

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TED A. BRADSHAW and DEPARTMENT OF THE NAVY,
U.S. MARINE CORPS, Camp Lejeune, NC

*Docket No. 02-1711; Submitted on the Record;
Issued December 6, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,548.89 because health benefits were not deducted from his monthly compensation from July 22, 1999 to September 8, 2001; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying a waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$50.00 from appellant's continuing compensation.

On July 21, 1989 appellant, then a 47-year-old sewage disposal plant operator, injured his back while pulling himself out of a pretreatment hole. The Office accepted his claim for a low back strain and herniated disc at L3 and L4 and paid appropriate compensation for temporary total disability. Appellant resigned from the employing establishment on or about August 30, 1990 and was subsequently employed in the private sector as a maintenance mechanic-plumber for the Cape Fear Community College. The Office thereafter, adjusted appellant's compensation to reflect his ability to earn wages and continued his life insurance and health benefits coverage.

In a notice dated October 2, 2001, the Office advised appellant that a preliminary determination had been made that an overpayment of \$2,548.89 was created for the period July 22, 1999 to September 8, 2001 because no deductions were made for health insurance premiums. The Office noted that appellant carried health benefits under code 451, mailhandlers high self; however, premiums were not deducted for the period.¹ The Office found that appellant was without fault in creating the overpayment. The Office advised appellant that he could request a waiver of the overpayment and enclosed a questionnaire regarding appellant's financial situation for completion. In response, appellant requested a waiver of recovery of the

¹ The Board notes that appellant opted for the high option for mailhandlers during the period in which deductions were not taken; however, appellant subsequently changed his health insurance to code 454 with a lower monthly premium. Effective March 19, 2002 appellant's health insurance premium deduction was reduced to \$51.30 per month.

overpayment, submitted a completed overpayment questionnaire and requested a prerecoupment hearing, which was held on February 26, 2002.

At the prerecoupment hearing, the Office hearing representative indicated that a determination needed to be made regarding appellant's request for a waiver. The Office hearing representative verified appellant's income including benefits and monthly expenses during the hearing to determine whether recovery of the overpayment would cause him any hardship.

By decision dated May 24, 2002, the Office hearing representative finalized the preliminary overpayment determination. The Office found that appellant was not entitled to waiver of the overpayment and that \$50.00 would be withheld from his continuing compensation until the overpayment was recovered.

The Board finds that appellant received an overpayment of compensation in the amount of \$2,548.89 because health benefit premiums were not deducted from his monthly compensation from July 22, 1999 to September 8, 2001.

In this case, deductions for health insurance premiums were not taken from appellant's compensation payments during the period July 22, 1999 to September 8, 2001. Although appellant no longer worked for the employing establishment, he carried health benefits which he had previously elected since he continued to receive compensation for wage loss due to the employment-related injury.² As no health benefit deductions were made and there is no evidence appellant cancelled his health benefits enrollment, the Board finds that an overpayment was created in the amount of \$2,548.89 due to the underwithholding of health insurance premiums.

The Board further finds that appellant is not entitled to waiver of the overpayment.

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.³ 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.”⁴

² An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits (FEHB) program. Under applicable regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment. *See* 5 C.F.R. § 890.502(b)(1). An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions. *See* 5 C.F.R. § 890.502(d).

³ 5 U.S.C. § 8129(a).

⁴ *Id.* at § 8129(b).

In the present case, the Office determined that appellant was without fault in the creation of the overpayment. Because he 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 Regulations⁵ 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 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.”⁶

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 \$50.00.⁷

Following appellant's request for a waiver, the Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act. The information provided by appellant in the questionnaire was reviewed and verified at the February 26, 2002 hearing. Appellant verified that he received Veterans Administration benefits of \$199.00 and had monthly expenses which included \$200.00 for food, \$75.00 for clothing, \$185.00 for telephone, electricity and gas, \$180.00 for an automobile loan and \$143.00 for other debts. The record reflects that appellant received compensation benefits of \$975.70 each month. He further testified that he owned his home and had \$350.00 in his checking account and \$30.00 in cash on hand.

⁵ 20 C.F.R. § 10.436.

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

⁷ *Id.*

Based on the overpayment questionnaire and subsequent testimony of appellant regarding his financial situation, the Office properly found that appellant had a monthly income of \$1,174.70 with expenses totaling \$993.00 per month.⁸ The Office further found that his liquid assets included \$30.00 cash on hand, \$350.00 in checking.

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, 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.

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.⁹ 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 \$50.00 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.¹⁰ 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.¹¹

As appellant verified that his monthly expenses totaled \$993.00 and that his monthly compensation totaled \$1,174.70 and further, that he owned his own home and had some cash on hand and in savings, 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 \$50.00 every four weeks from appellant’s compensation.

⁸ The Board notes that the sum total of appellant’s monthly expenses as indicated on the questionnaire form submitted by appellant prior to the hearing is inconsistent with the amount discussed between appellant and the Office hearing representative at the February 26, 2002 hearing. However, as appellant verified the monthly expenses and compensation outlined by the Office hearing representative at the hearing through his testimony, the Office properly determined that appellant had expenses totaling \$993.00 per month.

⁹ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at *supra* note 5.

¹⁰ 20 C.F.R. § 10.441(a).

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(a) (September 1994).

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 24, 2002 is affirmed.

Dated, Washington, DC
December 6, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member