

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE A. PHILLIPS and DEPARTMENT OF THE NAVY,  
NAVAL STATION, Philadelphia, PA

*Docket No. 00-1268; Submitted on the Record;  
Issued June 6, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of recovery of an overpayment in the amount of \$4,040.40; and (2) whether the Office properly required repayment of the overpayment by withholding \$100.00 per month from appellant's continuing monthly compensation benefits.

On April 21, 1980 appellant, then a 46-year-old pipefitter, filed a notice of traumatic injury alleging that he was injured in the performance of duty. The Office accepted the claim for a lumbar strain and acceleration of L5-S1 radiculopathy. Appellant was placed on the periodic rolls and received appropriate compensation for wage loss. He also received several schedule awards for his injury adding up to 16 percent permanent impairment of the left leg and 33 percent permanent impairment of the right leg.

On June 4, 1999 the Office notified appellant that a preliminary finding had been made that an overpayment occurred in the amount of \$4,040.40 because postretirement basic life insurance were not deducted from appellant's compensation from January 19, 1994 to May 23, 1999.<sup>1</sup> The Office further found that appellant was not at fault in the creation of the overpayment. Appellant was advised that if he believed he should receive waiver of the overpayment he had 30 days to either request a telephone conference, request a final decision on the written record or request a prerecoupment hearing. The Office also requested that appellant complete an overpayment questionnaire within 30 days in order to determine the issue of whether recovery of the overpayment should be waived.

In a September 23, 1999 decision, the Office denied waiver of the overpayment and ordered that \$100.00 per month be deducted from appellant's continuing compensation.

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<sup>1</sup> The Board notes that appellant does not challenge the fact or amount of the overpayment. He has argued that since he was without fault in the creation of the overpayment, he should not be expected to repay the amount.

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

Section 8129 of the Federal Employees' Compensation Act<sup>2</sup> provides that an overpayment of compensation must be recovered 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 would be against equity and good conscience." Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then 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.<sup>3</sup>

Section 10.436 of the implementing regulations<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

Under section 10.438 of the regulations it states that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]." This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>8</sup>

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

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<sup>2</sup> 5 U.S.C. § 8129.

<sup>3</sup> See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>4</sup> 20 C.F.R. § 10.436 (1999).

<sup>5</sup> 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).

<sup>6</sup> See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

<sup>7</sup> 20 C.F.R. § 10.437 (1999).

<sup>8</sup> 20 C.F.R. § 10.441(a) (1999).

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 the amount from appellant’s continuing compensation.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, section 10.441(a), provides as follows:

“Whenever an overpayment has been made to an individual who is entitled to further payments, ... [the Office] shall decrease later payments of compensation, taking 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.”<sup>9</sup>

In this 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.<sup>10</sup> The Board, therefore, finds that the Office did not abuse its discretionary authority in determining that the overpayment should be withheld from appellant’s continuing compensation at the rate of \$100.00 per month.

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<sup>9</sup> *Id.*

<sup>10</sup> 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 September 23, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
June 6, 2002

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member