

FACTUAL HISTORY

On April 23, 1999 appellant, then a 48-year-old investigative assistant, filed an occupational disease claim alleging that she sustained an emotional condition while in the performance of duty. On October 27, 1999 the Office accepted her claim for prolonged post-traumatic stress disorder and major depressive disorder.¹ She stopped work on April 13, 1999. Appellant was determined 100 percent psychiatrically disabled as a result of the accepted employment factors. The Office thereafter paid appropriate workers' compensation benefits.

In a letter dated October 16, 2003, the Office notified appellant of a preliminary determination that she had received a \$724.08 overpayment because basic life insurance premiums were not deducted from her compensation payments from April 13, 1998 through September 6, 2003. The Office found that appellant was without fault in creating the overpayment and could request a waiver. The Office provided her with an overpayment recovery questionnaire and informed appellant that she should submit documents, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips and other records to support income and expenses shown on the questionnaire. The Office explained:

“This information will help us decide whether or not to waive the overpayment. If waiver is not granted, the information will be used to decide how to collect the overpayment. We will not try to collect the overpayment until we reach a final decision on your request for waiver.

“Also please note that, under 20 C.F.R. § 10.438, we will deny waiver if you fail to furnish the information requested on the enclosed Form OWCP-20 (or other information we need to address a request for waiver) within 30 days. We will not consider any further request for waiver until the requested information is furnished.”

On November 4, 2003 appellant requested waiver and submitted the overpayment recovery questionnaire, copies of banking statements, a social security benefits statement and supporting documentation of her monthly expenses. She submitted a bank account statement from Wells Fargo dated in June and July 2003, which showed balances over \$5,000.00 and her latest statement dated from September 23 through October 22, 2003, which showed a balance of \$4,027.00. Appellant stated that her account balances appeared inflated because she held funds necessary to pay property taxes and insurance due at the end of the year. She explained that she assisted her son with medical expenses over the previous two years and that it would be a hardship to return the overpayment.

Appellant submitted utility statements which support that for the 2002 tax year she owed property and school taxes totaling \$4,875.81 which she paid. She submitted other documents to support a monthly car payment of \$476.00, a biannual payment of \$631.68 for car insurance, monthly homeowners insurance of \$113.66 and a monthly mortgage payment of \$575.10. On

¹ Appellant had another work-related injury accepted by the Office in 1997 for bilateral tendinitis, which remained open for medical care. The two cases were doubled into a master file by the Office.

the questionnaire appellant listed social security benefits and workers' compensation as her combined source of monthly income which totaled \$2,697.28 and listed \$3,095.00 in the following monthly expenses: \$1,390.00 for mortgage including property tax and insurance, \$200.00 for food, \$0 for clothing, \$435.00 for utilities, \$470.00 in consumer debt and \$600.00 for "other expenses," including yard work, upkeep and repairs, an automobile note and other automobile expenses, including insurance, gasoline and maintenance. She reported that she owned no valuable property or real estate and that her checking account fluctuated, however, at that time held \$3,809.00 for property taxes due in December. Appellant further reported that she had \$206.12 in her savings account and no cash on hand.

On November 19, 2003 the Office finalized the overpayment determination and found that appellant was not entitled to waiver of recovery of the overpayment and that the sum of \$200.00 would be withheld from her continuing compensation payments, effective November 29, 2003.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act² provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustments shall be made by decreasing later payments to which an individual is entitled.³ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "[a]djustments or recovery by the United States may not be made when incorrect payments 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."⁴

A finding that appellant was without fault is insufficient, in and of itself, for the Office to waive the overpayment.⁵ The Office must exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulation.⁶

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 deductions from known facts.⁷

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

⁶ 20 C.F.R. § 10.434-437 (1999).

⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, 20 C.F.R. § 10.436 provides as follows:

“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.”⁸

With regard to the “against equity and good conscience” standard, section 10.437 of the regulation provides:

“(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.”⁹

ANALYSIS -- ISSUE 1

The Office determined that an overpayment was created for which appellant was not at fault based on the nondeduction of life insurance premiums. However the Office denied her waiver of the overpayment. In determining that appellant was not entitled to a waiver of the overpayment, the Office first reviewed her income and expenses as reported in the overpayment questionnaire and in financial information submitted by appellant. The overpayment questionnaire and other documentary evidence of record indicates that appellant had a monthly income, including workers’ compensation and a social security payment of \$2,697.28 a month and ordinary and necessary living expenses of \$3,095.00. The Office noted that appellant had over \$7,500.00 in combined checking and savings and given that those assets substantially exceeded the resource base found that she did not qualify for a waiver of the determined debt.

⁸ 20 C.F.R. § 10.436.

⁹ 20 C.F.R. § 10.437.

The Board notes that, although the Office found that appellant had over \$7,500.00 in combined checking and savings, her latest banking statement reflects that from September 23 through October 22, 2003, the time period in which a preliminary determination of overpayment was issued, appellant had \$4,027.00 in combined checking and savings.

In *Robert E. Wenholz*,¹⁰ the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, such as those set forth in section 10.436 and the applicable Office procedures, were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of her income to meet her current ordinary and necessary living expenses and also that her assets, those which are not exempted, do not exceed the set resource base. The Office procedure manual sets the asset resource base of \$3,000.00 for a single person and \$5,000.00 for a married person, with an additional \$600.00 for each dependent. The procedure manual's test for determining whether a claimant needs substantially all of her current income to meet her current ordinary and necessary living expenses is whether a claimant's income is less than her monthly expenses or does not exceed her monthly expenses by more than \$50.00.¹¹ In this case, the documentation provided shows that appellant, who is single with no dependants, had assets in excess of \$3,000.00; specifically that the time the preliminary determination was made she had \$4,027.00 in combined checking and savings. As her resource base exceeded the maximum allowable for a claimant without dependents, she has not shown that recovery of the overpayment would defeat the purpose of the Act.¹² Appellant argued that monies were set aside to pay property tax and insurance at the end of the year, but that does not change the fact that her assets exceeded the applicable asset resource base. The Board finds that there is no evidence that appellant relinquished a valuable right or changed her position for the worse in relying on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

LEGAL PRECEDENT -- ISSUE 2

“Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that, 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.¹³ 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

¹⁰ 38 ECAB 311 (1986).

¹¹ Federal (FECA) Procedure Manual, Part 6 -- *Overpayments and Collections, Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (September 1994).

¹² Appellant submitted documents which ostensibly showed that her monthly expenses were greater than her monthly income by about \$400.00; however given that she had assets exceeding the set resource base, it is not necessary for the Board to evaluate her monthly expenses in relation to her monthly income.

¹³ 20 C.F.R. § 10.441(a).

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

ANALYSIS -- ISSUE 2

The record supports that, in requiring repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every 4 weeks, the Office took into consideration the financial information submitted by her as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every 4 weeks.

CONCLUSION

The Board finds that, while appellant was not at fault in the creation of the established overpayment, she is not entitled to a waiver. The Board also finds that the Office properly required repayment by withholding \$200.00 every 28 days from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 19, 2003 is affirmed.

Issued: May 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member