

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JUDY DANIELS and DEPARTMENT OF DEFENSE, DEFENSE  
COMMISSARY AGENCY, MALMSTROM AIR FORCE BASE, MT

*Docket No. 02-1921; Submitted on the Record;  
Issued December 17, 2002*

---

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$1,068.72 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied waiver of the overpayment; (4) whether the Office properly determined that \$100.00 per month should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for back strain on February 19, 1999 and began paying compensation benefits.

In a preliminary determination dated April 1, 2002, the Office found that an overpayment in the amount of \$1,068.72 had occurred from May 16, 2000 through March 23, 2002 when the Office incorrectly withheld life insurance premiums for code "P" instead of codes "O," "B" and "C," which resulted in an underdeduction. The Office found that appellant was without fault in the creation of the overpayment. The Office informed appellant that, if she disagreed with the fact or the amount of the overpayment, she may submit new evidence to support her contention or she could request a waiver or recoupment within 30 days of receipt of the Office's letter and submit appropriate evidence to justify her request. The Office enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived.

Appellant requested waiver of the overpayment and submitted an overpayment recovery questionnaire with numerous photocopies of her tax returns, bank statements and utility bills. She stated that she had no knowledge that the government had been underwithholding life insurance premiums from her compensation checks.

By decision dated May 16, 2002, the Office finalized their preliminary determination, also finding that appellant was not entitled to waiver of the overpayment. The Office concluded

that \$100.00 should be withheld from appellant's continuing compensation payments until the overpayment was repaid.<sup>1</sup>

The Board finds that appellant received an overpayment in the amount of \$1,068.72.

The Office found in its April 1, 2002 preliminary determination that appellant received an overpayment in the amount of \$1,068.72 from May 16, 2000 through March 23, 2002 because the Office withheld life insurance premiums under an incorrect life insurance election code. The record shows that the Office withheld premiums for code "P" instead of codes "O," "B" and "C." The Employment Standards Administration reports confirm that the Office had not been withholding premiums for postretirement coverage and basic life insurance coverage for the period in question. The Office's calculations indicate that the Office withheld \$440.39 from appellant's check for life insurance premiums under code "P" when they should have withheld \$1,509.11 under codes "O," "B" and "C" a difference of \$1,068.72. The Office, therefore, correctly found that appellant received an overpayment in the amount of \$1,068.72 when the Office underdeducted life insurance premiums from appellant's compensation. The Board notes when an underwithholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation to appellant because the Office must pay the full premium to the Office Personnel Management upon discovery of the error.<sup>2</sup>

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act<sup>3</sup> provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience. Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.<sup>4</sup>

The implementing regulation provides that a claimant is with fault in the creation of an overpayment when she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.<sup>5</sup>

The evidence establishes that the overpayment occurred because the Office withheld life insurance premiums under the incorrect code from May 16, 2000 through March 23, 2002. Appellant did not know and had no reason to know that the election code was incorrect. She is therefore without fault in the creation of the overpayment.

---

<sup>1</sup> The Office incorrectly noted that there had been no response from appellant regarding the preliminary notification. Appellant submitted financial information received by the Office on April 15 and 17, 2002.

<sup>2</sup> 5 C.F.R. § 872.401(h); *Calvin W. Scott*, 39 ECAB 1031, 1036 (1988).

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(a).

The Board, however, finds that this case is not in posture for decision regarding whether the Office properly denied waiver of recovery of the overpayment in the amount of \$1,068.72 and whether the Office properly required repayment at the rate of \$100.00 per month.

In this case, the Office found in its May 16, 2002 decision that appellant was not entitled to waiver of recovery of the overpayment without considering appellant's financial information. In the preliminary determination dated April 1, 2002, the Office stated that appellant may request waiver within 30 days of the date of the Office's letter and submit an overpayment recovery questionnaire with supporting financial documents. Appellant requested waiver and submitted financial information to the Office including income tax returns, numerous bank statements, property tax information and utility bills. The Office received this information between April 15 and 19, 2002. The Board finds that, since the Office received appellant's financial information within 30 days of April 1, 2002, the date of the Office's preliminary decision, the Office incorrectly denied waiver of the overpayment. The case shall be remanded to the Office to consider the complete record before issuing a decision on waiver.<sup>6</sup>

For the reasons stated above, the Board further finds that this case is not in posture for decision on the issue of whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$100.00 every four weeks from appellant's continuing compensation checks. Consequently, the Board remands the case to the Office for recalculation of the monthly repayment amount, if necessary, based on a correct determination of appellant's ordinary and necessary living expenses in comparison with her monthly income.

The decision of the Office of Workers' Compensation Programs dated April 1, 2002 is hereby affirmed. The decision of the Office dated May 16, 2002 is set aside and the case is remanded for such further development as the Office deems necessary to be followed by a *de novo* decision on the issue of waiver of the overpayment.

Dated, Washington, DC  
December 17, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>6</sup> *William A. Couch*, 41 ECAB 548 (1990).