

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY C. WHITE and U.S. POSTAL SERVICE,
POST OFFICE, Washington, D.C.

*Docket No. 01-517; Submitted on the Record;
Issued November 19, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received overpayments of compensation in the amount of \$1,105.91 and \$1,257.43; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of recovery of the overpayments; and (3) whether the Office properly determined that \$100.00 should be withheld from appellant's continuing compensation checks to recover the overpayments.

The Office accepted appellant's claim for a right shoulder strain. Appellant returned to regular work on April 9, 1998, had right shoulder pain on November 25, 1999 and returned to limited duty on January 10, 2000 with a 35-pound work restriction.

On March 20, 2000 the Office advised appellant that it had made a preliminary determination that an overpayment of compensation existed in the amount of \$1,105.91 because appellant returned to work on January 10, 2000 and continued to receive compensation for wage loss through January 29, 2000. The Office found that appellant was at fault in the creation of the overpayment. The Office informed appellant that she should provide information regarding her income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

On March 20, 2000 the Office also made a preliminary determination that an overpayment of compensation existed in the amount of \$1,257.43 because appellant was paid compensation at the augmented three fourths compensation rate for the period May 13 through October 29, 1999 when she was only entitled to compensation at the statutory two thirds rate for the same time period. The Office considered that appellant underwent right shoulder surgery on March 9, 1999 and received compensation for temporary total disability. The Office also considered that on May 12, 1999 appellant's husband passed away but appellant continued to receive the augmented compensation. The Office found that appellant was not at fault in the creation of the overpayment. The Office informed appellant that she should provide information regarding her income and expenses in order to assist the Office in deciding whether to waive the overpayment or if waiver is not granted, how to collect the overpayment.

By two letters dated April 14, 2000, appellant requested waiver of the overpayments. Regarding the \$1,257.43 overpayment, appellant stated that she was not at fault and a collection of the overpayment would cause a financial hardship for her. Regarding the \$1,105.91 overpayment, appellant stated that the Office erroneously determined that the amount of the overpayment was \$1,105.91 from January 10 through 29, 2000, an approximate eight-day period, because she did not receive that sum for eight days of loss wages. She also stated that she returned to work on January 11, 2000, not January 10, 2000. Appellant stated that she was not at fault in the creation of the overpayment.

Appellant submitted an overpayment recovery questionnaire, Form OWCP-20, dated April 14, 2000 and a continuing claim for compensation, Form CA-7, dated January 10, 2000 indicating that she sought leave without pay from January 7 to 10, 2000.

In a telephone conference dated April 25, 2000, between appellant and the Office, the Office considered that appellant had take home pay of \$700.00 per month and monthly debts of \$3,013.40 and that she had \$765.00 in checking, saving and cash on hand which was not supported by documentation. Appellant informed the Office that she was legal guardian of two nieces and the Office requested documentation of her guardianship. The Office also stated that although appellant claimed her son as a dependent, he was an adult, living in his own place and running a family cleaning business.

By decisions dated August 25, 2000, the Office finalized its determination that appellant received overpayments of compensation in the amount of \$1,105.91 and \$1,257.43 and found that appellant was without fault in the creation of the overpayments.¹ The Office found that appellant was not entitled to waiver of recovery of the overpayment as appellant did not provide supportive documentation about her debts and dependents and did not establish that debt collection would present a hardship. The Office also stated that the amount of \$1,105.91 represented 20-calendar days from January 10 to 29, 2000. The Office stated that in decisions issued that day, appellant would be instructed to submit \$50.00 per month toward each overpayment account until the debts were satisfied.

The Board finds that appellant received two overpayments of compensation, one in the amount of \$1,105.91 and the other in the amount of \$1,257.43.

Regarding the overpayment of \$1,105.91, although appellant contended that she started work on January 10, 2000 and that the amount of the overpayment represented only eight days, the Office relied on evidence of record that appellant's wages from January 10 to 29, 2000 equaled \$1,105.91. Appellant has not shown that the Office's figure is erroneous. Regarding the overpayment of \$1,257.43, the Office relied on evidence showing that appellant was paid augmented compensation from May 13 through October 29, 1999 and that the amount totaled \$1,257.43. Appellant did not dispute that amount and there is no evidence to the contrary.

The Board finds that the Office properly denied appellant's request for waiver of both overpayments.

¹ The Board notes that appellant did not appeal from an August 25, 2000 wage-earning capacity determination.

Section 8129(a) of the Act² provides that, where an overpayment of compensation has been made “because of an error of fact or law” adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments or recovery by the United States may not be made when incorrect payments 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.”³

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁴ The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.434-10.437 of the implementing federal regulations.

Section 10.436 of the Office’s regulations⁵ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because (a) [t]he beneficiary from whom the Office seeks recovery needs substantially all of his or her current income including compensation benefits to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. Section 10.437⁶ states that recovery of an overpayment is also considered to be against good conscience if the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

Section 20 C.F.R. § 10.438 states:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will all be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

⁵ 20 C.F.R. § 10.436.

⁶ 20 C.R.F. § 10.437.

In the overpayment recovery questionnaire dated April 14, 2000, appellant indicated that she had monthly earnings of \$700.00, that she had three dependents, a son and two nieces and had total monthly expenses of \$3,043.40. She indicated that she had miscellaneous funds of \$765.00. In determining that appellant was not entitled to waiver of recovery of the overpayments, the Office considered that the OWCP-20 showed that appellant had a monthly net pay of \$700.00 with monthly debts of \$3,013.40 and checking, saving and cash on hand of \$765.00. The Office found that appellant did not include her family cleaning business, which she referenced in the overpayment recovery questionnaire dated December 12, 1999 and that she incorrectly listed her son as a dependent as he was an adult, lived in a separate residence and ran the family business. The Office also considered that appellant had been working full time since January 10, 2000 and concluded that debt collection would not present a hardship.

Since appellant did not supply the Office with complete financial information regarding her family business and did not provide documentation of her guardianship of her two nieces, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted. Further, appellant has not shown that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the relevant time periods. Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayments in this case.⁷

Section 10.441⁸ provides if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.

In its August 25, 2000 decisions, the Office indicated that appellant would be instructed to submit \$50.00 each month, toward each overpayment account, until the debts were satisfied. Since appellant submitted incomplete financial data, there is not sufficient information for the Board to perform an analysis of the reasonableness of the monthly recovery rate of \$50.00 for each overpayment Appellant has, therefore, not shown that the Office abused its discretion in withholding \$50.00 or a total of \$100.00 from appellant's monthly compensation payments to recover the amount of the overpayments.⁹

⁷ *Robert B. Hutchins*, 52 ECAB _____ (Docket No. 99-2273, issued April 11, 2001); *Marlon G. Massy*, 49 ECAB 650, 652 n. 9 (1998).

⁸ 20 C.F.R. § 10.441.

⁹ *See William D. Emory*, 47 ECAB 363, 373 (1996).

The August 25, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 19, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member