

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD B. MASON and U.S. POSTAL SERVICE,
NORA POST OFFICE, Indianapolis, IN

*Docket No. 02-1068; Submitted on the Record;
Issued October 22, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$2,110.05; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by withholding \$120.00 from appellant's continuing compensation.

On September 10, 1998 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that on that date he hurt his lower back while lifting a tub out of a hamper. Appellant stopped work on the date of injury.

By letter dated December 14, 1998, the Office accepted appellant's claim for a lumbar strain. The Office expanded the acceptance of appellant's claim to include a herniated disc at L5-S1 by letter dated January 25, 1999.

Appellant returned to limited-duty work on May 26, 1999 with certain physical restrictions set forth by Dr. Don R. Jardine, a Board-certified orthopedic surgeon and his treating physician.

Subsequently, on September 29, 1999 the employing establishment offered appellant the position of modified letter carrier. On October 8, 1999 appellant stated that the offer was moot because he was in the process of filing for disability retirement.

By letter dated October 26, 1999, the Office advised appellant that the offered position of modified letter carrier was suitable. He was notified of the penalty provisions of 5 U.S.C. § 8106 and given 30 days to respond. On October 18, 1999 appellant accepted the offered position only if his disability retirement was not approved. By letter dated November 29, 1999, the Office advised him that his decision to apply for disability retirement was irrelevant to its finding that the offered position was suitable. The Office further advised appellant that his reason for refusing the offered position was not acceptable and he was given an additional 15 days to

respond. On December 2, 1999 appellant accepted the job offer. He began working in the new position on December 6, 1999.¹

By letter dated October 29, 2001, the Office made a preliminary determination that an overpayment had occurred in the amount of \$2,110.05, because it failed to make deductions from appellant's compensation benefits for health insurance premiums during the period August 13, 2000 to September 8, 2001.² The Office found that appellant was not at fault in the creation of the overpayment. He was advised that, if he disagreed with the amount of the overpayment, he could submit additional evidence or argument. Appellant was also informed of his right to request waiver of the overpayment, to request a telephone conference; a final decision based on a review of the written record or a precouplement hearing. The Office also requested that appellant complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. On November 16, 2001 appellant submitted financial information and requested a waiver of the overpayment and a telephone conference.

A telephone conference was held on January 30, 2002 between appellant and his wife, Judith Mason and an Office senior claims examiner. Appellant requested waiver of the overpayment because his family's expenses exceeded their income.

In a February 21, 2002 decision, the Office finalized its preliminary determination that appellant received an overpayment in compensation in the amount of \$2,110.05 and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment. The Office ordered repayment of the overpayment by deducting \$120.00 a month from each of appellant's compensation payments.³

The Board finds that appellant received an overpayment in compensation in the amount of \$2,110.05.

An overpayment in compensation based on underwithholding of health insurance or optional life insurance is subject to the waiver provisions of 5 U.S.C. § 8129, as well as other statutes and regulations relative to overpayments and collection of debts.⁴

¹ By decision dated February 8, 2000, the Office reduced appellant's wage-loss compensation on the grounds that his earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity.

² The record reveals that the Office deducted appellant's health insurance premiums beginning September 9, 2001.

³ The Board notes that on appeal appellant has submitted additional evidence. The Board, however, may not review evidence that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting his evidence along with a request for reconsideration to the Office.

⁴ *See* FECA Bulletin No. 85-31 (issued June 4, 1985); *James Lloyd Otte*, 48 ECAB 334 (1997); *Glen B. Cox*, 42 ECAB 703 (1991).

The record in this case indicates that, when appellant retired on disability from the employing establishment on August 11, 2000, the employing establishment did not transfer his health benefits enrollment under code 105 to the Office. Thus, no deductions for health benefits were made from appellant's compensation for the period August 13, 2000 through September 8, 2001. The Office, therefore, properly determined that this underdeduction constituted an overpayment of compensation in the amount of \$2,110.05.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

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.⁵ 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.”⁶

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 regulations⁷ 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.⁸

⁵ See *Robert Atchison*, 41 ECAB 83 (1989).

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.436.

⁸ 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 Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994); *Robert F. Kenney*, 42 ECAB 297 (1991).

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 \$50.00.⁹

On November 16, 2001 appellant completed an overpayment recovery questionnaire, indicating that he had a total monthly income of \$2,769.00,¹⁰ a checking account balance of \$1,000.00 and expenses in the amount of \$3,328.03.

In a memorandum regarding the January 30, 2002 telephone conference, the senior claims examiner indicated that he advised appellant that the financial information previously submitted was unclear and that he needed to clarify this information. The senior claims examiner noted that appellant's household consisted of four people including Mrs. Mason and their two sons, ages 22 and 25. The younger son did not attend college and contributed about \$100.00 a month. Mrs. Mason stated that the oldest son helped out financially every so often "if we [a]re lucky." The memorandum indicated that appellant's monthly income totaled \$2,922.00, which included \$1,350.00 from pension benefits and \$1,572.00 in compensation benefits from the Office. His monthly expenses included the following: \$1,272.00 for mortgage; \$100.00 for real estate taxes; \$400.00 for food; \$100.00 for gas; \$150.00 for electricity; \$45.00 for telephone service; \$3.00 for sewage; \$75.00 for cable; \$16.00 for trash collection; \$56.00 for home insurance; \$22.00 for life insurance; \$50.00 for automobile gas; \$61.00 for automobile insurance for appellant and Mrs. Mason; \$364.00 for automobile insurance for both sons; \$50.00 for miscellaneous personal care; \$215.00 for an automobile and home improvement loan; \$10.00 for charitable contributions; \$170.00 for credit cards; and \$185.00 for medical expenses.

In response to the Office's memorandum of telephone conference, appellant indicated that the contents of the memorandum were approximately accurate. He also indicated additional expenses for Mrs. Mason and dental treatment for both of them.

In the February 21, 2002 decision, the Office found that expenses for automobile insurance and food for appellant's sons were not necessary inasmuch as appellant's sons were not considered as dependents under the Act because neither son was in school and both were apparently working. The Office also found that expenses for cable television service did not constitute an ordinary and necessary living expense. The Office, therefore, concluded that appellant's monthly expenses could be reduced by more than \$600.00, specifically, \$638.50. The Office determined that an allowance for dental expenses and additional medical treatment for Mrs. Mason, which involved health insurance deductibles, totaled approximately \$100.00 a month. The Office recalculated appellant's ordinary and necessary monthly expenses as \$2,805.50, which it found left \$116.50 from which to recover the overpayment. The Office, therefore, found that appellant did not need substantially all his income to meet current ordinary and necessary expenses and thus, the evidence of record did not establish that recovery of the overpayment would defeat the purpose of the Act. The Office's analysis is reasonable and

⁹ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁰ The Board notes that appellant's overpayment questionnaire should reflect actual monthly income in the amount of \$2,765.00 rather than \$2,769.00 as indicated by appellant.

proper and its finding that appellant is not entitled to waiver of the overpayment under the “defeat the purpose of the Act” standard is affirmed.

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.¹¹

In this case, appellant has neither alleged nor submitted evidence demonstrating that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation payments he received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

Lastly, the Board finds that the Office properly determined that appellant should repay the overpayment by withholding \$120.00 from appellant’s continuing compensation.

Section 10.441(a) states in pertinent 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 relevant factors, so as to minimize any hardship.”¹²

As noted above, the Office prepared a detailed list of appellant’s monthly income and expenses, which indicated that, appellant had approximately \$116.50 in income exceeding expenses. The Board finds that the Office gave due regard to appellant’s financial circumstances in determining the rate of repayment in this case.

¹¹ 20 C.F.R. § 10.437.

¹² *Id.* at § 10.441(a).

The February 21, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 22, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member