James Lloyd Otte*, 48 ECAB 334 (1997) (excess of approximately \$200.00 in monthly income did not entitle appellant to waiver).