

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL R. GRAHAM and DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Rockville, MD

*Docket No. 03-1802; Submitted on the Record;
Issued December 4, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of a \$4,584.64 overpayment; and (2) whether the Office properly determined that the overpayment should be collected by deducting \$300.00 from appellant's continuing compensation payments.

This is the third appeal in this case. In a decision dated May 7, 2002, the Board affirmed that an overpayment in the amount of \$4,584.64 had been created, but found that the Office had failed to meet its burden of proof in establishing that appellant was at fault in the creation of the overpayment.¹ The Board remanded the case for the Office to decide the issue of waiver. In a decision dated February 4, 2003,² the Board set aside the Office's June 7, 2002 decision and remanded the case for the Office to recalculate appellant's income and monthly household expenses based on current financial information in order to determine if waiver was appropriate. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the Board's February 4, 2003 decision, the Office requested additional financial information from appellant. Appellant responded on May 5, 2003 and submitted an overpayment recovery questionnaire, tax returns and household expenses.

¹ Docket No. 01-1523 (issued May 7, 2002).

² Docket No. 02-2198 (issued February 4, 2003).

By decision dated May 8, 2003, the Office denied waiver and found that appellant could repay the \$4,584.64 overpayment by withholding \$300.00 per month from her continuing compensation benefits.³

The Board finds that the Office properly denied waiver of a \$4,584.64 overpayment.

Section 8129 of the Federal Employees' Compensation Act⁴ provides that an overpayment of compensation must be recovered unless 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. The fact that appellant was without fault in creating the overpayment in this case does not, under the Act, preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purposes of the Act" or the "against equity and good conscience" standards pursuant to the guidelines set forth in the implementing regulations.

Regarding waiver, section 10.434 of the Office's regulations provides that, if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

"(a) Adjustment or recovery would defeat the purposes of the [Federal Employees' Compensation Act⁵], or

"(b) Adjustment or recovery of the overpayment would be against equity and good conscience."⁶

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purposes of the Act if the beneficiary needs substantially all his or her current income to meet current ordinary and necessary living expenses⁷ and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁸ Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when

³ Following the Office's May 8, 2003 decision, appellant submitted additional evidence to the Office. As the Office did not consider this evidence in reaching a final decision, the Board will not review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. §§ 8101-8193, § 8129.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.434.

⁷ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB 659 (2000).

⁸ 20 C.F.R. § 10.436. This amount has been considered to be \$3,000.00 for an individual or \$5,000.00 if there are dependents. *Fitzgerald*, *supra* note 7.

any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.⁹

Appellant completed an overpayment recovery questionnaire on May 6, 2003 and listed her assets as a time-share valued at \$9,000.00; with monthly expenses of \$220.68 associated with this property, and stocks, bonds and cash of \$1,628.51. She listed the household monthly income as \$3,606.56. Appellant listed her monthly expenses as: rent or mortgage, \$1,117.30; food, \$400.00; clothing, \$15.00; utilities, \$458.05; and other expenses, \$832.16. Appellant totaled her monthly expenses at \$1,334.67.¹⁰ Appellant also included an online bank statement which listed amounts paid on credit cards but did not provide monthly balances. This statement is also largely illegible. Appellant concluded that her monthly expenses were \$3,884.78. On a separate attachment, appellant stated that the household income was \$3,296.29 per month and that her total expenses were \$4,346.55 per month for a monthly deficit of \$739.99.

In a telephone conversation on May 8, 2003, the Office informed appellant that the additional information submitted was not sufficient to establish the expenses alleged. 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 of an overpayment would defeat the purposes of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹¹

In the May 8, 2003 decision, the Office found that recovery of the overpayment would not defeat the Act nor be against equity or good conscience as appellant's monthly income exceeded her expenses by \$784.05. The Office concluded that appellant had a household income of \$3,606.56 per month based on the overpayment recovery questionnaire, and that she had monthly expenses of \$2,822.51 per month as listed on the questionnaire. The Office noted that the evidence submitted in support of additional expenses was not sufficient to establish these expenses. Appellant did not submit the necessary evidence to establish additional expenses listed. The Board finds that the Office properly determined that appellant did not need substantially all of her current income to meet ordinary expenses and that recovery, therefore, would not defeat the purposes 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 at attempting to repay the debt or if the individual in reliance on the overpaid compensation relinquished a valuable right or changed her position for the worse. There is no evidence in this case that appellant changed her position for the worse or gave up a valuable right.

⁹ 20 C.F.R. § 10.437.

¹⁰ The Board notes that the sum of these expenses is \$2,822.51.

¹¹ 20 C.F.R. § 10.148; *Linda Hilton*, 52 ECAB 476, 479 (2001).

The Board further finds that the Office properly determined to recover the overpayment by withholding \$300.00 per month from appellant's continuing compensation benefits.

The Office's regulations provide that to recover an overpayment, 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 other relevant factors, so as to minimize any hardship.¹²

In the present case, the Office, in determining the rate of repayment by deduction from appellant's continuing compensation payments, considered the factors set forth by this section. The Office noted appellant's financial circumstances as well as the amount by which her income exceeded her debts. The Office's determination to recover the overpayment at the rate of \$300.00 every month was reasonable under the circumstances of the case. The Board, therefore, finds that the Office properly required repayment at the rate of \$300.00 per month

The May 8, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 4, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹² 20 C.F.R. § 10.441(a).