

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROGER D. BROMGARD and GENERAL SERVICES ADMINISTRATION,  
PUBLIC BUILDINGS SERVICE, Fort Worth, TX

*Docket No. 98-775; Submitted on the Record;  
Issued February 25, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$4,016.96 overpayment in compensation for the period April 1, 1994 through March 1, 1997; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$150.00 from appellant's compensation payments every 4 weeks.

On December 8, 1989 appellant, then a 50-year-old custodial worker, filed a traumatic injury claim alleging that he chipped a bone in his right shoulder when he backed into a low hanging pipe in the basement of a U.S. courthouse on December 7, 1989. The Office accepted the claim for right shoulder tendinitis with consequential septic shoulder joint and surgical exploration on January 13, 1990. Appellant retired effective November 27, 1990 and on November 28, 1992, appellant elected to be paid compensation benefits under the Federal Employees' Compensation Act.<sup>1</sup>

In a letter dated June 23, 1997, the Office advised appellant that it had made a preliminary determination that he had received an overpayment of compensation in the amount of \$4,016.96, which occurred when deductions were not made for health insurance benefits and basic life insurance for the period April 1, 1994 through March 1, 1997. The Office further advised appellant that a preliminary determination had been made that he was without fault in the creation of the overpayment. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment and asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office informed appellant that the financial information would be used to determine whether he was entitled to waiver and, if a determination were made to not grant waiver, to decide how to recover the overpayment. The

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<sup>1</sup> On December 20, 1991 appellant was issued a schedule award for a 31 percent permanent impairment for loss of use of his right arm.

Office advised appellant that he had 30 days from the date of the letter to request a hearing before a representative of the Branch of Hearings and Review or to submit additional evidence and arguments. The Office informed appellant that failure to submit the requested financial information within 30 days of the letter would result in a denial of waiver of the overpayment. The Office attached a calculation which indicated that the \$4,016.96 overpayment was created when the Office failed to deduct any health benefits or basic life insurance for the period April 1, 1994 through March 1, 1997.

On July 18, 1997 the Office received a Form OWCP-20 completed by appellant on July 16, 1997 and income tax returns for 1994 and 1996, copies of his checking account statement and financial documents.<sup>2</sup> Appellant also requested waiver of the overpayment.

In a memorandum of conference dated August 6, 1997, the Office noted that the financial information appellant had submitted was incomplete and asked him to supply the information in writing or by telephone conference. The Office noted income from appellant's wife of \$2,000.00 to \$3,000.00 annually, detailed expenditures listed by appellant on the Form OWCP-20 and that appellant would be willing to repay up to \$50.00 per pay period.

By decision dated November 6, 1997, the Office finalized its preliminary determination that appellant had received an overpayment in the amount of \$4,016.96, which had occurred when deductions were not made for health insurance and basic life insurance for the period April 1, 1994 through March 1, 1997.<sup>3</sup> The Office also finalized its preliminary determination that appellant was without fault in the creation of the overpayment. Next, the Office determined that waiver was not warranted based on the August 6, 1997 telephone conference. The Office stated that the overpayment would be recovered by deducting \$150.00 from his continuing compensation.

The Board finds that appellant received a \$4,016.96 overpayment in compensation for the period April 1, 1994 through March 1, 1997.

In the present case, the record contains evidence which shows that appellant received a \$4,016.95 overpayment when the Office failed to deduct health insurance and basic life insurance from his compensation for the period April 1, 1994 through March 1, 1997. Appellant has not alleged that the Office improperly calculated the overpayment; nor has he submitted evidence showing that the Office improperly calculated the overpayment.

The Board further finds that the case is not in posture for decision with respect to the issues of whether the Office abused its discretion by refusing to waive recovery of the overpayment and whether the Office properly required repayment of the overpayment by deducting \$150.00 from appellant's compensation payments every 4 weeks.

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<sup>2</sup> Appellant submitted a signed form dated August 6, 1997 since he had failed to sign the Form OWCP-20 received by the Office on July 18, 1997.

<sup>3</sup> In an undated sheet of paper, there are references to the monthly income of appellant and his wife as well as the monthly expenditures with a notation that \$411.00 was left over.

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.<sup>4</sup> These statutory guidelines are found in section 8129(b) of the 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."<sup>5</sup> Therefore, if a claimant is determined to be without fault in the matter of an overpayment, the Office, in accordance with section 8129(b), may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).<sup>6</sup> Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.<sup>7</sup>

In the November 6, 1997 decision, denying appellant's request for waiver of recovery of the overpayment as being unwarranted, the Office referred to the August 6, 1997 telephone conference in support of its decision. The November 6, 1997 decision by the Office is conclusory as it contains no reference to the amount of monthly income received by appellant and his wife nor does it refer to the amount of monthly expenditures by appellant. Furthermore, the decision also failed to provide any reasoning as to why the amount of \$150.00 to be repaid each month would not create any financial hardship. Thus, the information provided by the Office is insufficient for the Board to review its decision as it cannot be reasonably determined upon what basis the Office made its decision that waiver was not warranted and that the amount of \$150.00 would not create a financial hardship or defeat the purpose of the Act. The Board, therefore, finds that the decision of the Office must be set aside and remanded to the Office to

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<sup>4</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. §§ 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show 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 applicable resource base; see *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986).

<sup>7</sup> 20 C.F.R. § 10.323.

provide supporting rationale for its decision that appellant was not entitled to a waiver of the overpayment.

The decision of the Office of Workers' Compensation Programs dated November 6, 1997 is hereby affirmed with respect to the existence and amount of the overpayment and is set aside with respect to the issues of waiver and recovery of the overpayment. The case is remanded to the Office for further development and a *de novo decision* consistent with the above decision.<sup>8</sup>

Dated, Washington, D.C.  
February 25, 2000

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> Appellant submitted new evidence on appeal. The Board, however, may only consider evidence that was in the case record that was before the Office at the time the Office rendered its decision; *see* 20 C.F.R. § 501.2(c).