

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER I. HUTCHINSON and GENERAL SERVICES ADMINISTRATION,
EMPLOYEE & LABOR RELATIONS BRANCH, Fort Worth, TX

*Docket No. 01-1786; Submitted on the Record;
Issued July 8, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$5,235.82; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office abused its discretion by deciding to recoup the overpayment by deducting \$200.00 per month from appellant's continuing compensation.

On June 21, 1994 appellant, then a 51-year-old custodial worker supervisor, experienced an acute allergic reaction when he was exposed to cleaning chemicals in the performance of duty. The Office accepted appellant's traumatic injury claim for an episode of chemical sensitivity reaction. The claim was later expanded to include aggravation and acceleration of a preexisting asthmatic condition and acceleration of respiratory symptoms. Appellant received compensation for wage loss and was placed on the periodic rolls.

On April 12, 2001 the Office made a preliminary finding that an overpayment had occurred in the case in the amount of \$5,235.82.¹ The Office advised appellant that he was without fault in the creation of the overpayment. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods including a request for a telephone conference, a request for a written review of the record or a request for a recoupment hearing. If appellant wished to request a waiver of the overpayment, he was specifically directed to submit financial information by completing an Office overpayment recovery questionnaire.

The record indicates that appellant did not complete the requested questionnaire and submitted no evidence or argument in response to the Office's April 12, 2001 letter.

¹ The Office noted that appellant had been compensated at an incorrect pay rate from September 26, 1994 to February 23, 1995 because he received three-fourths (3/4) rather than two-thirds (2/3) of his weekly pay. Appellant was also told that he was paid wage-loss compensation from January 1, 1997 to December 30, 2000 although he was working during that time frame and should not have been paid benefits.

In a decision dated June 6, 2001, the Office determined that the circumstances of appellant's case did not warrant a waiver of the recovery of the overpayment and ordered that \$200.00 be deducted per month from appellant's continuing compensation beginning July 14, 2001 until the debt is repaid.²

The Board finds that appellant received an overpayment. After carefully reviewing the record, the Board notes that during the period of September 26, 1994 to February 23, 1995 appellant received compensation equal to three-fourths (3/4) of his salary because the Office had him incorrectly listed as being married. Because a marriage certificate indicates that appellant was not married until February 1995, he was only entitled to two-thirds (2/3) of his salary.³

Furthermore, although appellant returned to work effective January 1, 1999, the Office did not reduce appellant's compensation payments to reflect his actual earnings as required by the Federal Employees' Compensation Act.⁴ The Office's calculations are correct with regard to the finding of an overpayment in the amount of \$5,235.82.⁵

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

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁶ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."⁷ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

² The Office attached a debt amortization schedule for the period of July 14, 2001 to August 9, 2003 with interest and principal payments outlined.

³ See 20 C.F.R. § 10.401(b)2.

⁴ See generally 20 C.F.R. § 10.525.

⁵ Contrary to appellant's allegation on appeal, the Office calculated that appellant was underpaid compensation from February 23, 1995 through December 30, 2000 since he was entitled to three-fourths (3/4) of his salary but only received a compensation rate of two-thirds (2/3) of his salary. The Office had not recognized during that time that appellant was married. Notwithstanding the error, the Office added the total amount of compensation appellant received from September through December 1994, which totaled \$139,705.96. From that amount the Office subtracted the total amount of compensation appellant was due with his marital status taken into consideration, \$134,470.14. The total amount of overpayment was therefore assessed at \$5,235.82 (\$139,705.96 - \$134,470.14 = \$5,235.82).

⁶ See *Robert Atchison*, 41 ECAB 83 (1989).

⁷ 5 U.S.C. § 8129(b).

Section 10.436 of the implementing regulation⁸ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics.⁹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁰

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

In the instant case, appellant failed to complete the overpayment recovery questionnaire as directed by the Office.¹² Without an accurate and complete breakdown of appellant's monthly expenses and income, as well as assets, supported by financial documentation, the Office was not able to calculate whether monthly income exceeds monthly expenses by more than \$50.00 or whether assets exceed the specified resource base.¹³ There was also no information of record from which to conclude that appellant would be under severe financial hardship if recovery was sought because he had relinquished a valuable right or changed his position for the worse.¹⁴

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁵ As the evidence in this case

⁸ 20 C.F.R. § 10.436 (1999).

⁹ An individual's assets must exceed a 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. This base includes all of the individual's assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

¹⁰ *See Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹¹ 20 C.F.R. § 10.437 (1999).

¹² In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information as described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of the request shall result in denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished. 20 C.F.R. § 10.324.

¹³ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁴ Although appellant submitted financial information subsequent to the Office's May 28, 1999 decision, the Board does not have jurisdiction to consider evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

¹⁵ *Carroll R. Davis*, 46 ECAB 361 (1994).

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 by denying waiver of recovery.

In this case, appellant did not complete an overpayment questionnaire as requested by the Office, nor did he provide any financial information to show that recovery of the overpayment would defeat the purpose of the Act. Appellant likewise has not alleged and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous amount of compensation benefits received in this case without deduction of appropriate health and life insurance premiums. Because appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The Board also finds that the Office acted properly in deciding to recoup the overpayment by deducting \$200.00 per month from appellant’s continuing compensation.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, section 10.321(a), provides as follows:

“Whenever an overpayment has been made to an individual who is entitled to further payments, 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...”¹⁶

In the present case, the Office requested that appellant provide financial information to enable it to determine the rate of recovery of the overpayment having due regard to the factors noted above. Appellant, however, did not provide any information as requested to indicate that his financial circumstances were such that recovery of the overpayment from his continuing compensation would cause him undue financial hardship.¹⁷ The Board, therefore, finds that the Office did not abuse its discretionary authority in determining that appellant’s continuing compensation should be deducted by \$200.00 per month in order to recoup the overpayment.

¹⁶ 20 C.F.R. § 10.441(a) (1999).

¹⁷ 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. When an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collections guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *Gail M. Roe*, 47 ECAB 268 (1995); *see Nina D. Newborn*, 47 ECAB 132 (1995) (Where appellant failed to complete the overpayment recovery questionnaire, the Office’s decision to recover the overpayment by withholding 100 percent of appellant’s continuing compensation was found to be proper).

The decision of the Office of Workers' Compensation Programs dated June 6, 2001 is hereby affirmed.

Dated, Washington, DC
July 8, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member