

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JIMMIE L. FORNERO and DEPARTMENT OF THE INTERIOR,  
BUREAU OF RECLAMATION, Page, AZ

*Docket No. 03-1115; Submitted on the Record;  
Issued August 5, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of an overpayment in compensation in the amount of \$1,768.50; and (2) whether the Office properly required repayment of the overpayment by withholding \$100.00 every 28 days from his continuing compensation.

This case has been before the Board on two prior occasions. By decision dated January 16, 2001, the Board found that an overpayment in compensation in the amount of \$1,768.50 was created and that the Office properly found that appellant was without fault in the creation of the overpayment. The Board, however, remanded the case for the Office to consider appellant's request for a telephone conference.<sup>1</sup> A telephone conference was held on March 2, 2001 during which appellant's income and expenses were discussed and an overpayment questionnaire was created.<sup>2</sup> In a letter dated March 2, 2001, appellant was asked to submit a copy of his 2000 tax return, a letter from his church regarding his contributions, credit card statements, mortgage payment information and information regarding disability insurance automobile payments. In response, appellant submitted credit card and mortgage information and a letter from his church outlining contributions made by his wife and him.

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<sup>1</sup> Docket No. 99-875 (issued January 16, 2001).

<sup>2</sup> Appellant advised that he had \$200.00 in savings and checking accounts and his monthly income in the form of compensation benefits under the Federal Employees' Compensation Act was \$3,026.48. He detailed monthly expenses at \$800.00 for food, \$200.00 for clothing, \$751.00 mortgage, \$67.00 taxes, utilities including telephone \$219.00, home maintenance \$50.00, car loan \$268.00, automobile gas and oil \$200.00, automobile maintenance \$50.00, automobile insurance for two cars \$75.00, unreimbursed medical expenses \$128.00, charitable contributions \$333.00, cable television \$36.00 and internet provider \$15.00 to total \$3,092.00. He further detailed payments to Discover of \$100.00, to MasterCard of \$25.00, a second mortgage payment of \$250.00 and a second car payment of \$120.00 to total \$495.00 additional expenses. He also indicated that disability insurance made the car payment of \$268.00, which increased his income to \$3,294.48.

By decision dated April 24, 2001, the Office determined, *inter alia*, that appellant was at fault in the creation of the overpayment.<sup>3</sup> In a decision dated December 2, 2002, the Board again remanded the case to the Office. The Board determined that the Office improperly found appellant to be at fault and remanded the case to the Office to determine whether recovery of the overpayment in compensation should be waived.<sup>4</sup> The law and facts as set forth in the previous Board decisions are incorporated herein by reference.

Subsequent to the Board's December 2, 2002 decision, in a decision dated January 27, 2003, the Office found appellant to be without fault in the creation of the overpayment but that appellant was not entitled to a waiver. The Office utilized the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey for Phoenix, Arizona to determine the ordinary and necessary living expenses for appellant's household of four<sup>5</sup> and allowed \$750.00 a month for food and personal care items and \$100.00 per month for clothing and deducted \$25.00 from his car insurance to reflect insurance for only one vehicle. The Office further found that appellant's credit card expenses were duplicative of grocery, clothing and other household expenses, that there was no apparent need for a second vehicle and found his charitable contribution of \$333.00 per month to be "extraordinary," ascertaining that \$100.00 per month would be ordinary and necessary. The Office concluded that, as appellant's income exceeded his expenses by \$360.48, he could repay the overpayment in compensation at a rate of \$100.00 every 28 days from his continuing compensation.<sup>6</sup>

The Board finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to a waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>7</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustments shall be made by decreasing later payments to which an individual is entitled.<sup>8</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "[a]djustments or recovery by the United States may not be made when incorrect payments 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."<sup>9</sup>

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<sup>3</sup> The Office made a cursory waiver determination but, as it found appellant at fault in the creation of the overpayment, found that he was not entitled to a waiver.

<sup>4</sup> Docket No. 01-1679.

<sup>5</sup> Page, AZ is approximately 277 miles from Phoenix, AZ.

<sup>6</sup> The record further indicates that, subsequent to this decision, a remaining balance of \$191.36 interest and \$30.54 principal was written off.

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> 5 U.S.C. § 8129(a).

<sup>9</sup> 5 U.S.C. § 8129(b).

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>10</sup> The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.<sup>11</sup>

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 deductions from known facts.<sup>12</sup> There is no evidence in the instant case that the Office’s denial of appellant’s request for a waiver of recovery of the overpayment constituted an abuse of discretion.

Office regulations provide 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.<sup>13</sup> The Board has found that 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.<sup>14</sup> Additionally, 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 or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.<sup>15</sup>

Office procedures provide that the finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary. The burden is on the claimant to show that the expenses are normal and needed for a legitimate purpose. If the amount of certain expenses are found not to be ordinary and necessary, particularly regarding the significant expenses of food, clothing and vehicles, the Office must show in writing the reasons for this finding. The finding must be supported by clear and complete rationale, which may include reference to recognized research data (such as current statistics from BLS) which address averages or ranges of expenses for the general population relevant to the claimant’s circumstances. Office procedures further indicate that care must be exercised to avoid counting

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<sup>10</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>11</sup> 20 C.F.R. § 10.434-437 (1999).

<sup>12</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>13</sup> *Frederick Arters*, 53 ECAB \_\_\_\_ (Docket No. 01-1237, issued February 27, 2002).

<sup>14</sup> *Id.*

<sup>15</sup> *John Skarbek*, 53 ECAB \_\_\_\_ (Docket No. 01-1396, issued June 21, 2002).

an expense “twice” when totaling the claimant’s ordinary and necessary living expenses. For example, the claimant’s consumer debt (*e.g.*, bank credit cards, department store charge cards, etc.) may consist largely or completely of items the claimant has already accounted for in his or her documentation of fixed and miscellaneous living expenses and may also include expenses which are not ordinary and necessary.<sup>16</sup>

In the instant case, in determining that appellant was not entitled to a waiver of the overpayment, the Office first reviewed appellant’s income and expenses as discussed in the telephone conference held on March 2, 2001, as well as additional financial information submitted by appellant. The overpayment questionnaire and other documentary evidence of record indicates that appellant had a monthly income, including a disability insurance payment, of approximately \$3,294.48 per month. The Board finds that it was permissible for the Office to utilize BLS data in lowering some of appellant’s monthly expenses and to find that his monthly charitable contribution of \$333.00 was not “ordinary” and, thus, it was reasonable for the Office to find that appellant’s ordinary and necessary living expenses were \$2,934.00.<sup>17</sup> As his income of \$3,294.48 per month exceeded his allowable monthly expenses by \$360.48 per month, the Office properly determined that appellant’s income exceeded his ordinary and necessary living expenses and did not abuse its discretion in finding that he was not entitled to a waiver on the grounds that recovery would defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt<sup>18</sup> or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.<sup>19</sup> In this case, appellant submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.<sup>20</sup> As the evidence in this case fails to support 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 denying a waiver.

Lastly, the Board finds that the Office properly required repayment by withholding \$100.00 every 28 days from appellant’s continuing compensation.

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office’s discretion. The analysis that determines the amount of adjustment is

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<sup>16</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (September 1994).

<sup>17</sup> The Board further notes that appellant did not submit his 2000 income tax return, as requested by the Office.

<sup>18</sup> 20 C.F.R. § 10.437(a) (1999).

<sup>19</sup> 20 C.F.R. § 10.437(b) (1999).

<sup>20</sup> The Board notes that section 10.437(b)(1) of the implementing regulations specifically states that donations to charitable causes are not considered relinquishments of valuable rights. 20 C.F.R. § 10.437(b)(1) (1999).

substantially the same as that used to determine waiver.<sup>21</sup> With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“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.”<sup>22</sup>

In this case, after determining that appellant was not entitled to waiver, the Office found that appellant could repay the overpayment by withholding \$100.00 every 28 days from his continuing compensation. The record indicates that after \$100.00 is added to appellant's ordinary and necessary monthly expenses, current monthly income still exceeds expenses by more than \$50.00. The Board finds that the Office gave due regard to appellant's financial circumstances and did not abuse its discretion in determining the rate of repayment in this case in determining that repayment of the overpayment could be accomplished by withholding \$100.00 every 28 days from appellant's compensation.

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<sup>21</sup> *Howard R. Nahikian*, 53 ECAB \_\_\_\_ (Docket No. 01-138, issued March 4, 2002).

<sup>22</sup> 20 C.F.R. § 10.441(a) (1999).

The decision of the Office of Workers' Compensation Programs dated January 27, 2003 is hereby affirmed.

Dated, Washington, DC  
August 5, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member