

**United States Department of Labor
Employees' Compensation Appeals Board**

T.B., Appellant)	
)	
and)	Docket No. 09-2112
)	Issued: July 2, 2010
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Havre, MT, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2009 appellant filed a timely appeal from July 23 and 27, 2009 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied waiver of an overpayment in compensation in the amount of \$4,692.70; and (2) whether the Office properly required repayment of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation. On appeal appellant asserts that the July 27, 2009 decision improperly found him at fault and that he is entitled to waiver because he relinquished a valuable right and changed his position for the worse and is thus entitled to waiver. He also generally disagreed with the Office procedures regarding repayment.

FACTUAL HISTORY

This case has previously been before the Board. In a September 2, 2004 decision, the Board affirmed September 24, 2003 and February 17, 2004 decisions in which the Office found

that appellant did not establish that he sustained a recurrence of disability causally related to 1982 and 1988 employment injuries, and that the Office properly denied appellant's request for review of the written record.¹ The law and the facts of the previous Board decision are incorporated herein by reference.

In a health benefits election form signed by appellant on November 26, 2005, he changed his health insurance carrier to American Postal Workers' Union (APWU) health plan. By letter dated November 9, 2008, he stated that about one year previously he noticed that his compensation no longer listed deductions for health and life insurance and that he called the Office and asked for written confirmation that he was still insured but got nothing in response. Appellant attached a letter he received from APWU notifying him that, although its records indicated he was enrolled, enrollment information provided by the Office did not show that he was enrolled.² In a November 17, 2008 confirmation letter, the Office informed APWU that appellant had been enrolled for the period September 30, 2007 to November 22, 2008 but that his premiums were not deducted from his compensation. On November 26, 2008 the Office issued a preliminary determination, finding that an overpayment in compensation in the amount of \$4,692.72 had been created for the period September 30, 2007 to November 22, 2008 because deductions for health, basic life and optional life insurance coverage had not been made. Appellant was found not at fault and was provided an overpayment action request and overpayment questionnaire. An overpayment worksheet indicated that, when he changed his address, the deductions for insurance premiums were not continued for the period September 30, 2007 to November 22, 2008. The Office determined that health benefits totaling \$2,654.20 were not deducted, basic life insurance totaling \$234.00 were not deducted and optional life insurance premiums totaling \$1,804.50 were not deducted. A health benefits election form, signed by appellant on November 26, 2005, and an Office worksheet computing the employing establishment's contribution to appellant's health benefits were attached. The record contained computer printouts of appellant's compensation.

Appellant timely requested a precoupment hearing, and submitted a partially completed overpayment questionnaire, financial information and a copy of a November 9, 2008 letter in which he notified the Office that his insurance carrier had advised him that he was no longer covered on their rolls. At the hearing, held telephonically on May 22, 2009, he stipulated that he received an overpayment in compensation in the amount calculated by the Office. Appellant stated that in 2007 he did not question that the amount of his compensation increased because it was at the beginning of the fiscal year but that after three months he realized no insurance deductions were being made and called the Office on January 20, 2008. He argued that he changed his position for the worse by making extra mortgage payments and buying new kitchen appliances and putting a new roof on his home and, therefore, was entitled to waiver. Appellant testified that he received a salary of \$2,746.00 every two weeks, plus continuing compensation and had no savings. He described monthly expenses of: mortgage \$1,020.00; food \$600.00; clothing (including dry cleaning) \$350.00; utilities \$650.00; satellite television \$104.00; internet \$35.00; cellular telephone \$75.00; truck expense \$525.00; car expense \$225.00; car insurance

¹ Docket No. 04-1008 (issued September 2, 2004). The record reflects that, by decision dated October 28, 1999, the Office determined that appellant's actual earnings as an investigator for the State of Washington fairly and reasonably represented his wage-earning capacity and reduced his compensation. In a May 11, 2005 decision, not appealed to the Board, the Office denied appellant's request for chiropractic treatments.

² On November 10, 2008 appellant changed his enrollment from APWU to another health insurance carrier.

\$200.00; credit cards \$1,200.00; miscellaneous \$1,050.00 including gasoline, medical and dental; and that he gave \$500.00 a month to his son. The hearing representative asked that he submit credit card bills and expenses for the roof and appliances. In a letter dated June 6, 2009, appellant stated that he felt somewhat responsible for receiving increased compensation for the months of October, November and December 2007 and asked that an overpayment be declared for that period only with a repayment rate set at \$100.00 per month. He attached credit card and utility statements.

By decision dated July 23, 2009, an Office hearing representative finalized the preliminary overpayment finding as modified to correctly show that the amount of the overpayment in compensation was \$4,692.70. He found appellant not at fault and denied waiver, noting that appellant's monthly income exceeded his expenses by \$977.78,³ and ordered repayment by deducting \$200.00 every four weeks from appellant's continuing compensation.⁴ In a July 27, 2009 decision, the Office finalized the overpayment in compensation and ordering repayment by deducting \$200.00 every four weeks from his continuing compensation payments.⁵

LEGAL PRECEDENT -- ISSUE 1

Section 8129 of the Federal Employees' Compensation Act⁶ provides that an overpayment in 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 would be against equity and good conscience."⁷ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.⁸

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.⁹ Recovery of an overpayment is considered to be against equity and

³ The hearing representative noted that appellant's monthly income of \$4,850.00 was comprised of monthly compensation of \$1,248.50 and monthly salary of \$3,600.00, for a total of \$4,848.50. He found the following monthly expenses ordinary and reasonable: Mortgage \$1,020.00; food \$600.00; electricity \$194.22; satellite television \$104.00; internet \$35.00; telephones \$175.00; water \$92.50; truck payment \$525.00; car payment \$225.00; automobile insurance \$200.00; gasoline \$250.00; payment for roof repair \$250.00; payment for refrigerator \$200.00, to total \$3,870.72. Subtracting appellant's monthly ordinary expenses of \$3,870.72 from his monthly income of \$4,848.50 yielded \$977.78 in discretionary income.

⁴ The hearing representative stated that the preliminary determination was "final" in his cover letter.

⁵ The July 27, 2009 decision contains a typographical error, finding "that you were at fault" in the preliminary decision, whereas appellant was found without fault in the November 26, 2008 preliminary determination and by the Office hearing representative in his July 23, 2009 decision.

⁶ 5 U.S.C. § 8101-8193.

⁷ *Id.* at § 8129.

⁸ *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

⁹ 20 C.F.R. § 10.436.

good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹⁰ 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.¹¹

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.¹²

ANALYSIS -- ISSUE 1

Appellant is not challenging the fact and amount of the overpayment. As noted by appellant on appeal, the July 27, 2009 Office decision contains a typographical error finding appellant at fault in the creation of the overpayment whereas the Office hearing representative found that appellant was not at fault.¹³ The Board agrees that appellant was without fault. Because he was not at fault, the Office may adjust later payments only if the adjustments would not defeat the purpose of the Act or be against equity and good conscience.¹⁴ The Board finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹⁵ The Office carefully considered the financial information submitted by appellant and properly included figures for monthly income and monthly expenses which were adequately documented and showed that his monthly income exceeded his monthly ordinary and necessary expenses by more than \$900.00.¹⁶ As appellant's current income exceeds his ordinary expenses by more than \$50.00, he has not shown that he needs substantially all of his current

¹⁰ *Id.* at § 10.437(a).

¹¹ *Id.* at § 10.437(b).

¹² *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹³ The Board notes that it is unclear why the Office issued the July 27, 2009 decision.

¹⁴ 20 C.F.R. §§ 10.436, 10.437; *see Keith A. Mapes*, 56 ECAB 130 (2004).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.a(1)(b) (June 2009).

¹⁶ The Board notes that appellant did not submit an entire, completed overpayment questionnaire. From hearing testimony and financial records, the hearing representative reasonably determined that appellant had monthly income of \$4,850.00 and monthly expenses of \$3,870.72. *Supra* note 4.

income to meet current ordinary and necessary living expenses. Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the allowable resource base.¹⁷

On appeal appellant contends that recovery of the overpayment would be against equity and good conscience because he relied on the additional funds to make improvements to his home, stating that he paid down his mortgage, put on a new roof and purchased appliances. 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. 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.¹⁸ An individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.¹⁹

In this case, appellant does not qualify for waiver under the principle of detrimental reliance because the evidence does not establish that he gave up a valuable right or changed his position for the worse in reliance on anticipated payments. Conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.²⁰ Appellant gained a benefit by paying down his mortgage, repairing his roof and purchasing new appliances. Moreover, he has not shown that if required to repay the overpayment, he would be in a worse position after repayment than if he had never received the overpayment at all. The Office properly found that he was not entitled to waiver on the grounds that recovery would be against equity and good conscience.²¹

As appellant failed to establish that recovery of the overpayment in compensation would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in denying waiver of recovery.

LEGAL PRECEDENT -- ISSUE 2

The Office's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.²²

¹⁷ *R.M.*, 60 ECAB ____ (Docket No. 07-1066, issued February 6, 2009).

¹⁸ 20 C.F.R. § 10.437; *see W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008).

¹⁹ *See Wayne G. Rogers*, 54 ECAB 482 (2003).

²⁰ *K.K.*, 61 ECAB ____ (Docket No. 09-207, issued October 2, 2009).

²¹ *Id.*

²² 20 C.F.R. § 10.441(a).

ANALYSIS -- ISSUE 2

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$200.00 per compensation period. The record supports the finding of the hearing representative that appellant had monthly income of \$4,848.50 and monthly expenses of \$3,870.72, yielding a discretionary income of \$977.78 per month. The Office therefore did not abuse its discretion in finding that appellant should repay his overpayment at the rate of \$200.00 per compensation period.

CONCLUSION

The Board finds that the Office properly denied waiver and required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2009 be affirmed.

Issued: July 2, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board