

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN SKARBEK and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 01-1396; Submitted on the Record;
Issued June 21, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$25,676.70 overpayment of compensation from September 1, 1987 through June 20, 1998; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly recovered the overpayment by withholding \$150.00 from continuing compensation payments.

On March 7, 1985 appellant, then a 59-year-old engineering aid, filed a claim alleging that he sustained a coronary heart condition causally related to factors of his federal employment. He became aware of his condition on January 23, 1985. The Office accepted appellant's claim for myocardial infarction. He did not stop work.

In a memorandum to the file dated November 4, 1999, the Office indicated that appellant was on the periodic rolls following his January 23, 1985 injury. The Office noted he chose health insurance plan code 102 as his insurance. The Office indicated that it mistakenly withheld premiums for health insurance plan code SU2. The period for which this occurred was from September 1, 1987 to June 20, 1998. The Office indicated that during this period of time the health insurance premiums for plan SU2 were lower than the premiums for plan 102; therefore, appellant was overpaid due to the under withholding of the correct premiums. The Office noted that appellant was without fault in the creation of the overpayment.

In a November 16, 1999 overpayment worksheet, the Office calculated that health insurance premiums for plan SU2 were withheld instead of the chosen plan 102 for the period of September 1, 1987 to June 20, 1998, which amounted to an overpayment of \$25,676.70.

On March 9, 2000 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$25,676.70. The Office noted that the overpayment occurred because the Office withheld incorrect premium amounts for his health insurance plan. Appellant was enrolled in Blue Cross/Blue Shield, but the Office incorrectly deducted the wrong, lower premium amount during this time period. The Office also determined appellant was without

fault in the matter of the overpayment. The Office indicated that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.

In a letter dated March 20, 2000, appellant indicated that he disagreed with the finding that there was an overpayment. He requested the Office provide him with evidence of the overpayment. By letter dated May 12, 2000, appellant indicated that he received the evidence of the overpayment and requested a waiver of overpayment. He noted that he was not at fault for the overpayment. Appellant indicated that the Office did not furnish him with a benefits statement where he could check that the proper health insurance premiums were being withheld. He further noted that had he received such notice he could have informed the Office of the mistake in a timely manner. Appellant indicated that his ability to catch this mistake in a timely manner could never be regained. He noted that he was deprived of this valuable right and should be granted a waiver of the overpayment.

By letter dated May 22, 2000, the Office informed appellant that a waiver could not be granted unless appellant requested either a telephone conference or a hearing.

In a letter dated July 5, 2000, the Office requested appellant complete an overpayment questionnaire. The Office informed him that if he desired a hearing he was required to request one within 30 days of the preliminary finding. If appellant had not yet requested a hearing within the required 30 days, the Office instructed him that he could request a waiver of the 30-day requirement.

In a letter dated August 16, 2000, appellant indicated that he attempted to reach the Office several times but was unsuccessful. He indicated that he would not request a waiver of the 30-day requirement for a hearing as he did not believe it was necessary. Appellant requested that a waiver of overpayment be granted to him. He attached an overpayment questionnaire. The overpayment questionnaire indicated a monthly income of \$4,374.82 and monthly expenses of \$4,258.19.

In a memorandum dated October 16, 2000, the Office noted it had not received any supporting financial documents from appellant substantiating his income and expenses and therefore, could not otherwise grant a compromise of the debt. The Office noted that it tried to contact appellant however the telephone was disconnected. The Office was notified that appellant moved to Texas and thereafter, transferred his case record to that Office.

In a letter dated October 25, 2000, the Office notified appellant that the financial information he submitted was incomplete and again instructed him to submit supporting financial documents to substantiate his expenses before waiver of overpayment could be considered.

In a letter dated January 11, 2001, the Office informed appellant that no additional financial information had been received in support of his request for waiver of overpayment and therefore, waiver of overpayment would not be granted. The Office notified appellant that deductions in the amount of \$150.00 would be made from his compensation benefits.

By decision dated February 8, 2001, the Office found that appellant received a \$25,676.70 overpayment of compensation from September 1, 1987 to June 20, 1998 for which he

was without fault in creating. In an accompanying memorandum, the Office noted appellant's argument in support of waiver and found that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act¹ nor would it be against equity and good conscience. Therefore, waiver of overpayment was not granted. The Office advised appellant that the overpayment would be recovered by deducting \$150.00 from appellant's continuing compensation payments every four weeks.

The Board finds that appellant received an overpayment of \$25,676.70 in compensation from September 1, 1987 to June 20, 1998.

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits (FEHB) Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”

In addition 5 C.F.R. § 890.502(d) provides:

“An agency that withholds less than or none of the proper health benefits contributions from an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”

The Office calculated that health insurance premiums for plan SU2 were withheld instead of the chosen plan 102 for the period of September 1, 1987 to June 20, 1998. On March 9, 2000 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$25,676.70. The Office noted that the overpayment occurred because the Office withheld incorrect premium amounts for appellant's health insurance plan. Appellant was enrolled in Blue Cross/Blue Shield, but the Office incorrectly deducted a lower premium amount during this time period. Therefore, an overpayment of compensation in the amount of \$25,676.70 was created for the period of September 1, 1987 to June 20, 1998.²

The Board further finds that appellant is not entitled to waiver of recovery of compensation for the period of September 1, 1987 to June 20, 1998.

¹ 5 U.S.C. § 8129(b).

² See *Jennifer Burch*, 48 ECAB 633 (1997).

Where an overpayment of compensation has been made because of an error of fact or law, collection of such compensation shall be waived 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. The waiver of an overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.³

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. § 8129(b) as specified in 20 C.F.R. § 10.436(a)(b) provides as follows:

“Recovery of an overpayment will defeat the purpose of the [Act] if 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 ordinary and necessary living expenses; and
- (b) The beneficiary’s assets do not exceed the specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”⁴

In *Robert E. Wenzel*,⁵ the Board found that the guidelines for recovery of an overpayment from an individual who is without fault were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those which are not exempted, do not exceed a resource base.

Section 10.438 of the regulations, 20 C.F.R. § 10.438 provides:

- “(a) 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. This information will also be used to determine the repayment schedule, if necessary.

³ *William Phillips, Jr.*, 39 ECAB 330 (1987).

⁴ 20 C.F.R. § 10.436(a).

⁵ 38 ECAB 311 (1986).

(b) Failure to submit the requested 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 submitted.”

In this case, appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on March 9, 2000 if he wanted to request waiver. On August 16, 2000 he submitted an overpayment recovery questionnaire noting monthly expenses of \$4,258.82 and a monthly income of \$4,374.82. However, appellant failed to provide any supporting financial information. In letters dated October 16, October 25, 2000 and January 11, 2001 the Office advised appellant that he could be eligible for a waiver of the overpayment if he would furnish copies of the documents substantiating his expenses. Although appellant delineated reasons why he believed recovery of the overpayment would be against equity and good conscience, he failed to submit any financial information supporting his claimed income, assets or expenses. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.⁶ Therefore, the Office acted properly in refusing to waive the recovery of the overpayment on this ground.

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides:

“(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.”

⁶ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information); see *John B. Moore*, 41 ECAB 804 (1990).

Appellant asserts that because the Office did not furnish him with a benefits statement where he could check that the proper health insurance premiums were withheld, he was unable to catch the Office's mistake in a timely manner and avoid the substantial overpayment. He noted that he was deprived of this valuable right because he was not provided with notice of the benefits being withheld. Appellant, however, has not given any specific description of any actions he took or rights he relinquished on the basis of the receipt of the erroneous payment of compensation which eventually changed his position for the worse. The Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that he changed his position for the worse. Additionally, appellant has not submitted any evidence to show that he is entitled to waiver of recovery of the overpayment on the grounds that recovery would be against equity and good conscience. The Office therefore, did not abuse its discretion in denying appellant's request for a waiver of recovery of the overpayment. As noted, appellant failed to submit the financial information required by section 10.438⁷ which was necessary to determine whether appellant detrimentally relied on the overpayments. As 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 further finds that the Office did not abuse its discretion in requiring repayment of \$150.00 every four weeks from appellant.

Section 10.441(a) provides if an overpayment has been made to an individual who is entitled to further payments and 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 circumstance of the individual and any other relevant factors, so as to minimize any hardship."⁸

The record establishes that appellant submitted an overpayment recovery questionnaire, however failed to furnish any supporting financial evidence to substantiate his expenses from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits.⁹ The Office, therefore, considered the total amount of net compensation appellant was receiving of \$4,374.82 and determined that a \$150.00 withholding every four weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant. As appellant has submitted no financial information indicating that such an amount would not minimize any hardship, the Office properly directed repayment by withholding this amount from continuing compensation.

⁷ 20 C.F.R. § 10.438.

⁸ 20 C.F.R. § 10.441(a).

⁹ See 20 C.F.R. § 10.438 which provides that if additional financial information is not submitted or a prerecoupment hearing is not requested, within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The overpaid individual has the responsibility for providing the financial information as the Office may require.

The decision of the Office of Workers' Compensation Programs dated February 8, 2001 is affirmed.

Dated, Washington, DC
June 21, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member