

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONZEL R. YARBOUR and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Dayton, Ohio

*Docket No. 96-2552; Submitted on the Record;
Issued December 8, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation benefits in the amount of \$12,550.36 for the period October 21, 1991 through February 4, 1994 for which she was without fault; (2) whether the Office properly denied waiver of recovery of the overpayment in the amount of \$12,550.36; and (3) whether the Office properly required repayment of the overpayment by withholding 10 percent or \$200.00 per month from appellant's continuing monthly compensation benefits.

Appellant, a mailhandler, filed a traumatic injury claim (Form CA-1), assigned number A9-356190, alleging that on June 19, 1991, she sustained a lower back strain while lifting a sack to place in a gurney. She stopped work on June 22, 1991. Appellant returned to limited-duty work on July 9, 1991.

By letter dated July 23, 1991, the Office accepted appellant's claim for a lumbosacral sprain.

On August 12, 1991, appellant filed a claim for a recurrence of disability (Form CA-2a). She stopped work on July 14, 1991. By letter dated August 26, 1991, the Office accepted appellant's claim for a recurrence of disability.

Appellant returned to limited-duty work on October 7, 1991.

On November 1, 1991, appellant filed a Form CA-2a alleging that she sustained a recurrence of disability on October 21, 1991. Appellant stopped work on that same date.

By decision dated January 29, 1992, the Office found the evidence of record insufficient to establish that the claimed October 21, 1991 recurrence of disability was causally related to the June 19, 1991 employment injury.

In a February 21, 1992 letter, appellant, through her counsel, requested an oral hearing before an Office representative. By decision dated November 10, 1992, the hearing representative vacated the Office's January 29, 1992 decision and remanded the case to the Office on the grounds that the medical evidence of record was sufficient to require further development of the record.

On remand, the Office in a February 23, 1993 decision found the medical evidence of record insufficient to establish that the alleged October 21, 1991 recurrence of disability was caused by the June 19, 1991 employment injury.

In a March 5, 1993 letter, appellant, through her counsel, requested an oral hearing. By decision dated June 24, 1993, the hearing representative vacated the Office's February 23, 1993 decision and remanded the case to the Office on the grounds that the medical evidence of record was sufficient to require further development of the record.

By decision dated November 2, 1993, the Office found the medical evidence of record insufficient to establish that the alleged recurrence of October 21, 1991 was causally related to the June 19, 1991 employment injury.

In a November 22, 1993 letter, appellant, through her counsel, requested an oral hearing. By decision dated May 4, 1994, the hearing representative vacated the Office's November 2, 1993 decision and remanded the case to the Office on the grounds that the medical evidence of record was sufficient to require further development of the record.

By letter dated July 12, 1994, the Office accepted appellant's claim for the October 21, 1991 recurrence of disability.

On July 29, 1994, appellant filed a Form CA-1, assigned claim number A9-392920 alleging that on July 28, 1994 she sustained a right side and a mid-back injury when she was hit by an "APC." On August 31, 1995, the Office accepted appellant's claim for thoracic strain and lumbar strain.

On September 12, 1995, appellant filed a Form CA-2a alleging that on July 28, 1994 she sustained a recurrence of disability of the June 19, 1991 employment injury. By letter dated January 26, 1996, the Office accepted appellant's recurrence.

By decision dated September 25, 1995, the Office found the medical evidence of record insufficient to establish that appellant had any continuing disability after October 28, 1994 which was caused by the July 28, 1994 employment injury.

By letter dated February 14, 1996, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$12,550.36 because she was awarded compensation benefits based on a recurrent pay rate when her disability recurred less than six months after her initial return to duty. The Office further advised appellant that compensation benefits should have been paid based on appellant's date of injury pay rate of \$524.99 per week rather than on a recurrent pay rate of \$774.74 per week. The Office also advised appellant that she was without fault in the creation of the overpayment and

that recovery of the overpayment would not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. In addition, the Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days if she believed that recovery of the overpayment should be waived.

On February 19, 1996, appellant requested waiver of the overpayment and a telephone conference to address the overpayment issue. Appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20) dated February 19, 1996.

On March 25, 1996, an Office claims examiner conducted a telephone conference with appellant. By letter of the same date, the claims examiner advised appellant that she and the employing establishment should provide any substantial changes of the accompanying memorandum of conference within 20 days. This letter was accompanied by a list of appellant's monthly income and expenses, and assets as provided in appellant's completed Form OWCP-20 and the March 25, 1996 telephone conference.

By decision dated July 15, 1996, the Office issued a final decision finding that appellant was not entitled to waiver of recovery of the overpayment in the amount of \$12,550.36¹ because she was awarded compensation benefits based on a recurrent pay rate when her disability recurred less than six months after her initial return to duty. The Office found that compensation benefits should have been paid based on her date of injury pay rate of \$524.99 per week rather than \$774.74 per week. In an accompanying memorandum, the Office determined that appellant could repay the debt in the amount of 10 percent of her compensation rate or \$200.00 per month and that this amount would not defeat the purpose of the Federal Employees' Compensation Act.

The Board finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$12,550.36 for the period October 21, 1991 through February 4, 1994, for which she was without fault.

In response to a January 29, 1996 internal memorandum regarding an error in appellant's pay rate for compensation effective October 21, 1991 following the June 19, 1991 employment injury, a claims examiner indicated in a memorandum to the file of the same date that appellant had properly received continuation of pay during the period June 22 through July 8, 1991 based on the pay rate of \$524.99. The claims examiner further indicated that appellant returned to limited-duty work on July 9, 1991 for eight hours per day. The claims examiner noted that appellant sustained a recurrence of disability and stopped work beginning July 14, 1991, and received continuation of pay for the period July 17 through August 13, 1991. The claims examiner stated that appellant received compensation benefits for temporary total disability based on the correct pay rate of \$524.99 per week, which was the pay rate in effect at the time of the injury, during the period August 14 through October 5, 1991. The claims examiner found that appellant stopped work alleging an October 21, 1991 recurrence of disability which was accepted by the Office, but that in the meantime appellant had returned to limited-duty work on

¹ The Board notes that the Office mistakenly stated that the amount of the overpayment was \$15,550.36 rather than \$12,550.36.

April 7, 1993. The claims examiner then stated that in January and April 1995, the Office processed payments for appellant's recurrent temporary total disability for the periods October 21 through November 27, 1991, November 28, 1991 through April 6, 1993 and November 15, 1993 through February 4, 1994 based on an erroneous pay rate of \$774.74. The claims examiner explained that appellant was not entitled to a recurrent pay rate on October 21, 1991 because six months had not passed since appellant's return to full-time work on July 8, 1991. The claims examiner further explained that the Office erred in computing appellant's base pay rate.

The Office properly stated that appellant was not entitled to a recurrent pay rate because she had not worked at least six months after her initial return to work before stopping work again as required under section 8101(4) of the Act² and in Chapter 2.900.4(a) of the Office's procedure manual.³ Consequently, appellant received an overpayment of compensation in the amount of \$12,550.36 for the period October 21, 1991 through February 4, 1994. As appellant was not aware that she should have been paid at the pay rate of \$524.99 and did nothing to cause this payment of compensation benefits at the incorrect pay rate, the Office properly determined that appellant was without fault in the creation of the overpayment in the amount of \$12,550.36.

The Board further finds that the Office properly denied waiver of recovery of the overpayment in the amount of \$12,550.36.

Section 8129(a) of the Act⁴ 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 8129(b) describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

“[A]djustment or recovery 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 [the Act] or would be against equity and good conscience.”⁵

Appellant correctly argues that she was not at fault in the matter of the overpayment. However, the fact that an individual is without fault in the matter of an overpayment does not, by itself, preclude the Office from adjusting later payments or recovering the overpayment amount, as explained by section 8129(b) as noted above. This section prohibits adjustment or recovery when the individual is without fault *and* when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. Thus, because appellant is without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b),

² 5 U.S.C. § 8101(4).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.4(a) (September 1990).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* § 8129(b).

adjust later payments or recover the overpaid amount only if adjustment or recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides that recovery of an overpayment will 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 if the individual's non-exempted assets do not exceed a resource base of \$3,000.00, or \$5,000.00 if the individual has a spouse or one dependent.⁶ Section 10.323 provides that recovery of an overpayment is considered to be against equity and good conscience if the overpaid individual 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, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.⁷

With respect to whether recovery of the overpayment would defeat the purpose of the Act, the record reveals that appellant had the following monthly expenses: rent, \$459.00; food \$100.00; clothing, \$50.00; electric, \$125.00; telephone, \$40.00; automobile maintenance, \$100.00; automobile loan, \$232.81; automobile insurance, \$80.00; household, \$75.00; medical and dental, \$50.00; personal necessities, \$130.00; and credit union, \$30.00. The record further reveals that appellant received monthly compensation benefits in the amount of \$170.00 from the Veterans Administration and \$2,156.92 from the Office. In addition, appellant had \$2,900.00 in her checking account. Appellant's monthly income, which totaled \$2,326.92 exceeded her monthly expenses, which totaled \$1,471.81, by \$855.11. As a result, recovery of the overpayment in the amount of \$12,550.36 would not defeat the purpose of the Act.

With respect to whether recovery would be against equity and good conscience, appellant has not alleged and the evidence does not demonstrate that she relinquished a valuable right or changed her position for the worse in reliance on the erroneous pay rate which formed the basis for the overpayment. Inasmuch as appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience," the Board finds that the Office properly denied waiver of recovery of the overpayment in the amount of \$12,550.36.

The Board also finds that the Office properly required repayment of the overpayment by withholding 10 percent or \$200.00 from appellant's monthly continuing compensation benefits.

"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,

⁶ 20 C.F.R. § 10.322(a).

⁷ *Id.* § 10.323.

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”⁸

Based on appellant’s information regarding her income, assets and expenses, the Office’s decision to withhold 10 percent or \$200.00 per month from appellant’s continuing compensation payments was made with due regard to appellant’s monthly household income, monthly expenses and assets, and is therefore appropriate under the circumstances of this case. Therefore, the Board finds that recovery of the overpayment by withholding 10 percent or \$200.00 per month from appellant’s continuing monthly compensation benefits does not constitute an abuse of discretion.

The July 15, 1996 decision of the Office of Workers’ Compensation Program is hereby affirmed.

Dated, Washington, D.C.
December 8, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁸ See *Roger Seay*, 39 ECAB 441 (1988); 20 C.F.R. § 10.321(a).