

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.02-2198; Submitted on the Record;
Issued February 4, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

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.

The case was before the Board on a prior appeal. In a decision dated May 7, 2002, the Board affirmed that an overpayment of \$4,584.64 had been created, but found that the Office had failed to meet its burden of proof to establish that appellant was at fault in creating the overpayment.¹ The case was remanded on the issue of waiver of the overpayment. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By decision dated June 7, 2002, the Office determined that appellant was not entitled to waiver of the overpayment and that the overpayment should be collected by deducting \$300.00 from appellant's continuing compensation payments.

The Board finds that this case is not in posture for decision.

Section 8129 of the Federal Employees' Compensation Act² 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 this subchapter [Act] or would be against equity and good conscience."³ Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act,

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

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129.

automatically preclude the Office from recovering all or part of the overpayment.⁴ 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” standards⁵ pursuant to the guidelines set forth in sections 10.436 and 10.437 of the regulations.⁶

Section 10.322 of the regulations⁷ provides in pertinent part:

“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 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.”

To be eligible for waiver under the “defeat the purpose of the Act” standard, appellant must show both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base.⁸

Section 10.437 of the regulations⁹ provides in pertinent part:

“(a) Recovery of an overpayment is considered to be 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.¹⁰

⁴ *George E. Dabdoub*, 39 ECAB 929 (1988).

⁵ *See William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

⁶ 20 C.F.R. §§ 10.436-37.

⁷ 20 C.F.R. § 10.322.

⁸ *See George E. Dabdoub*, *supra* note 4; *Robert E. Wenholz*, 38 ECAB 311 (1986).

⁹ 20 C.F.R. § 10.437.

¹⁰ The regulations further provide: “(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 that the action was based chiefly or solely in

The Office found that recovery of the overpayment would not defeat the Act nor be against equity or good conscience because the Office determined that appellant's monthly income exceeded her expenses by \$975.00. The Office accepted appellant's calculation of a total of \$3,157.29 in monthly expenses, including mortgage payments, food, utilities, credit and bank cards, and other expenses.¹¹ However, the Office did not accept appellant's stated monthly income of \$3,337.04, but rather calculated her monthly income based on the annual gross income listed on appellant's 1999 income tax return. The Office found that appellant's taxable income of \$31,128.00 per year, divided by 12 equated to \$2,594.00 per month, which, when added to appellant's monthly compensation benefits of \$1,588.29, totaled \$4,182.29 per month. The Office then reduced appellant's total monthly income by the \$50.00 cushion, as set forth in the Office's procedures,¹² and found that the remaining \$4,132.29, minus the stated expenses of \$3,157.29, equaled a disposable income of \$975.00 available for debt repayment. Therefore, the Office concluded that it was reasonable for appellant to repay her debt at the rate of \$300.00 per month, to be deducted from her continuing compensation benefits. This was not proper. An individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source.¹³ Appellant's pretax income cannot be said to be available for her use, therefore, the Office improperly calculated appellant's disposable income and improperly determined that she was not entitled to waiver, and was capable of repaying her debt at the rate of \$300.00 a month. In addition, the Board notes that, in making this determination, the Office apparently relied on information provided by appellant in an overpayment recovery questionnaire dated February 9, 2001. There is no indication that the Office attempted to secure current financial information from appellant in order to make a determination on eligibility for waiver of the overpayment. Since the only financial information in the record was more than one year old, the Office should have attempted to obtain current information regarding appellant's income, expenses and assets. It is appellant's current financial situation, at the time of the waiver determination, that must be considered.¹⁴

This case will be remanded to the Office for recalculation of appellant's income and monthly household expenses based on current financial information and to determine whether

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 worse, 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." *Id.*

¹¹ Appellant did not list a monthly amount for clothing, and did not itemize her utility and other expenses, but rather listed \$309.95 for all utilities and \$282.00 for other expenses, such as miscellaneous household expenses, medical and dental care not covered by insurance, automobile expenses or other transportation costs and personal necessities.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Initial Overpayment Actions, Chapter 6.200.6(a)(1) (September 1994).

¹³ *Thomas Lee Jones*, 48 ECAB 666 (1997).

¹⁴ *See Ronald E. Smith*, 36 ECAB 652 (1985).

waiver of recovery of the overpayment is appropriate.¹⁵ After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated June 7, 2002 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
February 4, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁵ See *Linda D. Lane*, 46 ECAB 727 (1995).