

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE MCCARTHY and U.S. DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE, Boston, MA

*Docket No. 00-1677; Submitted on the Record;
Issued December 4, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$7,586.58 overpayment of compensation from July 10, 1994 through July 18, 1998; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly recovered the overpayment by withholding \$250.00 from continuing compensation payments.

On May 26, 1994 appellant, then a 52-year-old internal revenue agent, sustained an emotional condition after being threatened by a taxpayer. The Office accepted appellant's claim for post-traumatic stress disorder and he was paid appropriate compensation for disability. Appellant stopped work on May 26, 1994 and did not return.

In a letter dated July 16, 1998, appellant was notified that he was eligible to continue his current Federal Employees' Group Life Insurance coverage for basic coverage; option B for five times his salary; and option C for coverage for his family. Appellant, in a letter dated August 24, 1998, indicated that as of September 1, 1998 he wanted to cancel his option B life insurance coverage. The employing establishment confirmed appellant's request to cancel his option B life insurance and indicated that appellant would be refunded any excess premiums.

In a February 8, 2000 overpayment work sheet, the Office calculated that no deduction was made for appellant's basic life insurance premiums from July 10, 1994 to July 18, 1998, which amounted to an overpayment of \$1,074.15. The Office also calculated that the optional life insurance code D was deducted from appellant's pay instead of code Y as requested, which resulted in an overpayment of \$6,761.00. Finally, the Office deducted optional life insurance for code Y when appellant changed to code E from September 1 to October 10, 1998, which incurred a refund of \$248.57. The Office calculated that this resulted in a \$7,586.58 overpayment.

On February 8, 2000 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$7,586.58. The overpayment occurred because the Office did

not deduct the basic life insurance premium from July 10, 1994 to July 18, 1998 and deducted optional life insurance code D instead of the requested code Y from July 10, 1994 to July 18, 1998. The Office also determined that appellant was without fault in the creation of the overpayment. The Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.

In a letter dated February 17, 2000, appellant requested waiver of the \$7,586.58 overpayment because recovery would be against equity and good conscience. He stated that he relied on the incorrect information from the Office regarding the cost of his optional life insurance premiums and that, as a result of the Office's error, he lost his right to cancel the higher life insurance premiums in 1994.

By decision dated March 29, 2000, the Office found that appellant received a \$7,586.58 overpayment of compensation from July 10, 1994 to July 18, 1998, which he was without fault in creating. The Office found that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act¹ nor would it be against equity and good conscience. Therefore, waiver of overpayment was not granted. The Office advised that the overpayment would be recovered by deducting \$250.00 from appellant's continuing compensation payments every four weeks.

The Board finds that appellant received an overpayment of \$7,586.58 in compensation from July 10, 1994 to July 18, 1998.

The record indicates that appellant received the moneys that should have been used to afford coverage for basic life and optional life insurance. Consequently appellant received an overpayment of this amount. The Office properly determined that from July 10, 1994 to July 18, 1998 appellant received an overpayment of \$7, 586.58. Appellant does not dispute the amount or his receipt of the overpayment. The Board finds that the Office properly determined the amount or his receipt of the overpayment that covered the period of July 10, 1994 to July 18, 1998.

The Board further finds that the Office acted within its discretion in denying waiver of the overpayment.

Section 8129 of the 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 does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.³

¹ 5 U.S.C. § 8129(b).

² 5 U.S.C. § 8129.

³ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

Section 10.436 of the implementing federal regulations⁴ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.” Section 10.438 of the regulations⁵ provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by Office’s ... failure to furnish the information within 30 days of the request shall result in denial of waiver....”

In this case, the Office advised appellant to provide the necessary financial information by completing the overpayment recovery questionnaire issued on February 8, 2000 if he wanted to request waiver. However, appellant failed to submit a completed OWCP-20 form or other financial information. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.⁶

Section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, 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.

Appellant asserts that as a result of the Office’s error he lost his right to cancel the higher life insurance premiums in 1994. However, that reliance is not cognizable under the applicable sections of the Act⁷ and its implementing regulations. Appellant did not submit any financial information to show that he would experience severe financial hardship; that he relinquished a valuable right; or showed that his position changed for the worse. The Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that he changed his position for the worse. The record indicates that appellant elected option life insurance code Y, five times his salary; and option C, family insurance on April 1, 1981.

There is no evidence in the record that appellant made a decision that would not otherwise have been made nor does the evidence demonstrate that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. Therefore, appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience.”

The Board further finds that the Office acted within its discretion in requiring repayment of \$250.00 every four weeks from appellant.

⁴ 20 C.F.R. § 10.436.

⁵ 20 C.F.R. § 10.438.

⁶ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

⁷ *Supra* note 2.

Section 10.441(a) provides if an overpayment has been made to an individual who is entitled to further payments and no refund is made, the Office “shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstance of the individual and any other relevant factors, so as to minimize any hardship.”⁸

The record establishes that appellant failed to submit an overpayment recovery questionnaire or any other evidence from which the Office could determine what amount appellant could afford to repay out of his continuing compensation of \$3,568.54 every four weeks.⁹ The Office, therefore, determined that withholding \$250.00 every four weeks would promptly repay the overpayment with the least amount of burden on appellant. He submitted no financial information indicating that such an amount would result in any hardship. Therefore, the Office properly directed repayment by withholding this amount from continuing compensation.

The decision of the Office of Workers’ Compensation Programs dated March 29, 2000 is affirmed.

Dated, Washington, DC
December 4, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁸ 20 C.F.R. § 10.441(a).

⁹ See 20 C.F.R. § 10.438 which provides that, if additional financial information is not submitted, or a preredemption 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. The overpaid individual has the responsibility for providing the financial information as the Office may require.