

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOAN H. TICHENOR and DEPARTMENT OF THE ARMY,  
ARMY CORPS OF ENGINEERS, LOUISVILLE DISTRICT, Louisville, KY

*Docket No. 98-1529; Submitted on the Record;  
Issued August 9, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$6,685.99 overpayment of compensation; and (2) whether the Office properly refused to waive recovery of the overpayment in compensation.

On February 17, 1988 appellant, then a 43-year-old personnel manager, slipped on water on the floor of the employing establishment's cafeteria and fell, landing on her right knee. She underwent arthroscopic surgery on June 28, 1988 which revealed a fracture of the medial femoral condyle. Appellant underwent several subsequent operations. On January 5, 1989 she underwent surgery for resection of a synovial shelf and debridement of a tibial plateau fracture. Appellant developed reflex sympathetic dystrophy, which led to osteoporosis in the tibia and femur around the right knee. On August 30, 1990 she underwent surgery for a proximal shift of the medial collateral ligament. On May 1, 1991 appellant underwent surgery for resection of the medial synovial shelf and lateral retinacular release. On December 3, 1991 she had an arthrotomy and repair of the retinacular defect and advancement of the medial capsule and collateral ligament. Appellant had a right lumbar sympathectomy on March 19, 1992 for treatment of the reflex sympathetic dystrophy. On January 14, 1993 she underwent surgery for patellectomy of the right patella and plication of the medial collateral ligament. On November 2, 1993 appellant underwent a second right lumbar sympathectomy. On February 3, 1995 she underwent surgery for implantation of a spinal cord stimulator. On November 14, 1995 appellant underwent a partial medial and lateral meniscectomy. On April 23, 1996 a new spinal cord stimulator was implanted after the first system failed. The Office accepted appellant's claim for sprain of the right knee and right thigh and reflex sympathetic dystrophy.

In a March 5, 1997 letter, the Office informed appellant that she had received a \$6,685.99 overpayment in compensation. The Office indicated that appellant was entitled to \$112,587.67 in compensation for the period August 30, 1988 through November 9, 1996 but had received \$119,273.66 for that period. The Office noted that appellant was paid at an incorrect pay rate for part of that period and received a incorrect loss of wage-earning capacity determination for

another portion of the period in question. The Office stated that it had found that she was not at fault in the creation of the overpayment. It informed her of her right to request waiver of recovery of the overpayment and her right to seek a hearing before an Office hearing representative. The Office also indicated that appellant had to submit financial information in support of any request for waiver of recovery of the overpayment. In a January 20, 1998 decision, the Office found that appellant had received a \$6,685.99 overpayment in compensation. It further found that appellant was not entitled to waiver of recovery of the overpayment because she had not submitted the financial information necessary to support a request for waiver.

The Board finds that the Office properly determined that appellant received a \$6,685.99 overpayment in compensation.

The overpayment in compensation in this case was based on use of an incorrect pay rate to calculate appellant's compensation. Under the Federal Employees' Compensation Act, the pay rate to be used in calculating compensation is either the pay rate as of the date of injury, the date disability began or the date disability recurred if disability recurred more than six months after an employee returned to regular, full-time work with the United States, whichever is greater.<sup>1</sup>

Appellant received continuation of pay from May 19 through August 2, 1988 and received buy back of leave for 134 hours during the period August 30 through January 24, 1989. An Office claims examiner noted in some of the payments, compensation was based on a calculation that appellant worked 45 hours a week. Subsequent inquiry and review showed that appellant would work 45 hours the first week of a pay period and 35 hours the second week, thereby working 80 hours a pay period or an average of 40 hours a week. Appellant's pay at the time of injury and at the time injury began was \$30,488.00 a year or \$586.31 a week. However, during this period, appellant's compensation was calculated on the assumption that her pay rate was \$657.45 a week. On January 1, 1990 appellant had a recurrence of disability. Her pay rate at that time was \$638.80 a week. Appellant received compensation for 1,506 hours of compensation during the period January 2, 1990 through February 22, 1991. She returned to work on January 21, 1991 but subsequently had 24 hours of intermittent disability for which she received compensation. Appellant's compensation for this period, however, was calculated on the basis of an incorrect assumption that her pay rate of \$705.15. She had another recurrence of disability on May 1, 1991. Appellant's pay rate at that time was \$676.00 a week. She received compensation for 677 hours for the period May 1 through August 24, 1991 and received temporary total disability compensation for the period August 25, 1991 through October 5, 1992. However, appellant's compensation was based on the assumption that her weekly pay rate was \$751.50 a week.

Appellant returned to work part time, 23 hours a week, on October 6, 1992, working from her home. She received compensation for 1,123 hours for the period October 6, 1992 through

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<sup>1</sup> 5 U.S.C. § 8101(4).

October 22, 1993. Appellant's compensation was based on the assumption that her pay rate for compensation purposes was \$751.50 a week rather than the correct pay rate of \$676.00.<sup>2</sup>

On November 1, 1993 appellant had another recurrence of disability. The Office subsequently concluded that, as appellant was working 23 hours a week and receiving buy back of 17 hours a week at this time, her compensation should have been calculated as if she was working 40 hours a week. The Office indicated that appellant's pay rate at this time was \$19.33 an hour or \$773.20 a week. At the time of the recurrence of disability, however, the Office continued to base appellant's compensation on the assumption that the proper pay rate was \$751.50 an hour. The Office paid temporary total disability compensation for the period November 1, 1993 through March 2, 1994 and for 1,554 hours between March 3, 1994 and May 12, 1996.

The Office found that appellant had another recurrence of disability effective May 13, 1996. The Office indicated that the records showed appellant was working 34 hours a week effective November 1, 1995 but was receiving sick leave for 6 hours a week for which she would subsequently receive buy back of leave. As of May 14, 1996, appellant began working 20 hours a week. The Office calculated that appellant had a 40 percent loss of wage-earning capacity. However, it based appellant's pay rate on the assumption that, effective May 13, 1996, she was receiving \$785.06 a week for 34 hours a week. The Office subsequently concluded that appellant's compensation should have been calculated on the assumption that her pay rate as of May 13, 1996 was \$923.60 a week.

The Office compared the amount of compensation appellant actually received for the period August 30, 1988 through November 9, 1996 and then computed the amount she should have received for the same period, taking into account all overpayments and underpayments of compensation during the period. The Office, therefore, properly concluded that appellant received a \$6,685.99 overpayment of compensation.

The Board further finds that appellant is not entitled to waiver of recovery of the overpayment.

The Office determined that appellant was not at fault in the creation of the overpayment. Where an overpayment of compensation has been made because of an error of fact or law, collection of such compensation shall be waived 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. The waiver of an overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.<sup>3</sup> The regulations provide that recovery of an overpayment will defeat the purposes of the Act if recovery would cause hardship by depriving the overpaid beneficiary of

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<sup>2</sup> Although appellant had returned to work on October 6, 1992, she had only returned to work part time. She therefore was not entitled to have her compensation based on her pay rate as of October 6, 1992 as she had not returned to regular full-time work as required by 5 U.S.C. § 8101(4).

<sup>3</sup> *William Phillips, Jr.*, 39 ECAB 330 (1987).

income and resources needed for ordinary living expenses.<sup>4</sup> Recovery is considered against equity and good conscience where a claimant had relied on the payments or notice of payments by relinquishing a valuable right or changing his or her position for the worse.<sup>5</sup>

Appellant submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act and the evidence has not shown that she relied on the payments or notice of payments by relinquishing a valuable right or changing his position for the worse. Accordingly, the Office properly denied appellant's request for waiver of the overpayment.<sup>6</sup>

The decision of the Office of Workers' Compensation Programs dated January 20, 1998 is hereby affirmed.

Dated, Washington, D.C.  
August 9, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> 20 C.F.R. § 10.322.

<sup>5</sup> 20 C.F.R. § 10.323.

<sup>6</sup> *William D. Emory*, 47 ECAB 365 (1996).