

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. GAITHER and DEPARTMENT OF THE ARMY,
ANNISTON ARMY DEPOT, Anniston, AL

*Docket No. 03-2050; Submitted on the Record;
Issued November 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received a \$1,423.35 overpayment of compensation for the period January 26 through March 22, 2003; (2) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every four weeks.

On May 12, 1997 appellant, then a 41-year-old mobile equipment mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that her fingers went numb while in the performance of her federal duties. The claim was accepted for bilateral carpal tunnel syndrome and bilateral surgical release was authorized. Appellant returned to work on light duty on November 3, 1997. On March 2, 1999 appellant sustained a recurrence of disability and again underwent bilateral release. Appellant, who received a five percent schedule award for each upper extremity in 1998, also has had several nonwork-related medical conditions including a left L5-S1 hemilaminectomy with discectomy surgery, a cervical discectomy at C5-6, hysterectomy, hypertension, degenerative disc disease, obesity and migraine headaches. After a functional capacity evaluation was determined to be invalid due to appellant's submaximal effort, the employing establishment offered appellant a light-duty job on March 7, 2000 that she refused. Appellant was referred to vocational rehabilitation and on October 4, 2002 the Office conducted a preliminary loss of wage-earning capacity analysis and found appellant capable of working in the constructed position of cashier. Appellant was given 30 days to respond. No evidence was submitted and in a January 13, 2003 decision the Office finalized appellant's wage-earning capacity indicating that appellant could earn \$259.67 per week effective January 26, 2003.

On April 30, 2003 the Office issued appellant a preliminary notice finding a \$1,423.35 overpayment as a result of a clerical error by the Office. Appellant's compensation check for the period January 26 through March 22, 2003 failed to reflect her recently determined wage-earning capacity. As appellant had not been give instructions to return any check with the incorrect amount at the time her wage-earning capacity was finalized, the Office found appellant without

fault in creating the overpayment. Appellant was given 30 days to apply for a waiver and submit appropriate documentation of her assets and expenses. No response was received from appellant and in an August 1, 2003 decision the Office finalized the overpayment decision, refused to grant waiver and determined that the overpayment would be repaid in installments of \$100.00.

The Board finds that appellant received a \$1,423.35 overpayment of compensation for the period January 26 through March 22, 2003.

In the present case, the record contains evidence which shows that appellant received \$4,066.93 in compensation for the period January 26 through March 22, 2003 when she was only entitled to receive \$2,642.36. Therefore, the Office properly determined that appellant received an overpayment.

The Board further finds that the Office properly denied waiver of the overpayment. The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."² Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.³

Section 10.436 of the Office's regulations⁴ 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) 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. Section 10.437⁵ 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.

¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

² 5 U.S.C. § 8129(b).

³ Appellant argued that the overpayment should be waived because she was not found to be at fault in its creation but she would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁴ 20 C.F.R. § 10.436.

⁵ 20 C.F.R. § 10.437.

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 Office]. 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 also 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.”

Although appellant was provided with the opportunity, she submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act.⁶ Absent evidence documenting appellant’s financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.⁷ 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 while working. Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

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.

Since appellant did not submit any financial data, there is not sufficient information for the Board to perform an analysis of the reasonableness of the monthly recovery rate of \$100.00. Appellant has therefore not shown that the Office abused its discretion in withholding \$100.00 from appellant’s monthly compensation payments.

⁶ Appellant submitted additional evidence after the Office’s August 1, 2003 decision, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

⁷ *Id.*

⁸ 20 C.F.R. § 10.441.

The decision of the Office of Workers' Compensation Programs dated August 1, 2003 is affirmed.

Dated, Washington, DC
November 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member