

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN L. THOMAS and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Charleston, SC

*Docket No. 02-1312; Submitted on the Record;
Issued November 4, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of an overpayment of compensation of \$1,234.62; and (3) whether the Office properly determined that appellant should repay the overpayment by deducting \$150.00 every four weeks from his continuing compensation.

Appellant's claim was filed on January 4, 1994 after he fell off a ladder while checking a steam heater and accepted for a right shoulder strain and arthroscopy. The employing establishment terminated appellant on March 17, 1995 due to his inability to perform his duties. Appellant filed a recurrence of disability claim, which the Office accepted. Beginning on March 18, 1995 the Office paid total disability compensation with premium deductions for health benefits and optional life insurance.

Following rehabilitation and retraining, appellant accepted a position in private industry as an engineering technician. The Office reduced his compensation, effective March 8, 1999, based on his actual earnings and deducted premiums for health benefits and optional life insurance. On August 11, 1999 the Office determined that appellant's position represented his wage-earning capacity. The Office calculated that appellant would receive \$1,076.00 in wage-loss compensation every four weeks, less a health benefits premium of \$124.64.

On January 10, 2002 the Office informed appellant that an overpayment of compensation of \$1,234.62 had occurred because the Office failed to deduct premiums for basic or optional life insurance from August 15, 1999 to November 3, 2001.¹ Also, premiums for basic life insurance

¹ An Office memorandum dated August 2, 1999 noted that life insurance coverage was not available for claimants found capable of earning wages. By letter dated August 20, 2001, the Office informed appellant of a change in policy from the Office of Personnel Management (OPM), which now prohibited life insurance coverage only for those claimants who returned to their date-of-injury positions. On September 5, 2001 appellant elected to reinstate his life insurance coverage and acknowledged that an overpayment for retroactive premiums would be declared.

were not deducted from March 18, 1995 to August 14, 2001. The Office found that appellant was without fault in creating the overpayment, which was due to administrative error and provided options for appellant to request a waiver of recovery of the overpayment. Appellant did not respond.

By decision dated February 19, 2002, the Office found that appellant was not entitled to waiver of recovery of the overpayment. The Office noted that appellant was currently working and determined that deducting \$150.00 every four weeks from his continuing wage-loss compensation was reasonable to recover the overpayment.

The Board finds that the Office acted within its discretion in denying waiver of recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.² The only exception to this requirement must meet the tests set forth in section 8129(b): "Adjustment or recovery 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 this subchapter or would be against equity and good conscience."³ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.⁴

In this case, appellant was without fault in creating the overpayment because the Office failed to make the proper premium deductions.

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 section 8129(b), as specified in section 10.436 provides:

"(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 a 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."⁵

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

⁵ 20 C.F.R. § 10.436.

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered 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 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 worst, 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

The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.⁷ The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.⁸

For waiver under the first standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed a specific resource base. An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁹

⁶ 20 C.F.R. § 10.437.

⁷ *Rudolph A. Geci*, 51 ECAB 423 (2000).

⁸ *Linda Hilton*, 52 ECAB ____ (Docket No. 00-2711, issued August 20, 2001). Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Nor did appellant claim any lost right or detrimental reliance; see *Christine P. Burgess*, 50 ECAB 444, 449 (1999) (appellant sustained no loss due to detrimental reliance because her compensation was offset by her wage-earning capacity).

⁹ *Jan K. Fitzgerald*, 51 ECAB 659 (2000); see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses, and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁰ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office will result in denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹¹

In this case, appellant failed to submit any financial information or respond to the options provided by the Office in requesting waiver of recovery of the overpayment. The preliminary determination of overpayment dated January 10, 2002 asked appellant to submit documentation, such as “copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records which support the income and expenses listed.” The Office letter explained that this information would be used to determine whether to waive the overpayment or, if not waived, how to collect repayment.

Because appellant failed to submit supporting financial documentation, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Therefore, the Board finds that the Office properly denied waiver of recovery of the overpayment on this ground.¹²

Appellant argued that the overpaid amount was too much because his life insurance should have cost \$12.16 a month, not the \$24.74 he paid. The calculation of the \$1,234.62 overpayment was based on an annual salary of \$31,824.00 in 1995, when appellant was terminated, and wage-loss compensation of \$1,076.00 every four weeks, starting in March 1999. From February 28 to March 7, 1999 and from August 15, 1999 to November 3, 2001, the premium for optional life insurance A was \$1.80, for B coverage, \$6.40 and for C coverage, \$1.20. The number of days in the 2 periods totaled 820, which was divided by 28 days (4 weeks). The result was multiplied by the three premiums, equaling \$187.06, \$52.71 and \$35.14, for a total of \$274.91.

From March 18, 1995 to April 24, 1999, the bi-weekly premium for basic life insurance was \$5.61 and from April 25, 1999 to November 3, 2001 it was \$5.27.¹³ The number of days in the first period was 1,527, which was divided by 14; the result was multiplied by \$5.61, equaling \$611.89. The number of days in the second period was 924, which was divided by 14; the result

¹⁰ 20 C.F.R. § 10.438(a).

¹¹ 20 C.F.R. § 10.438(b).

¹² See *John Skarbek*, 53 ECAB ___ (Docket No. 01-1396, issued June 21, 2002) (finding that the Office properly denied waiver of recovery of the overpayment because appellant failed to submit financial information supporting his claimed monthly income and expenses).

¹³ Computer printouts in March 1999 show that no premium was deducted for basic life insurance. A total of \$10.64 was deducted for optional life insurance.

was multiplied by \$5.27, equaling \$347.82. Totaling the three amounts results in an overpayment of \$1,234.62.¹⁴

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$150.00 every four weeks from his continuing compensation.¹⁵

Section 10.441(a) states in relevant part:

“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 factors, so as to minimize any hardship.”¹⁶

In this case, appellant returned to full-time employment and received \$1,076.00 in wage-loss compensation every four weeks. The deduction of \$150.00 from appellant’s continuing compensation represents only 14 percent of the amount he receives in addition to the income from his private sector employment.

As the only limitation on the Office’s authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹⁷ Appellant failed to respond to the preliminary notice of overpayment and the record contains no evidence that the Office abused its discretion in finding that appellant could repay \$150.00 every four weeks.

Further, the record demonstrates that the Office gave due regard to the factors enumerated in section 10.441(a),¹⁸ and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal. Therefore, the

¹⁴ See *James Lloyd Otte*, 48 ECAB 334, 337 (1997) (finding that appellant was responsible for basic life insurance premiums that were not deducted from his compensation, resulting in an overpayment); see also *Howard R. Nahikian*, 53 ECAB ___ (Docket No. 01-138, issued March 4, 2002) (finding that waiver of recovery of the overpayment is not automatic because appellant is without fault in creating it). See generally *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁵ By letter dated February 28, 2002, appellant informed the Office that he did not want life insurance and “would appreciate” the Office withholding \$150.00 a month from his compensation until the overpayment was repaid.

¹⁶ 20 C.F.R. § 10.441(a).

¹⁷ *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

¹⁸ 20 C.F.R. § 10.441(a).

Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment at the rate of \$150.00 every four weeks from his continuing compensation.¹⁹

The February 19, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 4, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁹ See *Donzel R. Yarbour*, 50 ECAB 179, 185 (1998) (finding that the Office's decision to withhold 10 percent or \$200.00 a month from appellant's continuing compensation was appropriate under the circumstances of the case).