

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEROME MYERS and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, SC

*Docket No. 00-1529; Submitted on the Record;
Issued January 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,156.76; (2) whether the Office properly denied waiver of the overpayment under section 8129(a) of the Federal Employees' Compensation Act;¹ and (3) whether the Office properly withheld \$100.00 every 4 weeks from appellant's continuing compensation to recover the overpayment.

On June 30, 1998 appellant, then a 46-year-old welder, filed a notice of traumatic injury alleging that he inhaled toxic fumes at work on June 19, 1998. The Office accepted appellant's claim for pneumonitis and chemical and toxic fume exposure, and authorized payment of appropriate compensation benefits. The Office had previously accepted that on May 30, 1989 appellant sustained a traumatic injury when he "blacked out" and fell on the floor at work. This claim was accepted for bilateral shoulder strains, chronic pain syndrome and anxiety. The Office authorized payment of appropriate compensation benefits.

In a preliminary decision dated October 22, 1999, the Office found that appellant received a \$1,156.76 overpayment due to the fact that the Office failed to deduct from appellant's health insurance premiums from August 23, 1992 to October 9, 1999. Since appellant could not have known of the need for these deductions, the Office found that appellant was not at fault.

By letter dated November 16, 1999, appellant stated that he had tried to contact the Office regarding the overpayment. Appellant submitted copies of statements from his health insurance company showing that he had paid his premiums. He did not request waiver of the overpayment and did not submit any other information indicating that he was unable to repay the debt.

¹ 5 U.S.C. 8129(a); 5 U.S.C. §§ 8101-8193. (1974).

By decision dated December 17, 1999, the Office finalized the overpayment of \$1,156.76 and determined that the overpayment would be recovered at the rate of \$100.00 every 4 weeks, with final payment set for November 2000. The Office explained that the recovery schedule was based on appellant's ability to pay since he did not submit any information indicating that he would suffer financial hardship in repaying the debt.

The Board finds that the Office properly determined that appellant received an overpayment of compensation of \$1,156.76 due to the lack of deduction for health insurance premiums from August 23, 1992 to October 9, 1999.

The record establishes and appellant does not dispute, that an overpayment of compensation was created in his case when the Office inadvertently failed to deduct health insurance premiums from his compensation payments during the stated period. The record supports that, based upon information furnished by the health insurer, the amount of health insurance premiums due for the period in question totaled \$1,156.76.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault.

Section 8129(a)² of the 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 10.322-.323 of the implementing federal regulations.⁵

Section 10.322⁶ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses when the individual from whom recovery is sought

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ *William J. Murphy*, 40 ECAB 569, 571 (1989) (finding that waiver is not automatic when appellant is without fault in creating the overpayment).

⁵ 5 C.F.R. §§ 10.322-23. *James M. Albers, Jr.*, 36 ECAB 340, 345 (1984).

⁶ 20 C.F.R. § 10.434.

needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and 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. For waiver under the "defeat the purpose of the Act" standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.⁷

In this case, appellant submitted a November 16, 1999 letter, in which he indicated that he had tried to contact the Office several times by telephone to discuss the overpayment of his premiums. He stated that he and his family had been covered by this health insurance company since 1990 and that he had never had a problem with the payment of his premiums. He also submitted copies of explanation of benefits forms from the insurance company showing that his premiums had been paid.

Appellant did not, however, request a waiver of the overpayment nor did he submit any financial information showing that he was unable to repay the debt. Appellant only submitted the explanation of benefits forms from the insurance company, which are irrelevant to the issue of waiver and whether appellant is financially able to repay the debt. Appellant has the burden of submitting evidence for waiver to show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.⁸ Since appellant did not submit any financial information showing that he cannot repay the debt he did not meet his burden of proof.

The Board further finds that the Office properly required repayment by withholding \$100.00 every 4 weeks from appellant's continuing compensation.

Section 10.441(a)⁹ provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payment 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."

In this case, the Office considered the financial information available in the record and determined that appellant could repay \$100.00 every 4 weeks to be withheld from his continuing compensation payments. Since appellant did not submit any financial information to the Office showing otherwise, the Office properly considered all the information available and determined

⁷ *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

⁸ *Id.*

⁹ 20 C.F.R. § 10.441(a).

that the amount would not cause him undue hardship. The Board finds that in determining this repayment schedule, the Office rendered due regard to the factors set forth in section 10.441 and that the repayment schedule was not unreasonable under the circumstances.¹⁰

The December 17 and October 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.¹¹

Dated, Washington, DC
January 17, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹⁰ See *Forrest E. Brown, II*, 44 ECAB 278, 286 (1992) (finding that withholding \$1,000.00 every 4 weeks from appellant's compensation was a reasonable repayment schedule).

¹¹ The Board notes that appellant has a second issue of overpayment in the amount of \$700.06 for the period of October 10, 1999 to January 29, 2000. The Office issued a preliminary finding of overpayment on June 5, 2000 but has not yet issued a final decision. The Board only has jurisdiction to consider and decide appeals from the final decisions of the Office in any case arising under the Act. 20 C.F.R. § 501.2(c). Since the Office has not yet issued a final decision regarding the \$700.06 overpayment, the Board does not have jurisdiction over this issue.