

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ESSIE V. WILLIAMS and DEPARTMENT OF TRANSPORTATION,  
OFFICE OF THE INSPECTOR GENERAL, Atlanta, GA

*Docket No. 03-2041; Submitted on the Record;  
Issued October 21, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$3,299.83 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied waiver of the overpayment; (4) and whether the Office properly determined that \$200.00 a month should be withheld from appellant's continuing compensation checks to recover the overpayment.

On January 27, 1999 appellant, then a 38-year-old auditor, filed a claim for occupational disease alleging that she developed an emotional condition in the performance of duty. The Office accepted her claim for emotional stress and anxiety on January 4, 2000 and began paying compensation for temporary total disability on the periodic compensation rolls.

In a preliminary determination dated June 25, 2003, the Office found that an overpayment in the amount of \$3,299.83 had occurred from July 7, 2001 through June 14, 2003, because on October 31, 2002, the Office of Personnel Management (OPM) informed the Office that it should begin withholding appellant's postretirement basic life insurance deductions effective July 7, 2001. The Office updated its periodic rolls to include the deduction effective June 15, 2003, however, as the Office had not deducted appellant's postretirement life insurance premiums for the period July 7, 2001 to June 14, 2003, an overpayment was created. The Office found that appellant was without fault in the creation of the overpayment. The Office informed appellant that if she disagreed with the fact or the amount of the overpayment, she could submit new evidence to support her contention or she could request a waiver of recoupment within 30 days of receipt of the Office's letter and submit appropriate evidence to justify her request. The Office enclosed an overpayment recovery questionnaire, to be completed by appellant for review in determining whether the overpayment should be waived.

By decision dated July 29, 2003, the Office finalized their preliminary overpayment determination. The Office noted that, as appellant had not responded to the Office's preliminary determination, returned the completed questionnaire or provided any financial information, she

was not entitled to waiver of the overpayment. The Office concluded that \$200.00 should be withheld from appellant's continuing compensation payments until the overpayment was repaid.

The Board finds that appellant received an overpayment in the amount of \$3,299.83.

The Office found in its June 25, 2003, preliminary determination that appellant received an overpayment in the amount of \$3,299.83, because the Office had not deducted postretirement basic life insurance premiums in the amount of \$66.74, every two weeks for the period July 7, 2001 through December 31, 2002 and \$60.35 every two weeks for the period January 1 through June 14, 2003. The record shows that the Office withheld premiums for basic life insurance in the amount of \$10.23, every two weeks or \$20.46 per compensation check, but did not withhold any premiums for postretirement basic life insurance premiums. By letter dated October 31, 2002, OPM notified the Office that it should begin withholding postretirement basic life insurance premiums, as well as basic life insurance premiums, effective July 7, 2001. From July 7, 2001 through December 31, 2002, the bi-weekly premium for postretirement basic life insurance was \$66.74 and from January 1 through June 14, 2003 it was \$60.35. The number of days in the first period was 543, which was divided by 14; the result was multiplied by \$66.74, equaling \$2,588.56. The number of days in the second period was 165, which was divided by 14; the result was multiplied by \$60.35, equaling \$711.27. Totaling the two amounts results in an overpayment of \$3,299.83.<sup>1</sup> The Office, therefore, correctly found that appellant received a combined overpayment in the amount of \$3,299.83, when the Office under deducted life insurance premiums from appellant's compensation. The Board notes that, when an under withholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation to appellant because the Office must pay the full premium to OPM upon discovery of the error.<sup>2</sup>

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act<sup>3</sup> provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience. Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>4</sup>

The implementing regulation provides that a claimant is with fault in the creation of an overpayment when she: (1) made an incorrect statement as to a material fact which he or she

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<sup>1</sup> See *James Lloyd Otte*, 48 ECAB 334, 337 (1997) (finding that appellant was responsible for basic life insurance premiums that were not deducted from his compensation, resulting in an overpayment); see also *Howard R. Nahikian*, 53 ECAB \_\_\_ (Docket No. 01-138, issued March 4, 2002) (finding that waiver of recovery of the overpayment is not automatic because appellant is without fault in creating it). See generally *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>2</sup> 5 C.F.R. § 872.401(h); *James Lloyd Otte*, *supra*.

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.<sup>5</sup>

The evidence establishes that the overpayment occurred because the Office under deducted life insurance premiums from July 7, 2001 through June 14, 2003. Appellant did not know and had no reason to know that the amount being deducted was incorrect. She is, therefore, without fault in the creation of the overpayment.

The Board further finds that the Office acted within its discretion in denying waiver of recovery of the overpayment.

Section 8129(a) of the 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.<sup>6</sup> 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.”<sup>7</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>8</sup>

In this case, appellant was without fault in creating the overpayment because the Office failed to make the proper premium deductions.

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.”<sup>9</sup>

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<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

<sup>9</sup> 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.”<sup>10</sup>

The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.<sup>11</sup> 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.<sup>12</sup>

For waiver under the first standard, appellant must show both that he or she 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 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.<sup>13</sup>

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<sup>10</sup> 20 C.F.R. § 10.437.

<sup>11</sup> *Rudolph A. Geci*, 51 ECAB 423 (2000).

<sup>12</sup> *Linda Hilton*, 52 ECAB 476 (2001). Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed her 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).

<sup>13</sup> *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).

Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>14</sup> Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office will result in denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.<sup>15</sup>

In this case, appellant failed to submit any financial information or respond to the options provided by the Office in requesting waiver of recovery of the overpayment. The preliminary determination of overpayment dated June 25, 2003 asked appellant to complete the overpayment questionnaire and to submit documentation, such as copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records which support the income and expenses listed. The Office letter explained that this information would be used to determine whether to waive the overpayment or, if not waived, how to collect repayment.

Because appellant failed to submit supporting financial documentation, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Therefore, the Board finds that the Office properly denied waiver of recovery of the overpayment for this reason.<sup>16</sup>

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$200.00 every four weeks from her 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.”<sup>17</sup>

In this case, appellant received \$3,760.84 in wage-loss compensation every four weeks. The deduction of \$200.00 from appellant’s continuing compensation represents less than six percent of the monthly amount she receives.

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<sup>14</sup> 20 C.F.R. § 10.438(a).

<sup>15</sup> 20 C.F.R. § 10.438(b).

<sup>16</sup> See *John Skarbek*, 53 ECAB \_\_\_\_ (Docket No. 01-1396, issued June 21, 2002) (finding that the Office properly denied waiver of recovery of the overpayment because appellant failed to submit financial information supporting his claimed monthly income and expenses).

<sup>17</sup> 20 C.F.R. § 10.441(a).

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 deduction from established facts.<sup>18</sup> Appellant failed to respond to the preliminary notice of overpayment and the record contains no evidence that the Office abused its discretion in finding that appellant could repay \$200.00 every four weeks.

Further, the record demonstrates that the Office gave due regard to the factors enumerated in section 10.441(a)<sup>19</sup> and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal. Therefore, the Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment at the rate of \$200.00 every four weeks from her continuing compensation.<sup>20</sup>

The July 29, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
October 21, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>18</sup> *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

<sup>19</sup> 20 C.F.R. § 10.441(a).

<sup>20</sup> *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).