

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN S. OVERMAN and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Pensacola, FL

*Docket No. 00-2663; Submitted on the Record;
Issued July 3, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$379.89, as the Office of Workers' Compensation Programs failed to withhold health insurance premiums from her compensation benefits from April 10 to July 12, 1998; (2) whether appellant was entitled to waiver of this overpayment; (3) whether the Office abused its discretion by withholding \$30.00 from appellant's continuing schedule award payments; (4) whether appellant received an overpayment in the amount of \$2,963.83 as she received a separate incentive of \$25,000.00 to retire but continued to receive compensation for wage loss from February 26 to April 24, 1999; (5) whether appellant was at fault in the creation of this overpayment; and (6) whether the Office abused its discretion by withholding \$200.00 from appellant's continuing benefits.

Appellant, a 47-year-old management assistant, filed a notice of occupational disease on September 13, 1995 alleging that she developed carpal tunnel syndrome due to factors of her federal employment. The Office accepted appellant's claim for carpal tunnel syndrome on March 26, 1996. The Office entered appellant on the periodic rolls on May 11, 1998. She returned to work on July 14, 1998 and stopped on July 19, 1998. Appellant accepted early retirement on February 26, 1999 with a separation incentive of \$25,000.00 and began receiving retirement benefits on March 1, 1999.

By decision dated January 21, 2000, the Office granted appellant a schedule award for 10 percent permanent impairment of each of her upper extremities.

On April 12, 2000 the Office found that appellant had received an overpayment in the amount of \$185.14 from July 13 to July 18, 1998 as she worked and received benefits for total disability. Appellant responded on April 18, 2000 and stated that she would repay the overpayment of \$185.14. The Office finalized this decision on May 2, 2000.¹

The Office made a preliminary finding that appellant had received an overpayment of compensation in the amount of \$2,963.83 on April 11, 2000 due to the receipt of both compensation and her retirement incentive. Appellant requested a review of the written evidence on April 20, 2000. She completed an overpayment recovery questionnaire. By decision dated August 15, 2000, the Office found that the overpayment occurred, that appellant was at fault as she knew or should have known that she could not receive both compensation and retirement benefits and that the overpayment should be recovered by withholding \$200.00 from appellant's schedule award payments.

On June 12, 2000 the Office made a preliminary finding that appellant received an overpayment of compensation in the amount of \$379.89, as the Office failed to deduct health insurance premiums from April 10 to July 12, 1998. The Office found that appellant was not at fault in the creation of the overpayment. The Office finalized this decision on August 15, 2000 finding that the overpayment occurred, that appellant was not at fault, that the overpayment was not subject to waiver and that it should be recovered by deducting \$30.00 from appellant's continuing schedule award.²

On appeal, appellant does not challenge the fact or amount of the \$379.89 overpayment which occurred when the Office failed to deduct health insurance premiums from her compensation benefits from April 10 to July 12, 1998. Rather, she appeals the Office's denial of waiver.

The Board finds that the Office properly denied waiver of recovery of the overpayment in the amount of \$379.89.

Section 8129(a) of the Federal Employees' Compensation Act provides that, when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled.³ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

"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

¹ The Board notes that appellant did not express disagreement with the January 21, 2000 decision granting her schedule award, nor the May 2, 2000 decision finalizing the \$185.14 overpayment. Therefore, the Board will not address these decisions on appeal.

² On appeal to the Board appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8129(a).

adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”

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 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 the implementing federal regulations.

Regarding waiver, section 10.434 of the Office’s regulations provides that if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the [Act],⁴ or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”⁵

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all her current income to meet current ordinary and necessary living expenses⁶ and the beneficiary’s assets do not exceed a specified amount as determined by the Office.⁷

Appellant completed an overpayment recovery questionnaire and participated in a telephonic conference with the Office. She indicated that she had a monthly income of \$4,887.00 and monthly expenses of \$4,346.31. Appellant indicated that she had \$4,000.00 in savings and \$300.00 in checking.

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As noted above, appellant’s monthly income exceeds her monthly ordinary and necessary expenses by approximately \$600.00. As a result recovery of the overpayment would not defeat the purpose of the Act.

Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.434.

⁶ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB ___ (Docket No. 98-2007, issued September 13, 2000).

⁷ 20 C.F.R. § 10.436. This amount has been considered to be \$3,000.00 for an individual. *Fitzgerald*, *supra* note 6.

repay the debt or when any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.⁸

There is no evidence in this case that appellant changed her position for the worse or gave up a valuable right. Therefore, she has not established that recovery of the overpayment would be against equity and good conscience.

On appeal, appellant does not challenge the fact or amount of the overpayment of compensation benefits due to receiving both compensation and retirement benefits from February 26 to April 24, 1999 in the amount of \$2,963.83. She appeals the finding of fault and the denial of waiver.

The Board finds that appellant was at fault in the creation of the \$2,963.83 overpayment.

Section 8129(a) of the Act⁹ provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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.”¹⁰ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office’s regulations¹¹ provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant

⁸ 20 C.F.R. § 10.437.

⁹ 5 U.S.C. §§ 8101-8193, 8129(a).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.320(b).

received the compensation check in question, she knew or should have known that the payment was incorrect.¹²

The Office found that appellant received her separation incentive of \$25,000.00 on February 26, 1999 and that she continued to receive compensation for total disability from February 26 to April 24, 1999. On May 13, 1998 appellant signed a form advising her that she must report any retirement income, as a recipient of compensation benefits is not permitted to receive benefits under the Civil Service Retirement Program. The Office found that appellant should have been reasonably aware that she could not receive a salary or a separation incentive while in receipt of compensation benefits. The Office noted that appellant continued to accept and negotiate four checks after receiving the separation incentive.

As appellant received a form from the Office expressly stating that she was not entitled to receive dual benefits from the federal retirement program and the Office, appellant knew or should have known that she was not entitled to wage-loss compensation benefits once she received retirement benefits and, therefore, the Board finds that she was at fault in the creation of this overpayment which is, therefore, not subject to waiver.

The Board further finds that the Office properly required repayment of the overpayments by deducting a total of \$230.00 from appellant's continuing compensation payments.

Section 10.441 of the Office's regulations provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If 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 circumstances of the individual and any other relevant factors, so as to minimize any hardship."¹³

Based upon appellant's information regarding her income, assets and expenses, the Office's decision to withhold a total of \$230.00 from appellant's continuing compensation benefits was made with due regard to her monthly household income and monthly expenses and assets and is, therefore, appropriate under the circumstances of the case. Therefore, the Board finds that the Office properly determined that recovery of the overpayments of compensation benefits would be obtained by withholding \$230.00 per month from appellant's continuing monthly compensation benefits.

¹² *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹³ 20 C.F.R. § 10.441.

The decision of the Office of Workers' Compensation Programs dated August 15, 2000 is hereby affirmed.

Dated, Washington, DC
July 3, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member