

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE W. MORGAN and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Lakewood, CO

*Docket No. 00-761; Submitted on the Record;
Issued October 15, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$3,679.83; (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 \$250.00 every four weeks from appellant's continuing compensation.

On December 26, 1996 appellant, then a 55-year-old project manager, filed an occupational disease claim, alleging that factors of employment caused his emotional condition. He had stopped work on July 20, 1995. On January 14, 1997 the Office accepted that appellant sustained an employment-related major depression with psychotic features and post-traumatic stress disorder.

By letter dated July 29, 1999, the Office issued a preliminary determination that an overpayment of compensation in the amount of \$3,679.83 occurred in appellant's case because no deduction had been made for life insurance from March 1, 1997 to May 22, 1999. The Office found that appellant was not at fault and requested that he indicate on an attached Office form whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment.¹ The Office also asked him to complete an attached overpayment recovery questionnaire and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether appellant was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment.

¹ The form provides a claimant with three choices: (1) a request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

On August 25, 1999 appellant requested waiver and a decision based on the written record. He also returned the overpayment questionnaire in which he indicated his disposable assets totaling \$49,091.00, but no income

By decision dated August 31, 1999, the Office finalized the overpayment decision. The Office determined that, while appellant was not at fault, the circumstances of appellant's case did not warrant waiver of recovery of the overpayment because he had disposable income of \$49,091.00 and monthly income of \$5,006.11 per month. The Office determined that recovery of the overpayment would be made from appellant's continuing compensation at a rate of \$250.00 every 28 days.

The Board finds that appellant received an overpayment of compensation in the amount of \$3,679.83.

An overpayment in compensation based on underwithholding of 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 this case establishes that from March 1, 1997 to May 22, 1999 no deductions for optional life insurance were made from appellant's compensation. The Office, therefore, properly determined that this underdeduction constituted an overpayment of compensation in the amount of \$3,679.83

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

Section 8129(a) of the Federal Employees' Compensation Act³ provides that, where an overpayment of compensation has been made "because of an error or fact of law" adjustments shall be made by decreasing later payments to which an individual is entitled.⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when incorrect

² Under the FEGLI program, most civilian federal employees are eligible to participate in basic life insurance and one or more options. Basic life coverage is effective unless waived and premiums for basic and optional coverage are withheld from the employee's pay. The Act and its regulations provide that an employee entitled to compensation may continue basic life insurance without cost under certain conditions and may also retain the optional life insurance. At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status. If the compensation chooses to continue basic and optional coverage, the schedule of deductions made while the compensation was an employee will be used to withhold premiums from compensation payments. Thus, while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums. When an underwithholding of premiums occurs, the entire amount is an overpayment of compensation because the Office must pay the full premium to Office of Personnel Management upon discovery of the error. *James Lloyd Otte*, 48 ECAB 334 (1997).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

payments 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.”⁵

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁶ 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 sections 10.434-437 of the implementing federal regulations.⁷

Section 10.436 of relevant Office regulations states:

“Recovery of an overpayment will defeat the purpose of the A[ct] if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”⁸

In determining that appellant was not entitled to waiver of the overpayment, the Office obtained figures from his overpayment recovery questionnaire dated August 25, 1999. While appellant indicated that he had zero income, the Office properly determined that he had a total monthly income of at least \$5,006.11, based on his receipt of \$4,621.01 in compensation every 28 days. Appellant advised that his monthly expenses totaled \$4,049.75, and he listed \$49,091.00 in disposable income. The Office, therefore, properly determined that since his monthly income exceeded his monthly expenses by approximately \$956.00, appellant did not need substantially all of his current income to meet ordinary and necessary living expenses and thus was not entitled to waiver on the grounds that recovery would 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 attempting to repay the debt,⁹ or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.¹⁰ In this case, appellant has submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore,

⁵ 5 U.S.C. § 8129(b).

⁶ See *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁷ 20 C.F.R. § 10-434-437 (1999).

⁸ 20 C.F.R. § 10.436 (1999).

⁹ 20 C.F.R. § 10.437(a) (1999).

¹⁰ 20 C.F.R. § 10.437(b) (1999).

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.¹¹ Because the evidence in this case fails to show 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 \$250.00 from appellant's continuing compensation.

Section 10.441(a) of Office regulations provides:

"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."¹²

The record in this case indicates that appellant has disposable income totaling \$49,091.00 and that his monthly household income exceeds his monthly expenses by approximately \$956.00. Hence, 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 \$250.00 every four weeks from appellant's compensation.

¹¹ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

¹² 20 C.F.R. § 10.441(a) (1999).

The decision of the Office of Workers' Compensation Programs dated August 31, 1999 is hereby affirmed.

Dated, Washington, DC
October 15, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member