

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LILLIAN N. HASZ and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Madison, WI

*Docket No. 99-1088; Submitted on the Record;
Issued December 7, 2000*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$24,472.11 overpayment in compensation; and (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment.

On August 24, 1988 appellant, then a 31-year-old optical character reader operator, filed a claim for overuse syndrome, tendinitis and early carpal tunnel syndrome. She related her condition to constantly placing bundles of mail into the machine which sorted 11 letters a second and removing the mail from the machine approximately 20 to 30 times a minute. The Office accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant stopped working on July 29, 1989 and returned to work, four hours a day, on August 22, 1989. The Office paid compensation for the period appellant did not work. She stopped working on April 28, 1990. Appellant returned to work with a private employer on February 8, 1993 and held a series of jobs thereafter with different employers.

The Office paid compensation through November 12, 1994. The Office retroactively paid compensation based on appellant's wage-earning capacity, effective February 7, 1993.

In a March 4, 1998 letter, the Office informed appellant that it had made a preliminary determination that she had received a \$24,472.11 overpayment of compensation. The Office stated that the overpayment occurred because the payments issued by the Office for the period February 7, 1993 through March 29, 1997 did not accurately reflect her wage-earning capacity. The Office related that appellant was paid \$87,502.87 for the period in question when she was entitled to \$63,030.76. The Office found that appellant was not at fault in the creation of the overpayment. The Office indicated that appellant could seek waiver of recovery of the overpayment on the grounds that recovery would defeat the purposes of the Federal Employees' Compensation Act to provide at least a subsistence income or that recovery would be against equity and good conscience. The Office informed appellant of her right to seek a preresoupment hearing before an Office hearing representative.

In a March 30, 1998 letter, appellant requested waiver of recovery of the overpayment and a hearing before an Office hearing representative, which was conducted on September 16, 1998. In a November 13, 1998 decision, the Office hearing representative determined appellant's wage-earning capacity for the period February 7, 1993 through March 29, 1997 and that she was owed \$20,651.65 after deducting the compensation she had received for the period February 7, 1993 through November 13, 1994. The Office hearing representative noted that the Office had calculated appellant's wage-earning capacity for the period November 13, 1994 through June 21, 1996, based on her actual earnings and issued a check for \$24,802.25. The Office hearing representative found that appellant had received duplicate payments. She concluded appellant had received a \$24,472.11 overpayment in compensation. The hearing representative found that recovery of the overpayment would not defeat the purposes of the Act as her income exceeded her expenses by \$424.00 a month. She instructed the Office to withhold \$400.00 a month from appellant's continuing compensation payments.

The Board finds that the Office properly determined that appellant had a \$24,472.11 overpayment of compensation.

Appellant started working on March 30, 1993 but continued to receive compensation until November 12, 1994. She was entitled to compensation for a loss of wage-earning capacity during the period but not compensation for total disability. The Office subsequently determined appellant's wage-earning capacity for the period in question and paid compensation based on her wage-earning capacity for the period February 7, 1993 through March 30, 1997 after subtracting the temporary total disability compensation she had received for the period February 7, 1993 through November 12, 1994. The Office, however, issued appellant a separate payment for her loss of wage-earning capacity for the period November 13, 1994 through June 21, 1996. The record establishes appellant received duplicate payments of compensation for the same period in question, November 13, 1994 through June 21, 1996, to which she was not entitled. The Office properly determined that appellant had received an overpayment in compensation.

The Board finds, however, that the issue of waiver of recovery of the overpayment is not in posture for decision.

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.¹

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. § 8129(b) as specified in 20 C.F.R. § 10.322(a) provides as follows:

“(a) General. Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled

¹ *William Phillips, Jr.*, 39 ECAB 330 (1987).

beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

- (1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
- (2) 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. This base includes all of the claimant's assets not exempted from recoupment in paragraph (d) of this section. The first \$3,000.00 or more depending on the number of the claimant's dependents is also exempted from recoupment.”²

In *Robert E. Wenholtz*,³ the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, as set forth in section 10.322(a)(1) and (2) were meant to read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those which are not exempted, do not exceed a resource base of \$3,000.00 (or \$5,000.00 with a spouse or dependent).

In her overpayment recovery form, appellant indicated that she had total household income of \$4,585.00 and total monthly expenses of \$4,161.00. The Office found that, as there was a surplus of \$424.00 of income over expenses, appellant was not entitled to waiver. The record indicates, however, that appellant included her son's monthly wages of \$437.00 in the calculation of her household income. She commented that her son would not continue in employment if his grades declined. Appellant asked that his wages not be included in the calculation of income.

The applicable regulations define income for overpayment calculation purposes as follows:

“The individual's total income includes any funds which may be reasonably considered available for his or her use, regardless of the source. Income to a spouse will not be considered available to the individual unless the spouse was living in the household at the time the overpayment was incurred and at the time waiver is considered.”⁴

² 20 C.F.R. § 10.322(a).

³ 38 ECAB 311 (1986).

⁴ 20 C.F.R. § 10.322(b).

In this case, the Office did not consider whether the income of appellant's son was reasonably available to appellant for her use. If the son's income was not expected to be used to meet any part of her household expenses, then his income should not be considered reasonably available to appellant. The removal of the son's income from the calculation of whether the overpayment should be waived would reduce the household income of appellant to the point where monthly expenses would exceed income. The case will therefore be remanded for a review of appellant's household income and expenses.

The Office should request an updated statement of appellant's income and expenses. The Office should specifically ask whether any of appellant's children have income, and if so, whether their income was used to pay the ordinary and necessary living expenses of the household. After further development as it may find necessary, the Office should issue a *de novo* decision on whether appellant is entitled to waiver of recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs dated November 13, 1998 is hereby affirmed as to fact and amount of overpayment, and set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
December 7, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member