

April 12, 2008.¹ The Board found, however, that the Office failed to adequately explain why it denied waiver of the overpayment. The Board remanded the case for the Office to further consider the issue of waiver. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On July 1, 2009 the Office requested that appellant complete an enclosed overpayment recovery questionnaire as soon as possible and submit supporting updated financial documentation in support of his request for waiver of the overpayment.

On July 3 and 31, 2009 appellant submitted pay stubs showing that he had earnings from private employment.

By decision dated August 6, 2009, the Office denied waiver of the recovery of the \$5,846.62 overpayment of compensation. It found that it had provided appellant a reasonable amount of time to submit financial information but that he failed to respond to its request. The Office further noted that he was now working in the private sector and had filed a claim alleging a loss of wage-earning capacity. It determined that, pending resolution of the wage-earning capacity determination, it would deduct 15 percent from his net current entitlement of compensation. The Office noted that the balance of the overpayment remaining was \$4,094.96.

On appeal appellant requests waiver of the recovery of the overpayment based on financial hardship. He noted that it took years for the Office to discover the overpayment but that it wanted repayment with interest very quickly. Appellant related that the Office deducted \$303.86 from his last compensation payment. He asked for a reduction in the amount collected monthly and enclosed financial information.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(b) of the Federal Employees' Compensation Act² provides that an overpayment 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 the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then 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.³

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by

¹ Docket No. 08-2133 (issued May 20, 2009).

² 5 U.S.C. § 8129(b).

³ *Id.*

the Office from data provided by the Bureau of Labor Statistics.⁴ An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.⁵ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.⁶

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.⁷ 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 reliance on the payments or on the notice of payment.⁸

ANALYSIS -- ISSUE 1

On prior appeal, by decision dated May 20, 2009, the Board affirmed the Office's finding that appellant received an overpayment of \$5,846.62 for the period September 23, 2002 to April 12, 2008 because it failed to properly deduct health premiums. The Board remanded the case, however, for the Office to further consider the issue of waiver.

By letter dated July 1, 2009, the Office requested that appellant submit updated financial information and complete an enclosed overpayment questionnaire as soon as possible. The overpayment recovery questionnaire is designed to obtain the financial information necessary to determine whether adjustment or recovery of the overpayment would defeat the purpose of the Act. Appellant did not return the overpayment recovery questionnaire provided by the Office and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Neither did he submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the creation of the overpayment, he nevertheless bears responsibility for providing the financial information necessary to support his request to waive recovery of the overpayment.⁹ Section 10.438 of the

⁴ 20 C.F.R. § 10.436. Office procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁵ *Id.*

⁶ *Id.*

⁷ 20 C.F.R. § 10.436.

⁸ *Id.* at § 10.437(b)(1).

⁹ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

regulations state 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.¹⁰ 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 a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹¹ The Office issued its final overpayment decision over 30 days after its request for additional financial information.

As appellant submitted no evidence in this case to establish that recovery of the overpayment 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 refusing to waive recovery of the overpayment.

On appeal appellant requested waiver of the recovery of the overpayment due to financial hardship and submitted financial information in support of his request. As discussed, however, the Office properly denied waiver as he did not submit the information required to determine whether or not recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹² Further, the Board cannot consider the financial information submitted on appeal as the Board's jurisdiction is limited to the evidence before the Office at the time of its decision.¹³

LEGAL PRECEDENT -- ISSUE 2

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹⁴ Section 10.441(a) of the regulations provide:

“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 relevant factors, so as to minimize any hardship.”¹⁵

¹⁰ 20 C.F.R. § 10.438(a).

¹¹ 20 C.F.R. § 10.438(b); *James A. Gray*, 54 ECAB 277 (2002); *Robert B. Hutchins*, 52 ECAB 344 (2001).

¹² *Id.*

¹³ See 20 C.F.R. § 501.2(c). Appellant can request waiver from the Office based on the submitted evidence; see *supra* note 9.

¹⁴ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁵ 20 C.F.R. § 10.441(a).

ANALYSIS -- ISSUE 2

The Office found that appellant could repay the overpayment by withholding 15 percent of his net income from his continuing compensation, or around \$303.86 monthly. As noted, appellant failed to submit any financial information. The Office's procedure manual provides that, when an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁶ Furthermore, without the appropriate financial documentation or overpayment questionnaire as required by section 10.441, the Office is unable to consider his financial circumstances. The Board thus finds that the Office did not abuse its discretion by deducting 15 percent of appellant's net compensation to repay the overpayment.

On appeal appellant requests that the Office lower the amount it deduced from his compensation to repay the overpayment. He noted that the Office deducted \$303.86 from his last compensation check. The Board finds, however, that as appellant did not submit financial information to the Office as requested, he has not shown that the Office improperly required withholding 15 percent of his net compensation, or \$303.86, from his continuing compensation payments every 28 days.

CONCLUSION

The Board finds that the Office properly denied waiver of the recovery of the \$5,846.62 overpayment of compensation. The Board further finds that the Office properly determined that it would collect the overpayment by deducting 15 percent from appellant's continuing compensation.

¹⁶ *Frederick Arters*, 53 ECAB 397 (2002). The Office's procedure manual provides 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), 6.22.4d(1)(b) (May 2004). In all cases where 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 6.200.4d(1)(b); *Gail M. Roe*, 47 ECAB 268 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 6, 2009 is affirmed.

Issued: June 4, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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