

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. THORNTON and U.S. POSTAL SERVICE,
CIVIC CENTER POST OFFICE, San Francisco, CA

*Docket No. 02-1360; Submitted on the Record;
Issued October 28, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of an overpayment of compensation of \$3,458.46; and (2) whether the Office properly determined that appellant should repay the overpayment by deducting \$95.00 every four weeks from his continuing compensation.

Appellant filed a claim on August 6, 1987 after he was struck by a postal container and injured his left hip and low back, accepted for a lumbar strain. Appellant was off work until September 21, 1987, when he returned to limited duty. On April 13, 1992 appellant stopped work and the Office accepted the consequential conditions of somatoform pain disorder and post-traumatic stress disorder as work related.

On December 22, 2000 the Office informed appellant that an overpayment of compensation had occurred because premiums for health benefits and optional life insurance had not been deducted from his compensation benefits after he stopped work in 1992. The Office explained that the employing establishment had been deducting these premiums while appellant had been working part time, but that the Office had failed to make the deductions after he was placed on the periodic rolls.

On April 11, 2001 the Office issued a preliminary notice of an overpayment of compensation of \$3,458.46, which occurred from October 16, 1994 through December 30, 2000, because no deductions were made for appellant's health benefits and optional life insurance. The Office found that appellant was without fault in creating the overpayment because he had no knowledge of the lack of deductions. The Office set a repayment schedule of \$95.00 every four weeks.

On April 20, 2001 appellant requested a waiver of the overpayment, noting that he had been under the care of a psychologist and thought he was receiving the right amount of

compensation. On May 17, 2001 the Office finalized the overpayment determination and found that appellant was not entitled to waiver of recovery of the overpayment.

The Board finds that the Office properly denied waiver of recovery of the overpayment.¹

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 he was unaware that deductions for his health benefits and optional life insurance were not being made after he stopped work in 1992.

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

¹ The calculation of the \$3,458.46 overpayment was based on the lack of deductions for health benefits from October 16, 1994 through December 30, 2000. The premiums that should have been deducted during those years ranged from a low of \$35.80 to a high of \$43.34 every two weeks. The total amounted to \$3,116.46. For optional life insurance premiums, a total of \$342.00 should have been deducted. The two sums equal the overpayment.

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

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).

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

In this case, appellant submitted an overpayment recovery questionnaire that showed he received \$2,396.83 in monthly wage-loss income or \$2,212.46 every four weeks. He reported monthly expenses totaling \$1,916.15, including \$1,010.00 for rent, \$200.00 for food, \$150.00 for clothing, \$120.00 for utilities and \$436.15 in miscellaneous costs. Therefore, appellant's monthly income exceeded his reported expenses by \$480.60, well beyond the \$50.00 minimum.

Appellant argued that he did not know he was being overpaid and would never cheat to get money that did not belong to him, implying that he should not have to repay the overpayment. The relevant regulation states that there are only two criteria in determining waiver.¹⁰ Section 10.435(a) provides that an error by a government agency, including the Office, which resulted in an overpayment, does not by itself relieve a claimant from liability for repayment.¹¹ Therefore, because appellant's monthly income exceeds his expenses by more than \$50.00, thus demonstrating that he does not need all his income to meet ordinary and necessary living expenses, the Board finds that the Office properly denied waiver of recovery of the overpayment.¹²

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$95.00 every four weeks from his continuing compensation.

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.”¹³

In this case, the Office examined appellant's monthly income and expenses and found that \$480.15 remained after ordinary and necessary living expenses, including miscellaneous costs. The deduction of \$95.00 every four weeks represents less than a fourth of appellant's discretionary income, leaving him close to \$400.00. The record demonstrates that the Office

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).

¹⁰ 20 C.F.R. § 10.434(a)(b).

¹¹ 20 C.F.R. § 10.435(a).

¹² See *Hoard R. Nahikian*, 53 ECAB ____ (Docket No. 01-138, issued March 4, 2002) (appellant's monthly income exceeded his listed monthly expenses by more than \$800.00, well above the regulatory minimum).

¹³ 20 C.F.R. § 10.441(a).

gave due regard to the factors enumerated in section 10.441(a)¹⁴ and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal.¹⁵ Therefore, the Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment at the rate of \$95.00 every four weeks from his continuing compensation.

The May 17, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 28, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *Id.*

¹⁵ *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).