U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY A. HUNT and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, Tex.

Docket No. 96-54; Submitted on the Record;
Issued April 9, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to compensation for wage loss following the expiration of her schedule award on July 27, 1992; (2) whether an overpayment was created to which she is entitled to waiver; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

Appellant, a rural carrier, sustained an occupational injury in the performance of duty on or about January 26, 1987. The Office accepted her claim for carpal tunnel syndrome, right wrist and authorized a surgical release. Appellant received compensation for temporary total disability through March 22, 1990. On March 23, 1990 she returned to work as a general clerk for four hours per day and received compensation for partial disability through June 1, 1990. Beginning June 2, 1990 appellant received a schedule award for a 36 percent permanent impairment of the right upper extremity. The period of the award expired on July 27, 1992.

During the period of the schedule award, the Office referred appellant, together with the case record and a statement of accepted facts, to a referee medical examiner to resolve a conflict in medical opinion, as to whether she could work more than four hours per day. On August 14, 1990 the referee medical examiner reported, that appellant should be able to progress to a 6-hour day for approximately 45 days and then be allowed to progress to an 8-hour day. Pursuant to this report, the employing establishment offered appellant a revised assignment that increased her work hours to six beginning November 3, 1990 and to eight beginning December 18, 1990. The referee medical examiner concurred with the job offer and medical restrictions, and appellant accepted.

On January 25, 1991 appellant advised the Office as follows:

> "I returned to work for four hours per day in March of 1990. After working 6 hours per day for 45 days, I have been working 8 hours per day since December 18, 1990.
>
> "Since my working hours have increased, I have experienced increased pain and discomfort in my hands and wrists. This has had an exhausting effect upon me and has also led to stomach nausea, which I experience when I have a lot of pain.
>
> "I feel that I cannot continue to work eight hours per day, and therefore request that my situation be re-evaluated so that I may be allowed to work a reduced number of hours."

Appellant stopped work on January 28, 1991. She did not file a claim for compensation due to a recurrence of disability. On September 19, 1991 her authorized representative advised the Office that appellant did not refuse to continue the limited-duty job: "The only reason she stopped work on January 28, 1991 was due to the claimed traumatic injury that occurred on January 28, 1991...."

The record establishes appellant sustained a traumatic injury in the performance of duty on January 28, 1991 when she fell to the floor. The Office accepted her claim for the conditions of contusion of the left knee, contusion to the left wrist, left wrist strain and cervical strain. Appellant filed a claim for wage loss from January 28, 1991 and continuing, but she failed to support her claim with a well-reasoned medical opinion explaining how her fall on January 28, 1991 caused disability for work. Finding that the medical evidence failed to establish disability for work causally related to the January 28, 1991 employment injury, the Board affirmed the denial of appellant's claim for wage loss.

On February 24, 1992 the Office issued a decision, finding that appellant was capable of working eight hours per day as a flagger. The Office advised appellant that this wage-earning capacity would reduce her compensation to $1,132.00 each four weeks, which the Office resumed when the schedule award expired. In a decision dated November 17, 1993, however, the Office vacated its wage-earning capacity decision of February 24, 1992 noting, among other things, that medical opinion evidence from two of appellant's physicians supported that that she could not perform the duties of the flagger position. Citing its procedure manual, the Office explored whether appellant ceased work as a result of a recurrence of disability. In a separate decision dated November 17, 1993, the Office denied compensation based on a recurrence of disability, finding that the evidence failed to demonstrate either a bona fide medical worsening of her January 1987 employment injury or a change in the nature of the full-time light-duty position.

On December 2, 1993 the Office made a preliminary determination that an overpayment occurred in appellant's case because the wage-earning capacity decision was vacated, and there was no evidence that appellant was entitled to compensation benefits following the expiration of her schedule award. The Office found that appellant was without fault in the matter of the

overpayment and requested that she supply financial information necessary to determine whether the overpayment should be waived.

After holding a hearing on February 27, 1995, the hearing representative issued a decision on May 11, 1995, affirming the Office's decisions. The hearing representative found that the Office properly vacated the wage-earning capacity decision, that appellant failed to establish a claim of recurrence of disability and that all compensation for wage loss received following the schedule award was an overpayment. On the issue of waiver, the Office denied certain expenses either because documentation showed a lower expense than appellant claimed, because documentation indicated that a debt was currently to have been paid, or because appellant submitted no documentation to support the expenses claimed. The hearing representative also disallowed unexplained credit card charges. The disallowances reduced appellant's monthly expenses to $2,065.41. The hearing representative accepted appellant's stated monthly income of $2,409.00. Because income exceeded expenses by $343.59, the hearing representative found that appellant did not need substantially all of her monthly income to meet her ordinary and necessary living expenses and that appellant should repay her debt at $293.00 per month.

Appellant's representative requested reconsideration contending that the hearing representative, committed a factual error, in stating that appellant returned to work on February 1, 1991 and then claimed a recurrence. The significance of this error, according to appellant's representative, was that it effectively shifted the burden of proof onto appellant by requiring her to establish a recurrence of disability.

In a decision dated August 22, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was insufficient to warrant a merit review of her case.

The Board finds that the evidence fails to establish that appellant is entitled to compensation for wage loss following the expiration of her schedule award on July 27, 1992.

It is well established that a claimant is not entitled to dual workers' compensation benefits for the same injury. A claimant may not receive compensation for disability and a schedule award covering the same period of time.[1] Where an injured employee is receiving disability compensation for the residuals, of an employment injury up to the date a schedule award made, for the same injury begins to run, the Office has the burden of proving after the expiration of the award that the employee no longer has disability for work. Thus, where an employee is receiving temporary total disability payments prior to a schedule award, payments at the preschedule award level must be automatically resumed, following the exhaustion of the schedule award, unless the Office establishes that the level of disability has changed. Similarly, where the employee is receiving partial disability benefits prior to the payment of a schedule award, the Office is obligated to resume benefits at that same level upon expiration of the

[1] *Eugenia L. Smith*, 41 ECAB 409 (1990).

schedule award unless a proper determination has been made warranting modification of the loss of wage-earning capacity.[2]

Because appellant was receiving compensation, for partial disability prior to the commencement of the schedule award, the Office generally would be obligated to resume the same level of compensation, when schedule award expired on July 27, 1992. During the period of the schedule award, however, the Office obtained additional medical evidence of appellant's capacity to work; appellant requested that she be allowed to work a reduced number of hours; appellant shortly thereafter sustained another employment injury; and the Office issued a decision, finding that appellant had a loss of wage-earning capacity. The Board will consider each of these events in turn to determine whether appellant is entitled to compensation, for wage loss following the expiration of her schedule award.

When a case, is referred to a referee medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[3] The Board finds that the report of the referee medical specialist is entitled to such weight. He had the entire case record and a statement of accepted facts at his disposal, he examined appellant and related his findings, and he offered an opinion that was sufficiently well rationalized to resolve the conflict that had arisen. Not only did the opinion of the referee medical specialist resolve whether appellant could perform the limited-duty position and progress to an eight-hour day, it established that the level of appellant's disability had changed prior to the expiration of her schedule award. Based on this evidence alone, the Office would have no obligation to resume disability compensation upon the expiration of the award.

Appellant stopped work on January 28, 1991, but not because of a claimed recurrence of disability causally related to her employment injury, on or about January 26, 1987. She did not file a claim for compensation due to a recurrence of disability and her January 25, 1991 letter to the Office did not state that she would no longer be working eight hours a day. She simply requested a reevaluation of her situation. The Office nonetheless explored the possibility of a recurrence and properly found that there was no medical evidence, to show a change in the nature or extent of appellant's right carpal tunnel condition and no evidence of a change in the nature or extent of appellant's full-time limited-duty assignment.[4]

Appellant's representative explained to the Office that the only reason appellant stopped work on January 28, 1991, was because she sustained a traumatic injury that day. Although appellant did sustain an injury in the performance of duty that day, the Board found in a separate

[2] *Arthur E. Billigmeier*, 42 ECAB 506 (1991).

[3] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[4] When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements. *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

appeal that the medical evidence failed to establish any resulting disability for work. This injury, therefore, has not established an increase in the level of appellant's disability following her return to an eight-hour day.

Appellant received compensation for wage loss upon expiration, of her schedule award, only because the Office had issued a decision finding that she was capable of performing the duties of a flagger. Medical opinion evidence from two physicians support that she could not perform such duties and in the absence of medical opinion evidence to the contrary, the Office properly vacated its decision, leaving no basis for the payment of compensation for wage loss following appellant's schedule award.

The weight of the medical opinion evidence established appellant's ability to perform the limited-duty position and to progress to eight hours a day, and thereby established a change in the level of appellant's disability, prior to the expiration of her schedule award. The record does not support a recurrence of disability on January 28, 1991. Appellant sustained an employment injury that day, but the medical evidence in that case failed to establish any resulting disability for work. The Office paid compensation for wage loss upon the expiration of the schedule award, on the erroneous basis that appellant had the capacity to earn wages as a flagger, but later corrected the error by vacating its initial decision.

Because the evidence fails to establish that appellant could no longer work eight hours a day at her limited-duty job on or after January 28, 1991, the Board finds that appellant is not entitled to compensation for wage loss following the expiration of her schedule award on July 27, 1992. The Office properly found that the compensation for wage loss paid after that date resulted in an overpayment in the amount of $20,043.09.

The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment that occurred in this case.

Section 8129(a) of the Federal Employees' Compensation Act[5] provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 10.321(b) of Title 20 of the Federal Code of Regulations provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.[6] Section 8129(b)

[5] 5 U.S.C. § 8129(a).

[6] 20 C.F.R. § 10.321(b).

describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

> "Adjustment or recovery by the United States may not be made when incorrect payment had 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]

Because appellant was without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b), adjust later payments only if adjustment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.322(a) of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment will defeat the purpose of the Act 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 cause such hardship under the following conditions:

> "(a) the individual from whom recovery is sought needs substantially all of his/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 ...."[8]

The Office's procedure manual explains: "Both condition in (a) and (b) above must be met to defeat the purpose of the FECA. When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time."[9]

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.[10]

The hearing representative did not abuse her discretion in disallowing undocumented or unexplained expenses. Although appellant is without fault in the matter of the overpayment, she nonetheless bears responsibility for providing the financial information necessary to support her

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[7] 5 U.S.C. § 8129(b).

[8] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1) (Sept. 1994).

[9] *Id.*

[10] *Id.*

request for waiver. Section 10.324 of Title 20 of the Code of Federal Regulations states in this regard:

> "In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial documentation described in § 10.322 as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in the denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished."[11]

Because the hearing representative properly found that monthly income exceeded monthly expenses by $343.59, appellant does not need substantially all of her current income to meet current ordinary and necessary living expenses. Accordingly, the Board finds that recovery will not cause financial hardship and defeat the purpose of the Act.

Recovery of an overpayment, is considered to be against equity and good conscience if an individual presently or formerly 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 10.322 above, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.

As the financial evidence submitted by appellant fails to establish that she would experience a severe financial hardship in attempting to repay the debt and as she has neither argued nor submitted evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation, the Board finds that recovery of the overpayment will not be against equity or good conscience.

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.[12] As the evidence in this case, does not 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 denying waiver.[13]

The Board also finds that the Office properly denied appellant's request for reconsideration.

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[11] 20 C.F.R. § 10.324.

[12] *See William J. Murphy*, 40 ECAB 569(1989).

[13] The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual in entitled; *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because collection of the overpayment in this case cannot be made by adjusting later payments (the evidence fails to establish that appellant is entitled to receive compensation under the Act) but must be recovered by other means, the Board lacks jurisdiction to review the rate of recovery set by the hearing representative.

Although the reopening of a case for merit review may be predicated solely on a legal premise, such reopening is not required where the contention does not have a reasonable color of validity.[14]

The hearing representative did not shift the burden of proof onto appellant to establish a recurrence of disability. Appellant was disabled from the rural carrier job she held when she was injured in the performance of duty on or about January 26, 1987. The weight of the medical opinion evidence, as represented by the report of the referee medical specialist, established that she could perform the limited-duty position of general clerk and progress to eight hours per day. Appellant would, therefore, bear the burden of proof to establish any recurrence of disability beginning on or after January 28, 1991.[15] The argument of appellant's representative that the Office should have the burden of proof fails to account for the opinion of the referee medical specialist and for the fact that appellant did return to full-time limited duty within her medical restrictions before stopping work on January 28, 1991. Because the argument presented by appellant's representative does not have a reasonable color of validity, the Board will affirm the Office's denial of the request for reconsideration.

The August 22 and May 11, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 9, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[14] *Constance G. Mills*, 40 ECAB 317 (1988) (legal premise not previously considered must have reasonable color of validity); s*ee generally Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

[15] *See supra* note 5.