

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAY L. ROGERSON and DEPARTMENT OF THE AIR FORCE,
AIR COMBAT COMMAND, ELLSWORTH AIR FORCE BASE, SD

*Docket No. 03-1735; Submitted on the Record;
Issued December 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to interest on her retroactive compensation benefits; (2) whether the Office properly determined that an overpayment of compensation in the amount of \$817.05 occurred; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly determined that \$380.00 per month should be withheld from appellant's continuing compensation checks to recover the overpayment.

This case has previously been before the Board. In a decision dated December 11, 2001, the Board found that, due to an unresolved conflict in medical opinion, the Office failed to meet its burden of proof in terminating appellant's benefits. The Board reversed the November 3, 1999 decision of the Office.¹ The law and the facts as set forth in the Board's prior decision are herein incorporated by reference.

The Office restored appellant's workers' compensation benefits retroactively and continued to develop the file. Appellant requested interest on her retroactive compensation benefits. By decision dated November 19, 2002, the Office denied appellant's request for interest on retroactive compensation.²

On March 6, 2003 the Office informed appellant of its preliminary determination that an overpayment of compensation in the amount of \$817.05 existed because it used an incorrect code

¹ Docket No. 00-1348 (issued November 3, 1999).

² By decision dated March 17, 2003, the Office finalized its preliminary determination that an overpayment of \$247.05 occurred because the Office did not deduct premiums for standard and basic life insurance for the period May 1, 2002 through January 25, 2003. The Office found that appellant was not entitled to waiver and withheld the sum of \$247.05 from appellant's continuing compensation payments effective April 19, 2003. Appellant apparently paid the overpayment of \$247.05 in full. By letter dated March 26, 2003, the Office advised appellant that it had received her payment in the amount of \$247.05, for payment in full of the overpayment which was declared for the period May 1, 2002 through January 25, 2003.

for health benefit premiums for the period May 1, 2002 through February 22, 2003. It noted that the code should have been HB code 311 as opposed to HB 451. The Office found that appellant was without fault in the creation of the overpayment. Appellant was requested to indicate whether she wished to contest the existence or amount of the overpayment or to request waiver of the overpayment. The Office further requested that appellant complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial information.

Appellant requested waiver of the \$817.05 overpayment and submitted the overpayment recovery questionnaire along with some financial information. She asserted that the amount of cash at hand, checking and savings account balance, current value of stocks and bonds and the value of other personal property and other funds were “protected by the Privacy Act.” A copy of her 2002 property taxes which totaled \$2,609.52 and a copy of her home insurance policy from March 28, 2003 to March 28, 2004 for a total of \$785.00 were also submitted.

By decision dated June 2, 2003, the Office finalized its determination that an overpayment in the amount of \$817.05 occurred because the Office did not deduct the correct health benefit premiums for the period May 1, 2002 through February 22, 2003. The Office further found that appellant was not entitled to waiver as she did not require substantially all of her income to meet ordinary and necessary living expenses and recovery would not defeat the purpose of the Federal Employees’ Compensation Act or be against equity and good conscience. The Office concluded that the sum of \$380.00 should be withheld from appellant’s continuing compensation payments effective July 12, 2003 for repayment of the overpayment.

The Board finds that the Office properly determined that appellant is not entitled to receive interest on her retroactive award of compensation.

There is no provision in the Act for payment of interest on awards of compensation.³ In the case *Abraham Hoffenberg*,⁴ the Board addressed the question of entitlement to interest on compensation under the Act, noting: “Payments under the Act are in the nature of grants or gratuities and are limited to the amounts and circumstances specified in the Act.” The Board noted that, although interest is payable under the workers’ compensation laws of several states, the Act deals with payments of compensation by the sovereign to its employees. The Board has since reiterated that interest is not payable on an award of compensation.⁵

The terms of the Act are specified as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. Unless a claimant’s contentions are in keeping with the scope or intent of the Act, *i.e.* unless the

³ 5 U.S.C. §§ 8101-8103.

⁴ 17 ECAB 527 (1966).

⁵ *Robert S. Winchester*, 45 ECAB 135 (1993); *Ralph W. Moody*, 42 ECAB 364 (1991); *Steven M. Gourley (Louise E. Gourley)*, 39 ECAB 413 (1988); *Edith C. Alter (David E. Alter, III)*, 32 ECAB 995 (1981).

statute authorizes payment of the kind demanded by appellant, the Office's denial of such demands must be affirmed.⁶

The Board finds that appellant received an overpayment in the amount of \$817.05.

In its March 6, 2003 preliminary decision, the Office found that appellant received an overpayment in the amount of \$817.05 from May 1, 2002 through February 22, 2003 as it had deducted the wrong code for health benefit premiums. It stated that it should have been deducting for HB code 311 as opposed to HB code 451. Review of the financial information reflects that, for the stated period, it had deducted \$459.06 for code HB 451 when it should have deducted \$1,276.11 for code HB code 311. This resulted in an overpayment of compensation in the amount of \$817.05. The Office, therefore, correctly found that appellant received an overpayment in the amount of \$817.05 when it used the improper code for deducting appellant's health benefit premiums.

The Board further finds that the Office did not abuse its discretion in denying waiver of recovery of the \$817.05 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.⁷ These statutory guidelines are found in section 8129(b) of the 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 which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."⁸ 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 regulations⁹ 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.¹⁰ An individual is deemed to need substantially all of his or her

⁶ See *Robert S. Winchester*, *supra* note 5; *Richard Dale Kornas*, 44 ECAB 1009 (1993); *Alonza Witherspoon*, 43 ECAB 1120 (1992); *Cecil P. Hann*, 9 ECAB 878 (1958).

⁷ See *Robert Atchison*, 41 ECAB 83 (1989).

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.436 (1999).

¹⁰ 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 *Robert F. Kenney*, 42 ECAB 297 (1991).

income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹¹

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.¹²

Under section 10.438 of the regulations it states that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of Act or be against equity and good conscience.”¹³

With the information available to the Office at the time of its decision, appellant’s monthly income of \$3,800.56 exceeded her listed monthly expenses of \$3,600.00 by more than \$50.00. As appellant’s monthly income exceeds her monthly expenses by more than \$50.00, she did not qualify for waiver of the overpayment.¹⁴ Furthermore, there is no information of record with which to conclude that appellant would be under severe financial hardship if recovery were sought.

As appellant refused to provide pertinent financial information, it is impossible to show that recovery of the overpayment would defeat the purpose of the Act. Appellant has not alleged and the evidence does not demonstrate that she relinquished a valuable right or changed her position for the worse in reliance on the erroneous amount of compensation benefits received in this case. Because appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The Board finds also that the Office properly determined that the amount of \$380.00 should be withheld from appellant’s continuing compensation payments to recover the \$817.05 overpayment.

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 the 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

¹¹ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹² 20 C.F.R. § 10.437 (1999).

¹³ 20 C.F.R. § 10.438 (1999).

¹⁴ 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; see *Leticia C. Taylor*, *supra* note 11.

financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁵

In this case, the Office had advised appellant twice, once in its February 10, 2003 preliminary decision for a separate overpayment which appellant paid,¹⁶ and in its March 6, 2003 preliminary decision, that she could request a waiver of the overpayment and submit supporting financial documents, including income tax returns, bank account statements, bills and cancelled checks, pay slips and other records to support income and expenses shown on the Form OWCP-20, so the Office could determine whether a request for waiver could be granted or determine how much should be recovered. Appellant submitted a Form OWCP-20, but did not fill in any financial information. The only financial information submitted was a copy of her 2002 property taxes which totaled \$2,609.52 and a copy of her home insurance policy from March 28, 2003 to March 28, 2004 for a total of \$785.00. She stated that recovery of overpayment would be grossly unfair, particularly since she has been reporting benefit calculation errors to the Office for nearly a year. Since the Office did not receive adequate information or documentation from appellant concerning her financial information and appellant’s monthly income exceeds her monthly expenses by more than \$50.00, the Office determined that the repayment of the \$817.05 overpayment could be deducted from appellant’s continuing compensation by deducting \$380.00 every four weeks. The Board finds that appellant did not provide the requested financial information to indicate that her financial circumstances were such that recovery of the overpayment from her continuing compensation would cause her undue financial hardship. The Office’s procedure manual notes that, if a claimant is being paid compensation or is due accrued benefits from the Office and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.¹⁷ The Board, therefore, finds that the Office did not abuse its discretionary authority in determining that the overpayment sum of \$817.05 would be deducted in increments of \$380.00 every four weeks from appellant’s due and accrued compensation benefits.

¹⁵ 20 C.F.R. § 10.441(a).

¹⁶ See *supra* note 2.

¹⁷ In establishing the initial collection strategy, the Office must weigh the individual’s income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations. When an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collections guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *Gail M. Roe*, 47 ECAB 268 (1995); see *Nina D. Newborn*, 47 ECAB 132 (1995).

The decisions of the Office of Workers' Compensation Programs dated June 2, 2003 and November 19, 2002 are affirmed.

Dated, Washington, DC
December 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member