

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET G. MECCA and DEPARTMENT OF AGRICULTURE,
SOIL CONSERVATION SERVICE, Albuquerque, NM

*Docket No. 01-530; Submitted on the Record;
Issued April 1, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$1,932.30 because health benefits were not deducted from her monthly compensation from February 1, 1996 to July 15, 2000; (2) whether the Office abused its discretion in denying waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$150.00 from appellant's continuing compensation.

On May 6, 1993 appellant, then a 44-year-old soil conservation technician, sustained employment-related neck and back injuries. On June 18, 1993 the Office accepted appellant's claim for cervical and lumbar strains. Appellant had a prior accepted claim for traumatic tendinitis of the right thumb, requiring surgical correction, dorsal back and right shoulder strains, as a result of employment-related injuries sustained on June 14, 1988. She retired from the employing establishment on February 1, 1996 and entered self-employment. Appellant remained eligible for medical benefits and wage-loss compensation for four hours a day.

In a notice dated August 30, 1990, the Office advised appellant that a preliminary determination had been made that an overpayment of \$1,932.30 occurred during the period February 1, 1996 to July 15, 2000 because no deductions were made for health insurance premiums. The Office found that appellant was without fault in creating the overpayment. The Office advised appellant that she could request waiver of the overpayment and enclosed a questionnaire regarding appellant's financial situation. In response, appellant requested waiver of recovery of the overpayment, submitted a completed overpayment questionnaire and requested a telephone conference, which was held on November 17, 2000.

By decision dated November 17, 2000, the Office finalized the overpayment determination. The Office found that appellant was not entitled to waiver of the overpayment and that \$150.00 would be withheld from her compensation checks until the overpayment was recovered.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,932.30 because health benefit premiums were not deducted from her monthly compensation from February 1, 1996 to July 15, 2000.

In this case, there does not appear to be any dispute that deductions for health insurance premiums were not taken from appellant's compensation payments during the period February 1, 1996 to July 15, 2000. Appellant retired from the employing establishment effective February 1, 1996 and as she continued to receive partial wage-loss compensation, she remained eligible for health benefits. The computer printouts indicate, however, that despite the fact that appellant desired health insurance coverage, no deductions were made for this period.¹ As the evidence indicates that no health benefit deductions were made and as no contrary evidence was submitted, the Board finds that an overpayment was created in the amount of \$1,932.30.

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

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.² Section 8129(b) provides the only exception to this mandatory adjustment:

“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.”³

In the present case, the Office has determined that appellant was without fault in the creation of the overpayment. Because appellant is without fault in the matter of the overpayment, the Office must adjust later payments only if adjustment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of Title 20 of the Code of Federal Regulations⁴ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living

¹ The Board has previously recognized that, when an underwithholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to Office of Personnel Management (OPM) when the error is discovered; *see John E. Rowland*, 39 ECAB 1377 (1988).

² 5 U.S.C. § 8129(a).

³ *Id.* at § 8129(b).

⁴ 20 C.F.R. § 10.436.

expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses and

“(b) 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.”⁵

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.⁶

Under the second criterion, an individual's assets include: (a) liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and (b) nonliquid assets, such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings or supplies therein, any vehicles above the two allowed per immediate family, jewelry and art work. Assets do not include the value of household furnishings in the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile or income-producing property if the income from such property has been included in comparing income and expenses.⁷ When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.⁸

Following appellant's request for waiver, the Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act. Based on the overpayment questionnaire submitted by appellant, the Office properly found that her liquid assets include \$200.00 cash on hand, \$5,000.00 in savings, \$5,000.00 in checking and a savings certificate in the amount of \$10,000.00. This exceeds the resource base for assets and is sufficient to support the Office's finding that recovery will not 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

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(1) (September 1994).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(4).

⁸ *Supra* note 5.

attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.

Appellant asserted that using proof of her monthly benefit checks as collateral, she obtained several loans, including a school loan with a remaining balance of \$6,500.00, on which she stated she pays \$45.00 a month and a past due credit loan with a balance of \$5,017.99, on which she pays \$75.00 a month. However, the Office noted that record contains a 1998 overpayment recovery questionnaire, dated almost exactly 24 months previously and submitted in connection with an earlier overpayment, in which appellant also claimed that she had a past due credit loan balance of exactly \$5,017.99 on which she paid \$75.00 a month, and further indicated that her student loan had a balance of \$6,948.04. In addition, appellant did not indicate on the prior overpayment recovery questionnaire that she provided any collateral for these loans. As this evidence indicates that appellant did not make a good-faith effort to fully and accurately complete the overpayment recovery questionnaire and as appellant has submitted no documentary evidence to establish that she changed her position for the worse in reliance on the overpaid compensation, the Office properly found that recovery of the overpayment would not be against equity or good conscience.⁹

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.¹⁰ As the evidence in this case fails to support 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 \$150.00 from appellant’s continuing compensation.

Section 10.441(a) provides that proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.¹¹ In establishing the initial collection strategy, the Office must weigh the individual’s income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations above.¹²

As appellant listed her liquid assets as \$5,000.00 in checking, \$5,000.00 in savings and \$10,000.00 in a savings certificate, 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

⁹ See *Gail M. Roe*, 47 ECAB 268 (1995).

¹⁰ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

¹¹ 20 C.F.R. § 10.441(a).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d (1)(a).

its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$150.00 every four weeks from appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated November 17, 2000 is hereby affirmed.

Dated, Washington, DC
April 1, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member