

FACTUAL HISTORY

This is the fourth appeal in the present case. In the first appeal, the Board issued a decision on April 24, 1997 which reversed a June 17, 1994 decision of the Office on the grounds that it improperly determined appellant's wage-earning capacity based on his ability to work as a security guard.¹ In the second appeal, the Board issued a decision on March 1, 2002 setting aside a March 20, 2000 Office decision on the grounds that it did not provide adequate findings of fact and reasoning to support the determination that appellant received a \$7,882.92 overpayment of compensation that was not subject to waiver.² The Board found that the Office did not specify whether appellant was found to be at fault in the creation of the overpayment and did not explain the basis for finding that the overpayment was not subject to waiver or for the finding that the overpayment would be recovered by deducting \$100.00 from his compensation payments every four weeks. The Board remanded the case to the Office for a final overpayment decision containing adequate findings of facts and reasoning.

In the third appeal, the Board issued a decision on September 2, 2003 affirming the Office's March 26, 2002 decision in part and setting it aside in part.³ The Board determined that the Office properly found that appellant received a \$7,882.92 overpayment and that he was without fault in the creation of the overpayment. The Board noted that the Office did not make an attempt to secure current financial information from appellant and that it did not have a proper basis to determine whether he was entitled to waiver of the overpayment or to determine the method of recovery. The Board remanded the case to the Office to secure current financial information relevant to appellant's current earnings, expenses and assets and to issue a decision regarding his entitlement to waiver of the overpayment and, if appropriate, the method of recovery of the overpayment. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

Following the Board's September 2, 2003 decision, the Office sent appellant an October 16, 2003 letter which requested that he provide current financial information regarding his current earnings, expenses and assets. The Office requested that appellant complete an attached overpayment questionnaire form.

¹ Docket No. 95-151 (issued April 24, 1997). On February 12, 1975 appellant, then a 27-year-old rigger, sustained an incomplete rotator cuff tear and chronic subdeltoid bursitis of his left shoulder due to digging at work. Appellant stopped work for a period and later returned to work in a light-duty position. He received appropriate compensation for his various periods of disability. In its March 20, 2000 decision, the Office found that appellant received a \$7,882.92 overpayment during the period January 14, 1990 to June 19, 1999 because he continued to pay his old premium rate after changing to a more expensive health insurance plan.

² Docket No. 00-1513 (issued March 1, 2002).

³ Docket No. 02-1146 (issued September 2, 2003). In a decision dated March 26, 2002, the Office determined that appellant received a \$7,882.92 overpayment and that he was not at fault in the creation of the overpayment. The Office indicated that appellant did not submit financial information showing that his income did not meet his ordinary and necessary living expenses and found that the overpayment was not subject to waiver. It further determined that the overpayment would be recovered by deducting \$100.00 from his compensation payments every four weeks.

On November 5, 2003 appellant stated that he had received the October 16, 2003 letter and indicated that he disputed the existence and amount of the overpayment. In an informational letter dated November 12, 2003, the Office advised appellant that the Board had affirmed the finding that he received a \$7,882.92 overpayment.

By decision dated January 27, 2004, the Office determined that appellant was not entitled to waiver of the \$7,882.92 overpayment and that the overpayment would be recovered by deducting \$100.00 from his compensation payments every four weeks.⁴ The Office indicated that it had complied with the Board's instruction to provide appellant with an opportunity to submit current financial information regarding his current earnings, expenses and assets, but he failed to submit such information. It noted that it had not received any new financial information which would show that it was inappropriate to deduct \$100.00 from his compensation payments every four weeks.

LEGAL PRECEDENT -- ISSUE 1

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.⁵ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation 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 who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁶ Since the Office found appellant to be without fault in the matter 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 Office's regulations⁷ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) [t]he 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) [t]he beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics.⁸ An individual is deemed to need substantially all of his or her income to meet

⁴ Appellant received more than \$2,000.00 in compensation every four months.

⁵ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.436 (1999).

⁸ 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, 301 (1991).

current ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.⁹

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.¹⁰

Section 20 C.F.R. § 10.438 states:

“(a) 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 purpose of the [Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) 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

ANALYSIS -- ISSUE 1

On appeal appellant argued that, because he disputed the fact and amount of the \$7,882.92 overpayment of compensation declared by the Office, it was premature for the Office to request financial information concerning his entitlement to waiver of the overpayment and the method of recovery of the overpayment. However, the issue of the fact and amount of the \$7,882.92 overpayment is not the subject of the current appeal. In the September 2, 2003 decision, the Board affirmed the Office’s determination that appellant received a \$7,882.92 overpayment. In the absence of further review by the Office on the issue of the fact and amount of the \$7,882.92 overpayment, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board.¹² Appellant did not seek reconsideration of the Board’s decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision.¹³

⁹ See *Leticia C. Taylor*, 47 ECAB 198, 203 (1995).

¹⁰ 20 C.F.R. § 10.437. The standard for determining whether an individual would experience severe financial hardship attempting to repay the debt is the same for determining whether recovery would defeat the purpose of the Act.

¹¹ 20 C.F.R. § 10.438.

¹² 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). In its January 27, 2004 decision, the Office did not conduct any further review regarding the issue of the fact and amount of the overpayment.

¹³ 20 C.F.R. § 501.6(d).

With respect to whether appellant was entitled to waiver of the overpayment, he was provided with the opportunity to submit current financial evidence establishing that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Appellant failed to submit any financial evidence within the allotted time period. By letter dated October 16, 2003, the Office requested that appellant provide current financial information regarding his current earnings, expenses and assets. He did not provide this information within 30 days of October 16, 2003. Under the relevant regulations, appellant therefore would not be entitled to waiver of the overpayment.¹⁴ Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides 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 financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁵

ANALYSIS -- ISSUE 2

The record supports that, in requiring repayment of the \$7,882.92 overpayment by deducting \$100.00 from appellant’s compensation payments every four weeks, the Office took into consideration the relevant factors, including the probable extent of his future payments, the rate of compensation, and his financial circumstances, so as to minimize any financial hardship. Appellant failed to present any current financial information and there is no evidence that appellant’s financial circumstances were such that recovery of the overpayment from his continuing compensation would cause him undue financial hardship. He received more than \$2,000.00 in compensation every four months and the \$100.00 deducted from his compensation every four weeks would represent less than five percent of that compensation. In its January 27, 2004 decision, the Office explained that it had not received financial information which would show that it was inappropriate to deduct \$100.00 from his compensation payments every four weeks. The evidence of record reflects that the method of recovery of the overpayment was in

¹⁴ See *supra* note 11 and accompanying text.

¹⁵ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

accordance with the relevant regulations and procedure.¹⁶ For these reasons, it has not been shown that the Office abused its discretion by deducting \$100.00 from appellant's compensation payments every four weeks.

CONCLUSION

The Board finds that the Office did not abuse its discretion by refusing to waive recovery of the \$7,882.92 overpayment. The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's continuing compensation every four weeks.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 27, 2004 is affirmed.

Issued: December 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁶ 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 submit evidence to support a waiver within the allotted time period, the debt should be recovered from such benefits as quickly as possible. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2), 6.200.4.d(1)(b) (May 2004). In all cases when an overpayment is due for recovery, the Office should follow minimum collection 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. *See id.* at Chapter 6.200.4.d(1)(b); *Gail M. Roe*, 47 ECAB 268, 276 (1995).