

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA L. CLARK and DEPARTMENT OF THE AIR FORCE,
AIR FORCE SYSTEMS COMMAND, EDWARDS AIR FORCE BASE, CA

*Docket No. 01-844; Submitted on the Record;
Issued September 3, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to waiver of recovery of a \$5,604.12 overpayment; and (2) whether the Office properly determined the rate of recovery of the overpayment.

The Office accepted that on February 4, 1988 appellant, then a 31-year-old supply clerk, sustained internal derangement of her left knee, for which she underwent arthroscopic surgery on June 23, 1988.¹ The Office accepted that on October 16, 1989 appellant sustained left knee strain, for which she underwent left knee arthroscopies on January 10, 1990 and March 15, 1993.² The Office accepted that on November 1, 1990 appellant sustained bilateral wrist sprain, right carpal tunnel syndrome, aggravation of bilateral wrist mild carpal instability with scapholunate instability, a fusion of the right wrist on January 22, 1993 and a refusion on April 30, 1993.³

Appellant ceased light-duty work following her wrist fusion surgeries and received compensation for temporary total disability due to upper extremity problems. She returned to light duty on January 27, 1994, chose disability retirement with the Office of Personnel Management on February 15, 1994, but thereafter received compensation from the Office for temporary total disability. Subsequently, she received schedule awards for a 42 percent permanent impairment of each upper extremity. Since February 1998 she has worked intermittently at different locations performing a variety of tasks. On May 13, 1999 the Office reduced her compensation based upon her wage-earning capacity as represented by her

¹ The Office assigned this claim No. A16-0139151.

² The Office assigned this claim No. A13-0903318. This claim number is now being treated as a master file number.

³ The Office assigned this claim No. A13-0935982.

employment as a clerk for the city of Blanca, Colorado. Her new compensation rate was \$722.20 each four weeks.

On June 12, 2000 the Office determined that appellant's loss of wage-earning capacity had previously been calculated incorrectly using California date-of-injury pay rate instead of the local rate. The Office calculated that, for the period February 10, 1999 to April 22, 2000 appellant had received an overpayment of compensation in the amount of \$5,604.12.

By notice of preliminary determination dated June 19, 2000, the Office advised appellant that she had received an overpayment of compensation in the amount of \$5,604.12 for the period February 10, 1999 to April 22, 2000, for which she was not at fault in its creation. The Office advised appellant that, since she was found not to be at fault in the creation of the overpayment, she could request waiver of the recovery of the overpayment. An overpayment recovery questionnaire was included and appellant was instructed to complete and return it within 30 days and to include supporting information.

Appellant timely completed and returned the overpayment recovery questionnaire and it was stamped received by the Office on July 7, 2000. However, it was misfiled and did not appear in appellant's case record.

On July 19, 2000 the Office issued a final decision finding that waiver would be denied and that recovery would be undertaken by withholding \$150.00 each four weeks from appellant's continuing compensation benefits. The decision noted that appellant "did not respond to the Office's preliminary notification."

Appellant disagreed with the decision and advised the Office that she had completed the OWCP-20 overpayment recovery questionnaire form and timely submitted it to the Office. The Office then found the completed form on July 24, 2000, date stamped as being received by the Office on July 7, 2000.

On July 24, 2000 the Office reviewed the form and issued another final decision denying waiver of recovery of the overpayment and adjusting the amount of withholding. The Office found that appellant had responded to the preliminary notification of the overpayment by returning the Form OWCP-20, but that she had failed to provide any supporting documentation. The Office reviewed all of the evidence before it and determined that appellant had the ability to repay the debt at the amount of \$75.00 per 28-day period.

By letter dated July 28, 2000, appellant requested an appeal specifically of the July 19, 2000 decision before the Board.⁴ In her request, appellant specifically argued that she had completed the Form OWCP-20 and returned it to the Office in a timely manner and that when the Office found it, it admitted that it had been misfiled. She argued that she should not be

⁴ No evidence of any date of mailing postmark appears in the docket file, as the Office faxed the Board appellant's July 28, 2000 letter on February 12, 2001 but incorrectly stated that she was appealing the Office's July 24, 2000 final decision, which she had apparently not yet received on July 28, 2000.

penalized for the Office's filing error and argued that she could not repay the overpayment at the rate of \$150.00 each four weeks.⁵

As the only issues specifically appealed to the Board on July 28, 2000 were waiver of recovery of the overpayment and the amount of the withholding. These are the only issues that will be addressed in this decision.⁶

The Board notes that, although appellant specifically appealed the July 19, 2000 decision, which would have been set aside by the Board, citing a *Couch*⁷ problem with the completed Form OWCP-20, date stamped as received on July 7, 2000 the Office found the missing evidence, considered it and promptly issued a *de novo* decision on July 24, 2000 based on all of the evidence properly before it, denying waiver of recovery of the overpayment and determining that the overpayment would be recovered by withholding \$75.00 every four weeks from appellant's continuing compensation benefits. As the Office *sua sponte* issued a new decision on the issues specifically being appealed to the Board, which corrected the errors of the July 19, 2000 decision, the Board will now consider appellant's case on the intent of her appeal and will, therefore, consider the findings in the subsequent July 24, 2000 decision.

The Board finds that the Office properly determined that appellant was not entitled to waiver of recovery of the overpayment.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office 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 conscious."⁸ Thus, the Office may not waive the overpayment of compensation in this case, unless appellant was without fault in its creation.⁹ Section 10.433(a) of Title 20 of the Code of Federal Regulations explains that the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. In the present case, appellant was found not at fault in the creation of the overpayment, such that waiver of recovery of the overpayment could be considered.

⁵ The Board notes that the content of appellant's appeal indicated that she had not yet received the Office's July 24, 2000 follow-up decision, which considered the Form OWCP-20 and reduced the rate of recovery of the overpayment.

⁶ Subsequent to appellant's July 28, 2000 letter of appeal to the Board, the Office issued further decisions on the medical merits of the cases. Since these decisions addressed other issues, occurred after the date appellant appealed to the Board and were not subsequently included in an amendment of appellant's appeal to the Board, such decisions will not now be addressed in this decision.

⁷ See *William A. Couch*, 41 ECAB 548 (1990). (As the Board decisions are final as to the subject matter appealed, it is crucial that all the evidence relevant to that subject matter which was properly submitted to the Office prior to the issuance of its final decision be addressed by the Office).

⁸ 5 U.S.C. § 8129.

⁹ See *Beverly E. Labbe*, 50 ECAB 440 (1999); *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

In section 10.434 it is explained that, if the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the [Act] ..., or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience....”

Section 10.436 states that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

“(a) The 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) The beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”

Section 10.437 states:

“(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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....”

The section noted above goes on to explain what constitutes relinquishing a valuable right and what constitutes changing one’s position for the worse. In this case, appellant has not alleged that she relinquished a valuable right nor changed her position for the worse, such that these actions will be discussed no further.

Appellant, however, claims that she needs substantially all of her current income to meet her current expenses.

The Board notes that on appellant’s OWCP-20 form she lists her monthly income as totaling \$2,015.77 and her monthly expenses as totaling \$1,979.29.¹⁰ That leaves excess income in the amount of \$36.48. She also lists her assets as totaling \$420.00. However, the Office added up appellant’s monthly available income, which was \$924.00 from Social Security, \$348.00 from the Department of Veterans Affairs, \$277.77 from a pension and \$680.00 from the

¹⁰ This amount included both the monthly mortgage payment on the Arizona house and appellant’s monthly rent in her current residence in Colorado.

Office, which totaled \$2,230.00.¹¹ It then subtracted appellant's claimed monthly expenses of \$1,979.29 from her monthly income and found that she had \$251.00 excess income every month, from which to recover the overpayment.¹² The Office, therefore, determined that appellant did not need substantially all of her current income to meet ordinary and necessary expenses. The Office further noted that appellant had, at that time, a second house which was used as a rental property, which would exceed the allowable assets base for an employee and her dependent. The Office, therefore, determined that appellant was not entitled to waiver of recovery of the overpayment as neither of the required criteria had been met.

The Board now concurs that appellant does not fit the criteria for waiver of recovery of the overpayment under section 10.436(a) or (b) and notes that appellant has not alleged that recovery would be against equity and good conscience as she relinquished a valuable right nor changed her position for the worse, such that section 10.437(a) and (b) will not be considered.

The Board further finds that the Office properly determined the rate of recovery of the overpayment.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.¹³ If 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 this case, in determining the rate of repayment of the overpayment, the Office properly took into account the probable extent of appellant's future payments, the rate of compensation, appellant's financial circumstances and all other relevant factors submitted to the record, so as to minimize any hardship. The Board notes that, based on the evidence of record and on her completed OWCP-20 form and considering subsequently submitted OWCP-20 forms, appellant reveals that she has substantial assets including an income-producing rental property and multiple acreage tracts in Arizona and California, as well as two sports utility vehicles.¹⁴ She subsequently provided a breakdown of her claimed expenses which was noted to include monthly cable TV and Internet access and usage costs. As these things are not considered to be ordinary and necessary monthly expenses, but are considered luxuries, the Office properly determined that from appellant's \$251.00 monthly excess income, less \$50.00 for personal needs, it would not be against equity and good conscience for the Office to withhold \$75.00 every four weeks to recover the overpayment as promptly as possible, leaving appellant with \$176.00 per month excess income. The Board again concurs with this determination.

¹¹ The Office rounded \$2,229.77 up to \$2,230.00 for calculation purposes.

¹² The Office again rounded the number up from \$250.71.

¹³ 20 C.F.R. § 10.441(a).

¹⁴ Subsequently provided information reveals that appellant has assets totaling \$139,415.00,

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 24, 2000 is hereby affirmed.¹⁵

Dated, Washington, DC
September 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ The disposition of the July 19, 2000 decision has previously been discussed and will not be here specifically affirmed, although the results were partially correct, due to its flaws, which were corrected by the July 24, 2000 decision.