

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN B. WILLEY and DEPARTMENT OF THE ARMY,
PUBLIC WORKS CENTER, Oakland, CA

*Docket No. 00-2456; Submitted on the Record;
Issued February 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment of \$1,651.90 occurred; (2) whether the Office abused its discretion in denying waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$300.00 every four weeks from his continuing compensation.

On February 26, 1982 the Office accepted appellant's claims for disability benefits based on an October 19, 1981 work-related injury and paid compensation.

On June 26, 2000 the Office determined that appellant had been overpaid compensation from October 27, 1993 to January 29, 2000 because his health insurance premiums were deducted at an incorrect rate. The Office found that appellant was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was not warranted.

The Board finds that appellant received an overpayment of compensation in the amount of \$1,651.90.

The record contains evidence which shows that the Office deducted health premiums from appellant under code M52 rather than code BU2 from October 27, 1993 to January 29, 2000. Appellant has not disputed that an overpayment occurred in the amount of \$1,651.90 because the Office incorrectly deducted his health premiums nor has he submitted evidence to show that he did not receive an overpayment for this period. The Office thus properly found that he received such an overpayment. The record shows that the Office correctly determined that premiums for health insurance were incorrectly deducted from October 27, 1993 to January 29, 2000 at a lower rate than appellant elected, resulting in an overpayment of \$1,651.90. The Board has recognized that an underwithholding of health insurance premiums

constitutes an overpayment of compensation because the Office must pay the full premium to the Office of Personnel Management (OPM) when the error is discovered.¹

The Board finds that the Office properly denied waiver of the overpayment.

Section 8129(a)² 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. 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 adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."³ (Emphasis added.)

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁴ 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 10.436 and 10.437 of the implementing federal regulations.⁵

The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment will defeat the purpose of the Act if:

"(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) The beneficiary's assets do not exceed a specified amount as determined by [the Office] as determined from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents."⁶

¹ See *Marie D. Simnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁵ 20 C.F.R. §§ 10.436-37; *James M. Albers, Jr.*, 36 ECAB 340, 345 (1984).

⁶ 20 C.F.R. § 10.436.

Section 10.437 of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment would be considered to be against equity and good conscience if any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.⁷

The Office's procedures manual states that recovery would cause hardship if:

“(a) The individual from whom recovery is sought needs substantially 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....”⁸

On May 30, 2000 appellant completed an overpayment recovery questionnaire, indicating that he had a total monthly income of \$3,821.76 and had expenses of exactly the same amount, \$3,821.76. In his expense portion of the questionnaire, appellant stated that he owed credit card payments of \$1,500.00 a month and food expenses of \$800.00 per month. Regarding his assets, appellant noted that his nonresidential property was valued at between \$200,000.00 and \$300,000.00 with a mortgage of \$29,000.00 and that he had additional stocks, bonds and other property worth approximately \$80,000.00.

The record reveals that appellant's assets exceed the maximum allowable of \$5,000.00 and that appellant did not need substantially all his income to meet ordinary and usual living expenses,⁹ the Board therefore finds that appellant is not entitled to waiver of recovery of the overpayment under the “defeat the purpose of the Act” standard. The Office's analysis is reasonable and proper and its finding that appellant is not entitled to waiver of the overpayment is affirmed.¹⁰

The Board further finds that the Office properly determined to recover the overpayment by withholding \$300.00 per month from appellant's continuing compensation benefits.

Section 10.441(a) states 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

⁷ 20 C.F.R. § 10.437.

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

⁹ The Office found that appellant's \$1,500.00 a month credit card payment on \$18,200.00 of credit card debt exceeds the minimum payment and that \$800.00 a month for food was excessive.

¹⁰ The Board notes that this case record contains evidence which was submitted subsequent to the Office's June 26, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n. 2 (1952).

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.”¹¹

As stated above, appellant’s refund questionnaire listed assets in excess of \$300,000.00 not including his residence.

As stated above, appellant listed real estate and other investment assets of over \$380,000.00, not including his residence. In ordering that \$300.00 be withheld every 28 days from appellant’s continuing compensation benefits, the Office implicitly found that recovery of the overpayment would not cause undue hardship. The Office’s finding is reasonable.

The June 26, 2000 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC
February 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹¹ 20 C.F.R. § 10.441(a).