

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAQUELINE G. FORNEY and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Concord, CA

*Docket No. 98-2031; Submitted on the Record;
Issued May 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$483.26 for the period September 27, 1994 through November 8, 1997 because basic life premiums were not deducted from her compensation; and (2) whether the Office abused its discretion in denying a waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

On February 2, 1993 appellant, a 45-year-old inventory coordinator, was assaulted while in the performance of duty. She filed claims based on both emotional and physical injuries resulting from the incident, on April 5 and April 20, 1993. The Office accepted the physical claim for cervical, thoracic and lumbar subluxations and eventually accepted the emotional condition claim for post-traumatic stress disorder, in a July 8, 1994 Office hearing representative decision. The Office paid her total disability compensation for appropriate periods and placed her on the periodic rolls. Appellant received disability retirement from the employing establishment on February 19, 1997.

On November 30, 1997 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$483.26 for the period September 27, 1994 through November 8, 1997 because basic life premiums had not been not deducted from her compensation. The Office found that appellant was without fault in the matter, stating that she could not have been reasonably aware that the payments she had been receiving were incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised her that when she was found to be without fault in the creation of the overpayment, recovery might not be made if it can be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that she had the right to request a precoupment hearing on the matter of the overpayment and that any response she

wished to make with regard to the overpayment should be submitted within 30 days of the November 30, 1997 letter. She did not respond to this request within 30 days.

In a decision finalized on March 30, 1998, the Office found that appellant was not entitled to a waiver. The Office noted that appellant was given 30 days to respond to the November 30, 1997 preliminary decision, but that as the date of the final decision she had not responded.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$483.26 for the period from September 27, 1994 through November 8, 1997. The record shows that appellant received augmented compensation during the period in question because basic life premiums were not deducted from her compensation. The Office calculated the amount of overpayment by determining the bi-weekly premium, \$5.94¹ and multiplying it by the number of bi-weekly periods from September 27, 1994 through November 8, 1997, which amounted to 81.357. This figure was multiplied by the bi-weekly premium, \$5.94, for a total overpayment of \$483.26. Based on this determination, the Office properly found that she received an overpayment of compensation in the stated amount during that period.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment in the amount of \$483.26 after finding that appellant was without fault with respect to that overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment 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 the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.322-10.323 of the implementing federal regulations.³

With regard to the "defeat the purpose of the Act" standard, section 10.322 of the regulations⁴ provides:

"(a) General. Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled

¹ The Office arrived at this figure by taking appellant's salary of \$33,558.96, rounded this to the nearest thousand, \$34,000.00 and adding \$2000.00 -- totaling \$36,000.00 -- in accordance with the formula for coverage. The rate for basic life, 1.65, was then applied to the number of thousands in her salary, 36, for a bi-weekly premium of \$5.94.

² 5 U.S.C. § 8129(a)-(b).

³ 20 C.F.R. §§ 10.322-23; see *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

⁴ 20 C.F.R. § 10.322.

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 that:

(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

(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. This base includes all of the claimant's assets not exempted from recoupment in paragraph (d) of this section. The first \$3,000[.00] or more depending on the number of the claimant's dependents is also exempted from recoupment.”

With regard to the “against equity and good conscience” standard, section 10.323 of the regulations⁵ provides:

“(b) 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....”

However, section 10.321(h) of the Office's regulations⁶ provides that if additional financial evidence is not submitted or a prerecoupment hearing is not requested within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. Section 10.324 of the Office's regulations⁷ provides that in requesting waiver of an overpayment, the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision on waiver; that failure to furnish the information within 30 days of request shall result in denial of waiver; and that no further requests for waiver shall be entertained until such time as the requested information is furnished.

In the instant case, the case record contains no response from appellant to the Office's November 20, 1997 preliminary determination on her overpayment of compensation. She failed to submit any evidence showing that she needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed, as requested by the Office in its November 20, 1997 letter. Therefore, she does not qualify for waiver under

⁵ 20 C.F.R. § 10.323.

⁶ 20 C.F.R. § 10.321(h).

⁷ 20 C.F.R. § 10.324.

the “defeat the purpose of the Act” standard.⁸ Further, there is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the period September 27, 1994 through November 8, 1997. Pursuant to its regulations, the Office therefore did not abuse its discretion by issuing its March 30, 1998 final decision denying waiver of recovery of the overpayment in the amount of \$483.26.

The decision of the Office of Workers’ Compensation Programs dated March 30, 1998 is hereby affirmed.

Dated, Washington, D.C.
May 16, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁸ See *Nina D. Newborn*, 47 ECAB 132 (1995) (finding that recovery of the overpayment in a lump sum was proper because appellant failed to complete the recovery questionnaire).