

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH BRADLEY and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 00-1213; Submitted on the Record;
Issued November 7, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment in the amount of \$292.13 and (2) whether the Office properly recovered the overpayment by withholding \$50.00 per compensation check.

The Board has duly reviewed the record and finds that the Office properly denied waiver of the overpayment. The Office accepted appellant's claims in 1986 for left knee strain, left rotator cuff tear and, subsequently, depression and adjustment disorder due to the shoulder injury. From February 11 to December 4, 1999, the Office withheld from his disability compensation premiums for health insurance code 592 but should have withheld premiums for health insurance code 105. For the stated period, the Office withheld premiums in the amount of \$1,016.59, but when they should have withheld \$1,308.72, thus creating an overpayment of \$292.13.

On December 28, 1999 the Office issued a preliminary determination that an overpayment of \$292.13 occurred because incorrect deductions were made for health insurance. The Office found that appellant was without fault in the creation of the overpayment, informed him of the right to a prerecoupment hearing and enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived.

Appellant completed the questionnaire and requested waiver of the overpayment along with a telephone conference.

In a decision dated January 20, 2000, the Office finalized its preliminary determination and denied waiver of recovery of the overpayment. The Office also found that a telephone conference call would not be necessary because appellant had already demonstrated in the questionnaire that he was able to repay the debt.

Section 10.434 of the Code of Federal Regulations¹ provides that recovery of an overpayment will defeat the purpose of the Federal Employees' Compensation Act² if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses and;

“(b) The individual's assets do not exceed the 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.”³

Under the first criterion, 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. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.⁴

Under the second criterion, an individual's assets include: (a) Liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and (b) nonliquid assets, such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings or supplies therein, any vehicles above the two allowed per immediate family, jewelry and art work. Assets do not include the value of household furnishings in the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principle family domicile or income producing property if the income from such property has been included in comparing income and expenses.⁵ Exceeding the limits for either disposable current income or assets provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time and a finding that recovery of the overpayment would not defeat the purpose of the Act.⁶

Based on the information provided in appellant's overpayment recovery questionnaire the Office properly determined that appellant received \$2,463.20 in net compensation a month and

¹ 20 C.F.R. § 10.434.

² 5 U.S.C. §§ 8101-8193.

³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 2.0200.6(a)(1) (September 1994).

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(4) (September 1994).

⁶ *Supra* note 2.

reported total monthly expenses of \$2,115.00, for a difference of \$348.20 a month. Thus, the Office properly determined that appellant did not need substantially all of his current income to meet ordinary expenses and that recovery, therefore, would not defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.434 or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.⁷ In this case, appellant has not shown that recovery would “be against equity and good conscience.”

Appellant also implied in his appeal notice that because he was without fault he should not have to repay the overpayment. However, the Act and its implementing regulations are clear that entitlement to waiver is not established solely by a finding that appellant is without fault in creating the overpayment.⁸ Rather, such a finding entitles appellant only to the opportunity to establish a basis for granting waiver of the recovery of the overpayment pursuant to section 8129.

The Board further finds that the Office properly determined to recover the overpayment by withholding \$50.00 per compensation check until the payment was recovered.

Section 10.441 of the regulations⁹ provides:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.”

In this case, the Office, in determining the rate of repayment by deduction from appellant’s continuing compensation payments, considered the factors set forth by this section. The Office noted appellant’s financial circumstances as well as the amount by which his income exceeded his debts. The Office’s determination to waive any interest charges and begin recovery of the debt at the rate of \$50.00 a compensation check was also reasonable under the circumstances. The Board, therefore, finds that the Office properly denied waiver of recovery of the overpayment and properly required repayment at the rate of \$50.00 a compensation check.

⁷ 20 C.F.R. § 10.434.

⁸ See *William J. Murphy*, 40 ECAB 569, 571 (1989) (finding that waiver is not automatic when appellant is without fault in creating the overpayment).

⁹ 20 C.F.R. § 10.441.

The January 20, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 7, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member