

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIA H. LEACH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC

*Docket No. 99-869; Submitted on the Record;
Issued November 8, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation as of December 6, 1998; (2) whether the Office properly determined that appellant received an overpayment in the amount of \$353.50; (3) whether the Office properly determined that appellant was not entitled to a waiver of recovery of the overpayment; and (4) whether the Office properly recovered the overpayment from appellant's compensation.

On August 26, 1993 appellant, then a 34-year-old nursing assistant, filed a notice of traumatic injury and claim for compensation alleging that she injured her left shoulder and neck while in the performance of duty on August 19, 1993. Appellant ceased work on August 20, 1993. After a brief return to work, she again stopped working on September 18, 1993. Appellant was diagnosed as suffering from a ruptured cervical disc at C7-T1 and she underwent a cervical laminectomy on December 10, 1993. While the Office initially denied appellant's claim in December 1993, approximately 18 months later, the claim was accepted for a herniated disc at C7-T1. Additionally, the Office authorized appellant's December 10, 1993 surgery. Appellant was awarded appropriate medical benefits and wage-loss compensation.¹

By letter dated February 2, 1996, the Office requested that appellant's treating physician, Dr. William T. Mason, a Board-certified orthopedic surgeon, submit additional medical evidence

¹ Approximately nine months after the Office initially denied appellant's claim, the employing establishment terminated her employment due to disability, effective September 2, 1994. The Office of Personnel Management (OPM) later awarded appellant disability retirement benefits retroactive to September 18, 1993. When the Office subsequently accepted appellant's claim, she elected to discontinue receipt of her OPM benefits, effective March 31, 1996.

concerning appellant's current condition. He did not respond to the Office's request.² Consequently, the Office referred appellant for an examination with Dr. Joseph J. Estwanik, a Board-certified orthopedic surgeon.

In a report dated June 17, 1996, Dr. Estwanik noted appellant's history of injury and her subsequent surgery in December 1993, followed by a nine-month period of physical therapy ending in August 1994. He also reported appellant's subjective complaints of pain throughout her entire body, which he characterized as "highly physiologically impossible." On physical examination, Dr. Estwanik noted that appellant had full flexion in her neck and nearly complete extension, missing approximately 10 degrees of extension. He also reported near full rotation right and left, with a slight decrease of 10 degrees of rotation towards the right. With respect to appellant's lower back, Dr. Estwanik indicated that she was actually able to bend forward and touch her finger tips on the floor. He further noted that appellant had no true pain in flexion, extension or lateral bend and that she was able to walk on her toes and heels with excellent strength. Dr. Estwanik characterized appellant's sensory examination as normal and he noted some mild tenderness in the lumbar area. Dr. Estwanik also obtained updated x-rays, which he interpreted as revealing a "totally intact and healthy appearing cervical and lumbar area." Additionally, Dr. Estwanik stated that appellant "has an extremely healthy cervical and lumbar spine" and that she is "fully capable of full active duty." He further indicated that appellant "has absolutely no neurologic deficit and no underlying degenerative changes." In conclusion, Dr. Estwanik stated that appellant's August 19, 1993 employment injury had fully resolved and that he had "absolutely zero medical findings to support that [appellant] is currently disabled for employment."

On November 14, 1997 the Office informed appellant that it had made a preliminary determination that an overpayment in the amount of \$353.50 had occurred. The Office explained that during the period of April 1, 1996 through September 13, 1997 it had not deducted appellant's life insurance premiums from her compensation benefits. The Office concluded that appellant was without fault in the creation of the overpayment and advised appellant of her rights in the event that she disagreed with the preliminary determination. Finally, the Office indicated that if appellant did not respond within 30 days, a final decision would be issued based on the information currently on file.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) on November 19, 1997 and requested that she be granted a waiver of recovery of the overpayment. Following a March 28, 1998 telephone conference, the Office determined that appellant's monthly income was \$2,209.78 and her monthly expenses totaled \$1,375.50. Additionally, appellant reported assets of \$30.00. Lastly, appellant indicated that she was capable of paying \$25.00 per month to discharge her debt arising from the overpayment of compensation.

² In his most recent report, dated December 13, 1995, Dr. Mason indicated that he had not seen appellant since July 8, 1994. He further noted that appellant had been hospitalized for a nervous breakdown since he last examined her approximately 18 months earlier. Dr. Mason reported current complaints of pain in the neck, back and arms, as well as stiffness of the neck and headaches. In conclusion, he stated that he did not feel that appellant was employable because her inner-personal relations would be effected by her neuropsychiatric disorder of depression.

In a notice of proposed termination of compensation dated August 17, 1998, the Office advised appellant that it proposed to terminate her compensation benefits because the weight of the medical evidence, as represented by Dr. Estwanik's June 17, 1996 opinion, supported that her accepted injury of August 19, 1993 had resolved. Additionally, the Office advised appellant that if she disagreed with the proposed action she should submit additional medical evidence or an argument within 30 days.

Appellant challenged the Office's proposed decision to terminate compensation and submitted an August 21, 1998 report from Dr. Mason. In his report, Dr. Mason noted that appellant stated she continued to experience problems with numbness of both hands and stiffness in her neck. He also noted that appellant had limited motion of her neck, aches and generalized anthralgia. Additionally, Dr. Mason reported that appellant continued to take about two extra strength Tylenol approximately four times a day and that she also took intermittent showers and warm soaks to control her pain. He also noted that appellant had problems with high blood pressure and major depression. With respect to appellant's depression, Dr. Mason explained that she was not currently on any anti-depressive medicines and she had not been to therapy in about a year due to financial concerns. Furthermore, he noted that appellant was terrified about the remote possibility of returning to her job. Finally, Dr. Mason noted that he advised appellant to strongly consider applying for Social Security disability benefits inasmuch as she had not worked for a period of about five years and, in his opinion, she would qualify for such benefits.

Regarding the issue of overpayment, on August 28, 1998, the Office denied appellant's request for a waiver of recovery. The Office explained that inasmuch as appellant's current monthly income exceeded her monthly expenses by \$834.28, a waiver of recovery of the overpayment was unwarranted. Furthermore, rather than allowing appellant to repay the debt in small monthly installments as she proposed, the Office determined that the entire overpayment of \$353.50 would be recovered in one payment from appellant's continuing compensation. As a basis for its determination, the Office noted the possibility that appellant's benefits would be terminated in the near future. Additionally, the Office explained that based on the financial information of record, appellant could make this single payment and still be able to meet her estimated monthly expenses. The Office subsequently deducted the entire overpayment from appellant's September 12, 1998 compensation check.

With respect to the Office's proposed termination of compensation, in a decision dated November 12, 1998, the Office advised appellant that the medical evidence of record established that she had recovered from her work-related injury of August 19, 1993. In an accompanying memorandum, the Office noted that Dr. Estwanik's June 17, 1996 report represented the weight of the medical evidence. The Office, therefore, concluded that effective December 6, 1998, appellant was no longer entitled to medical benefits and continuing compensation for wage loss as a result of her August 19, 1993 work-related injury.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits as of December 6, 1998.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴

As previously noted, the Office based its decision to terminate benefits on Dr. Estwanik's June 17, 1996 opinion. He clearly noted that appellant was no longer disabled as a result of her August 19, 1993 employment injury. The Board finds that Dr. Estwanik's opinion is sufficiently well rationalized and based on a proper factual background. Dr. Estwanik not only examined appellant, but also reviewed appellant's medical records. He also reported accurate medical and employment histories. In contrast, Dr. Mason's more recent reports did not specifically address how appellant's August 19, 1993 employment injury currently preclude her from returning to work. His December 13, 1995 report suggests that appellant is unfit for duty as a result of an unrelated psychiatric disorder, rather than her accepted employment injury of August 19, 1993. Moreover, Dr. Mason's most recent report, dated August 21, 1998, offers no insight regarding the issue of causal relationship, but merely expresses the opinion that appellant would qualify for Social Security disability benefits.

Because Dr. Mason's most recent reports do not include a reasoned explanation regarding the relationship between appellant's current condition and her accepted employment injury of August 19, 1993, this evidence does not rise to the level of rationalized medical opinion evidence.⁵ Inasmuch as Dr. Estwanik concluded that appellant's August 19, 1993 employment injury had fully resolved and that there were "absolutely zero medical findings to support that she is currently disabled for employment," the Office properly relied on his opinion as a basis for terminating appellant's compensation benefits.

The Board further finds that the Office properly determined that appellant received an overpayment in the amount of \$353.50 for the period April 1, 1996 through September 13, 1997. The record reveals that the Office neglected to deduct appellant's insurance premiums during the above-noted period. Moreover, the record indicates that the Office properly calculated the amount of the overpayment. Although appellant challenged the amount of the overpayment, her disagreement with the Office's calculation was premised on the erroneous assumption that the Office, in accordance with her proposed repayment schedule, had begun to deduct \$25.00 per month as of March 1998. In a letter dated September 8, 1998, appellant argued that the Office should have already deducted \$175.00, thereby leaving a remaining balance of only \$178.50. Contrary to appellant's argument, the Office did not attempt to recoup any of the overpayment prior to the issuance of its August 28, 1998 decision denying a waiver of recovery of the overpayment.

³ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁵ *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Additionally, the Board finds that appellant is not entitled to a waiver of recovery of the overpayment.

Section 8129 of the Federal Employees' Compensation Act⁶ provides that an overpayment must be recovered unless "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." In the instant case, appellant was found to be without fault in the creation of the overpayment. However, this finding, in and of itself, does not mandate that a waiver of recovery be granted. As noted, appellant is entitled to waiver of the overpayment only if recovery would defeat the purpose of the Act or would be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are respectively set forth under sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.⁷

Section 10.322(a) provides that recovery of an overpayment would "defeat the purpose of the Act" if it would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses.⁸ The section further provides that recovery would be inappropriate to the extent that the individual from whom recovery is being sought "needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses."⁹ Additionally, recovery would be inappropriate if 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.¹⁰ Therefore, to establish that recovery would defeat the purpose of the Act, appellant must show both that she needs substantially all of her income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base.¹¹

As previously noted, appellant reported a monthly income of \$2,209.78 and monthly expenses totaling \$1,375.50. Additionally, appellant reported assets of \$30.00. While appellant may have limited assets, her monthly income exceeds her monthly expenses by \$834.28.

⁶ 5 U.S.C. § 8129(a), (b).

⁷ 20 C.F.R. §§ 10.322 and 10.323.

⁸ 20 C.F.R. §§ 10.322(a).

⁹ 20 C.F.R. § 10.322(a)(1).

¹⁰ 20 C.F.R. § 10.322(a)(2).

¹¹ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

Accordingly, the Board finds that the Office properly concluded that appellant would not be deprived of income and resources required to meet her ordinary and necessary living expenses.¹²

As to the issue of whether recovery would be against equity and good conscience, section 10.323 provides that recovery of an overpayment would be inappropriate if the overpaid individual would experience “severe financial hardship” in attempting to repay the debt.¹³ Additionally, recovery would be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed his position for the worse.¹⁴

In the instant case, there is no evidence that appellant would experience severe financial hardship in attempting to repay the \$353.50 overpayment. As previously noted, appellant’s monthly income exceeds her monthly expenses by more than twice the amount of the current overpayment. Moreover, appellant has not alleged and the record does not establish, that she either relinquished a valuable right or changed her position for the worse in reliance on the excess compensation payments she received. Consequently, the Board finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

The Board further finds that the Office properly recovered the overpayment from appellant’s continuing compensation.

When an individual is entitled to receive continuing compensation, the Office is authorized to recoup the amount of any prior overpayment from such future compensation. However, in determining the extent of any offset against future payments, the Office must take into account such factors as “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 the individual.¹⁵

The Office decided to recoup the overpayment from a single check rather than enter into a long-term repayment agreement with appellant. As noted above, appellant’s monthly income exceeded her monthly expenses by more than \$800.00. Thus, appellant would be capable of repaying the entire \$353.50 overpayment from one check. Furthermore, the Office properly took into account the possibility that appellant’s compensation would be terminated in the near future; a factor that militated against entering into a long-term repayment schedule as proposed by appellant. Therefore, the Board finds that the Office gave due regard to appellant’s financial circumstances and the extent of future payments in determining the manner of repayment in this case.

¹² See *James Lloyd Otte*, 48 ECAB ____ (Docket No. 95-672, issued February 14, 1997) (where the claimant had approximately \$200.00 of monthly income in excess of expenses).

¹³ 20 C.F.R. § 10.323(a). The regulation further provides that “severe financial hardship” is to be determined in accordance with the criteria set forth in 20 C.F.R. § 10.322.

¹⁴ 20 C.F.R. § 10.323(b).

¹⁵ 20 C.F.R. § 10.321(a).

The decisions of the Office of Workers' Compensation Programs dated November 12 and August 28, 1998 are, hereby, affirmed.

Dated, Washington, D.C.
November 8, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member