

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD R. NAHIKIAN and DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCE CONSERVATION SERVICE, SOIL CONSERVATION
SERVICE, Waynesville, NC

*Docket No. 01-138; Submitted on the Record;
Issued March 4, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that a \$424.45 overpayment of compensation occurred in appellant's case due to the underdeduction of life insurance premiums for the period July 23, 1997 to January 1, 2000; (2) whether the Office abused its discretion by finding that the overpayment was not subject to waiver; and (3) whether the Office properly required recovery of the overpayment by deducting \$100.00 per month from appellant's continuing compensation payments.

The Office accepted that, on May 7, 1997, appellant, then a 46-year-old soil and water conservationist, slipped and fell on rocks in a creek, struck his back and sustained an aggravation of a preexisting T7 compression "burst" fracture, causing a kyphotic deformity, leg weakness, and motor difficulties in the lower extremities.¹ He stopped work that day and did not return. Appellant's case was placed on the periodic rolls effective August 2, 1997.²

The Office implemented a vocational placement plan in March 1999 to reemploy appellant in the private sector as an industrial order clerk. However, rehabilitation efforts were closed as of June 23, 1999 due to the severity of appellant's condition.³

¹ Appellant previously had a claim, No. 060647576, accepted for a lumbar strain on February 27, 1997 when he bent to pick up a roll of filter cloth. This claim was doubled into the May 7, 1997 claim, No. A6-0678480.

² Appellant submitted periodic reports from May 1997 through March 2000 from Dr. Gerald E. Rodts, an attending Board-certified neurosurgeon, finding appellant permanently disabled from his date-of-injury job and totally permanently disabled as of January 2, 1998. Dr. Christopher Edwards, a Board-certified orthopedic surgeon and second opinion physician, submitted an October 15, 1997 report opining that the May 1997 fall aggravated a preexisting bone graft which was "progressing to failure." Appellant received vocational rehabilitation services beginning in September 1997.

³ In a June 17, 1999 letter, the Office advised appellant that he had 90 days in which to obtain employment as an

On October 2, 1999 appellant elected to receive compensation benefits in lieu of civil service retirement benefits, effective July 2, 1999.

In an October 12, 1999 letter, appellant stated that it appeared that the Office was not fully deducting his health and life insurance premiums. He noted that his health insurance premium was \$159.53 per month and life insurance was \$62.18 per month, including the basic life insurance premium of \$14.44 per month.⁴

By notice dated February 25, 2000, the Office advised appellant of its preliminary finding that a \$424.25 overpayment of compensation had occurred in his case, as the Office failed to deduct appellant's basic life insurance premium from his continuing compensation payments for the period July 23, 1997 to January 1, 2000. The Office calculated that appellant was overpaid \$424.45, representing \$14.44 per month for the 29-month and 1-week period, equaling \$422.37 with minor adjustments. The Office provided appellant with an overpayment recovery questionnaire and instructions for requesting waiver of the overpayment and a prerecoupment hearing.

Appellant completed and returned the overpayment recovery questionnaire on March 15, 2000. He provided financial information indicating that he received \$180.00 per month in Veterans' Administration benefits, \$2,427.75 in compensation benefits and that his wife received \$550.00 per month from a pension, for a total monthly income of \$3,157.75. Appellant noted expenses of \$800.00 per month in mortgage payments, \$340.00 for food, \$80.00 for clothing, \$290.00 for utilities and \$215.00 in miscellaneous expenses. Appellant noted that he owned 30 acres of farmland worth \$36,000, had \$600.00 in a checking account and \$100.00 cash. He also noted \$381.00 per month payments toward a \$20,800.00 car loan and \$100.00 monthly payments on a \$1,200.00 credit card debt. Appellant requested waiver of the overpayment due to financial hardship and a telephone conference in lieu of a prerecoupment hearing.

In a March 24, 2000 telephone conference memorandum, the Office noted appellant's monthly income of \$3,157.75 and a total of \$2,324.00 in monthly expenses, leaving appellant with \$833.75 in discretionary income per month.⁵ The Office explained that as appellant had more than \$50.00 left between his monthly income and expenses and could not demonstrate that he was worse off financially than if the overpayment had never been made, the overpayment was not subject to waiver. The Office advised appellant and he agreed, that \$100.00 would be deducted from his continuing compensation payments beginning April 23, 2000.

industrial order clerk, after which time his compensation would be reduced "based on the wage-earning capacity of \$14,560.00 per year." In a June 23, 1999 letter, appellant alleged that the June 17, 1999 letter was in error, as he was unable to work. It appears from the record that the Office did not seek to reduce appellant's compensation benefits at that time.

⁴ Appellant's basic life insurance premium was \$14.44 per month, standard life insurance \$1.95 per month, additional life insurance \$44.49 per month, and "family optional" life insurance \$1.30 per month.

⁵ Appellant listed several items during the teleconference that he did not include in his overpayment recovery questionnaire.

By decision dated March 28, 2000, the Office finalized its preliminary determination, finding a \$424.45 overpayment of compensation in appellant's case due to the underdeduction of life insurance premiums for the period July 23, 1997 to January 1, 2000. Appellant was found to be without fault in creation of the overpayment. The Office found, however, that the overpayment was not subject to waiver. The Office directed that recovery of the overpayment be accomplished by deducting \$100.00 from appellant's continuing compensation payments beginning on April 23, 2000, with a fifth deduction of \$27.38. The Office directed the collection of the total overpaid amount of \$424.45, plus \$2.93 in interest, for a total of \$427.38.⁶

Regarding the first issue, the Board finds that the Office properly determined that a \$424.45 overpayment of compensation occurred in appellant's case due to the underdeduction of life insurance premiums for the period July 23, 1997 to January 1, 2000.

Under the Federal Employees' Group Life Insurance (FEGLI) program, most civilian employees of the federal government are eligible to participate in basic life insurance with one or more options.⁷ The coverage for basic life is effective unless waived and premiums for basic and optional life coverage are withheld from the employee's pay. Under the FEGLI program, insurance remains in effect until canceled and premiums due are to be deducted from the injured employee's compensation payments. The injured employee remains responsible for all insurance premiums.

In this case, the record reveals, however, that the Office did not deduct all appropriate life insurance premiums for appellant's continuing compensation payments. Appellant himself brought this underdeduction to the Office's attention in an October 12, 1999 letter and several subsequent letters. Thus, the record demonstrates that an overpayment was created in the amount of \$424.45 by the underdeduction of premiums for the insurance appellant elected.

Regarding the second issue, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault in its creation.

Section 8129(a) of the Federal Employees' Compensation Act⁸ provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Sections 10.441(a) of Title 20 of the Federal Code of Regulations provides that where an overpayment has been made to an individual by reason of an

⁶ Appellant filed his appeal with the Board on September 21, 2000. Following this filing, the Office issued a January 12, 2001 decision suspending appellant's compensation benefits effective that date as he failed to return a November 22, 2000 affidavit of earnings and employment (Form CA-1032). However, the record contains the November 22, 2000 form, signed by appellant on December 1, 2000 and date punched received by the Office on December 11, 2000. In a January 17, 2001 letter, the Office advised appellant that it had received his November 22, 2000 Form CA-1032, and to "disregard" the January 12, 2001 decision. The Board notes that the January 12, 2001 decision, in effect vacated by the January 17, 2001 letter, is of no effect in his compensation claim and should be considered harmless, nondispositive error.

⁷ See *James Lloyd Otte*, 48 ECAB 334, 337 (1997).

⁸ 5 U.S.C. §§ 8101-8193.

error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides “[a]djustment or recovery by the United States may not be made when incorrect payment had 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.”⁹

Appellant correctly asserts that he was not at fault in creating the overpayment. However, the fact that an individual is without fault does not, by itself, preclude the Office from adjusting later payments or recovering the overpaid amount, as explained by section 8129(b), *supra*. Thus, because appellant is without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b), adjust later payments or recover the overpaid amount only if adjustment or recovery would neither defeat the purpose of the Act nor be against equity and good conscience.

The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations. Section 10.436(a) provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses¹⁰ and if the individual’s nonexempted assets do not exceed a resource base determined by the Office with advice from the Department of Labor’s Bureau of Labor and Statistics, in this case, \$3,000.¹¹ An overpaid individual must meet both of these criteria in order to establish financial hardship. Section 10.436 also provides that recovery of an overpayment is considered to be against equity and good conscience if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.¹²

In the instant case, appellant submitted a completed overpayment recovery questionnaire dated March 15, 2000 and participated in a March 24, 2000 teleconference. He listed a total monthly household income of \$3,157.75, expenses of \$2,324.00 per month, \$36,000.00 in property and a homestead, and \$700.00 in cash and bank accounts. These assets exceed the \$3,000.00 asset base allowed under section 10.436(a). Thus, appellant does not qualify for waiver by reason of financial hardship. Further, appellant did not argue or submit evidence to establish that recovery of the overpayment would be against equity or good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse.

⁹ *Id.* § 8129(b).

¹⁰ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.

¹¹ 20 C.F.R. § 10.436(a).

¹² *Id.* § 10.437(b)

As appellant submitted no evidence in this case to establish 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 in refusing to waive recovery of the overpayment.

Regarding the third issue, the Board finds that the Office properly required recovery of the overpayment by deducting \$100.00 per month from appellant's continuing compensation payments.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part: "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 further 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."¹³

With respect to the \$100.00 withheld from appellant's continuing compensation payments to recover the amount of the overpayment, the Board notes that the amount of adjustment lies within the Office's discretion.¹⁴ The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.

In the March 24, 2000 telephone conference memorandum, the Office determined that appellant had \$833.75 more in monthly income than his monthly expenses. The Office properly exercised its discretion and determined that the \$100.00 per month deduction from appellant's monthly compensation payments from April to July 2000, with an explanation that as appellant had more than \$50.00 left between his monthly income and expenses and could not demonstrate detrimental reliance on the overpaid amount, the overpayment was not subject to waiver. The Office advised appellant and he agreed, that \$100.00 would be deducted from his continuing compensation payments beginning April 23, 2000, with a fifth deduction of \$27.38.

Therefore, the Board finds that the Office had sufficient current financial information at the time it determined the method and amount of recovery of the overpayment and that the decision to withhold \$100.00 per month for four months and \$27.38 in the fifth month, from appellant's continuing compensation payments was proper under the circumstances of this case.

¹³ 20 C.F.R. § 10.441(a).

¹⁴ See 20 C.F.R. § 10.441(a).

The decision of the Office of Workers' Compensation Programs dated March 28, 2000 is hereby affirmed.

Dated, Washington, DC
March 4, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member