

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LISA G. BORDERS and DEPARTMENT OF AGRICULTURE,  
FARMERS HOME ADMINISTRATION, Sullivan, IN

*Docket No. 01-1103; Submitted on the Record;  
Issued June 3, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs acted within its discretion in denying waiver of a \$1,027.42 overpayment of compensation; and (2) whether the Office properly required repayment of the overpayment by deducting \$100.00 each four weeks from appellant's continuing compensation payments.

On September 25, 1998 appellant, then a 37-year-old community development technician, sustained a herniated disc in the performance of duty.

Effective January 3, 1999, appellant was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

By letter dated October 31, 2000, the Office advised appellant that it had made a preliminary finding that she had received a \$1,027.42 overpayment of compensation because incorrect health benefits deductions had been made for the period January 3, 1999 through September 9, 2000. The Office found that appellant was without fault in the creation of the overpayment. Appellant was advised to submit evidence if she disagreed with the fact or amount of the overpayment or if she wished the Office to consider waiver of the overpayment.

On November 3, 2000 appellant submitted a completed overpayment recovery questionnaire showing that she had \$21,485.00 in assets that included \$19,200.00 in personal property, \$2,260.00 in her checking account, and \$25.00 cash on hand. She indicated that she had total monthly expenses of \$1,727.71 which included \$408.71 for rent, \$400.00 for food, \$50.00 for clothing, \$232.00 for utilities, \$300.00 for other expenses such as miscellaneous household expenses, medical and dental care and transportation expenses, \$230.00 in credit card debt and \$107.00 for a loan. Appellant indicated that she had a total household income of \$2,349.00. She requested waiver of the overpayment.

In a memorandum to the file dated January 10, 2001, the Office's senior claims examiner stated that she had telephoned appellant to determine whether she had provided all the correct

information for her monthly living expenses. She stated that later appellant left a message on her voice mail indicating that her monthly expenses included \$461.00 for rent, \$450.00 for food, \$50.00 for clothing, \$350.00 for utilities, \$547.00 for dental, medical, automobile and insurance expenses and \$300.00 in credit card debt for total monthly expenses of \$2,158.00.

By decision dated January 31, 2001, the Office determined that appellant had received an overpayment of compensation in the amount of \$1,027.42 because of incorrect health benefit deductions from January 3, 1999 through September 9, 2000. The Office found that the evidence showed that appellant had a total monthly household income of \$2,349.00 and total monthly expenses of \$2,158.00 which left her with disposable income of \$191.00 per month. Because appellant had more than \$50.00 remaining after monthly expenses, the Office found that she did not qualify for waiver of the overpayment. It determined that a reasonable rate of recovery was \$100.00 per month from appellant's continuing compensation benefits.<sup>1</sup>

The Board finds that the Office acted within its discretion in denying waiver of a \$1,027.42 overpayment of compensation.

Appellant does not contest the fact or amount of the overpayment and the record supports that the overpayment was \$1,027.42.

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.<sup>2</sup> These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation 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 who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."<sup>3</sup> 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.

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

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<sup>1</sup> The record contains additional evidence that was not before the Office at the time it issued its January 31, 2001 decision. Therefore, the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

<sup>2</sup> *See Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>3</sup> *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

<sup>4</sup> 20 C.F.R. § 10.436.

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 of an overpayment would defeat the purpose of [the Act] or be against equity and good conscience.”<sup>8</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because she has not shown that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As noted above, appellant’s monthly income exceeds her monthly ordinary and necessary expenses by \$191.00 and she has \$21,485.00 in assets. As a result, recovery of the overpayment in the amount of \$1,027.42 would not defeat the purpose of the Act.<sup>9</sup>

With respect to whether recovery of the overpayment would be against equity and good conscience, the evidence does not demonstrate that appellant relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation.

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<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 Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>7</sup> 20 C.F.R. § 10.437.

<sup>8</sup> 20 C.F.R. § 10.438.

<sup>9</sup> Appellant argues on appeal that when calculating her expenses, the Office failed to include \$107.00 a month loan repayment and incorrectly listed \$350.00 for utilities rather than \$390.00. Appellant argues that if such amounts had been added to the expenses, she would have been eligible for a waiver. However, under section 10.436 of the regulations (20 C.F.R. § 10.436(a) and (b)) recovery of an overpayment will defeat the purpose of the Act “if the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income ... to meet current ordinary and necessary living expenses; AND (emphasis added) the beneficiary’s assets do not exceed a specified amount” -- \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent. (Federal FECA Procedure Manual, Part 6 -- Initial Overpayment Actions, *Waiver of Recovery*, Chapter 6.0200 6(a)(1) (September 1994) *supra* note 5. In her overpayment recovery questionnaire, OWCP-20, appellant listed \$21,485.00 in assets. As this amount exceeds the resource base, she is not eligible for a waiver even if those amounts had been included on the expense worksheet. Therefore, the Board does not need to address these discrepancies.

Inasmuch as appellant has not shown that recovery of the overpayment 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 of compensation in the amount of \$1,027.42.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every four weeks.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a) provides as follows:

“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 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 hardship....”

Based on appellant's information regarding her income, assets and expenses, the Office's decision to withhold \$100.00 from her continuing compensation benefits was made with due regard to her monthly income and monthly expenses and assets and is, therefore, appropriate under the circumstances of this case. Therefore, the Board finds that the Office properly determined that the overpayment sum of \$1,027.42 would be deducted from appellant's continuing compensation benefits at the rate of \$100.00 per week.

The decision of the Office of Workers' Compensation Programs dated January 31, 2001 is affirmed.

Dated, Washington, DC  
June 3, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member