

The Office accepted appellant's claim for a low back strain, aggravation of a herniated disc, aggravation of degenerative disc disease at L4-5 and fusion and decompression at L4-5 arising from a low back injury at work on August 28, 1998. She received continuation of pay

immediately following her injury and then received compensation payments for temporary total disability. Appellant returned to limited-duty work on August 31, 1998 and lost intermittent time from work.

In a preliminary determination dated August 11, 2000, the Office determined that appellant received an overpayment in the amount of \$3,477.44 from September 10 through December 17, 1999, because she was paid compensation for temporary total disability, when in fact she was only eligible for 172 hours of intermittent compensation during that time. The Office calculated the amount of the overpayment based on a weekly pay rate of \$594.31 and its determination that appellant was only entitled to 172 hours of intermittent compensation. The Office found that she was at fault in the creation of the overpayment because on her CA-7 claim forms, for the periods November 22 through December 17, 1999, she marked "no" to the question whether she was claiming intermittent hours of wages loss. Further, in a letter to appellant dated January 3, 2000 the Office did not indicate that her payments were intermittent. The Office determined that appellant should have known that the amount of compensation she received for the relevant time period was incorrect.

By decision dated October 6, 2000, the Office finalized the preliminary determination, finding that an overpayment of \$3,477.44 was created and that appellant was at fault in the creation of the overpayment.

Appellant requested a prerecoupment hearing before an Office hearing representative. By decision dated December 19, 2000, the Office hearing representative found that the case was not in posture for a hearing because the Office erroneously calculated the amount of the overpayment. The Office hearing representative found that the Office used the incorrect pay rate of \$476.62 a week (including night differential) as of November 28, 1998, the date appellant first used leave, when the Office should have used the date appellant first missed work on August 28, 1998, which was the date of the injury. The Office hearing representative also found that the Office incorrectly determined a recurrence pay rate of \$594.31 a week (including night differential) effective July 7, 1999 since she did not return to full-time, regular employment and there was no recurrence of disability. The Office hearing representative found that the Office erred in determining that appellant was entitled to 172 hours of compensation from September 10 through December 17, 1999. She found that appellant worked six hours a day and was entitled to two hours of compensation for each holiday on November 11 and November 25, 1999. The Office hearing representative concluded that appellant was entitled to 176 hours of compensation during the relevant time period. The Office hearing representative, therefore, remanded the case for the Office to recalculate the amount of appellant's overpayment using the pay rate on August 28, 1998 and the fact that appellant was entitled to 176 hours of compensation from September 10 through December 17, 1999.

In a preliminary determination dated February 27, 2001, the Office found that an overpayment of \$4,123.83 was created from September 10 through December 17, 1999 because appellant received compensation for temporary total disability when she should have received compensation for 176 hours of intermittent time she lost from work. The Office also found that the correct pay rate on August 20, 1998 was \$462.72 a week. As shown on computer printout forms and the worksheet dated February 27, 2001, from September 10 through December 17, 1999, appellant was paid \$5,481.14 and should have been paid \$1,357.31 ( $\$462.72 \times 66 \frac{2}{3}$

percent x 176), thereby creating an overpayment of \$4,123.83 (\$5,481.14 - \$1,357.31). The Office found that appellant was without fault in the creation of the overpayment because the Office was aware that she was entitled to intermittent time off and incorrectly entered the compensation payment. 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. The Office requested that appellant complete the enclosed overpayment recovery questionnaire, Form OWCP-20.

Appellant submitted an overpayment recovery questionnaire dated March 19, 2001, in which she indicated that she had monthly income of \$1,550.00 and monthly expenses of \$1,432.00 representing monthly payments of \$382.00 for mortgage, \$200.00 for food, \$125.00 for clothing, \$125.00 for utilities, \$385.00 for miscellaneous expenses and \$340.00 for debts paid in monthly installments. Appellant indicated that she had funds of \$212.00 representing cash on hand and the balances in her checking and savings accounts. She also requested a prerecoupment hearing which was held on May 15, 2003. At the hearing, appellant testified that, when she received her compensation check for the relevant time period she called the Office to tell them that the amount could not be right, but was told that it was right and she should cash it. Appellant stated that it was the first compensation check she had received after not working for almost eight months. She stated that there had not been any change in her financial circumstances except that she had married and her husband received Social Security income. Appellant also stated that she received approximately \$180.00 from workers' compensation every two weeks. At the end of the hearing, the Office hearing representative informed her that she should complete a new OWCP-20 and submit as much information and documentation as possible.

By decision dated August 19, 2003, the Office hearing representative finalized the February 27, 2001 preliminary determination, finding that an overpayment of \$4,123.83 was created, that appellant was not at fault in the creation of the overpayment and that she was not entitled to waiver of the overpayment. The Office hearing representative noted that appellant did not submit any additional financial information and there was no supporting documentation for the information on the OWCP-20. The Office hearing representative considered that appellant's monthly income of \$1,550.00 exceeded her monthly expenses of \$1,432.00 by at least \$50.00 and, therefore, she was capable of repaying the debt. Further, the Office hearing representative considered that appellant was receiving compensation for two hours per day and determined that \$100.00 a month would be withheld from her continuing compensation payments until the overpayment was repaid in full.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of the Act<sup>1</sup> provides in pertinent part that, "[w]hile an employee is receiving compensation under this subchapter..., he [or she] may not receive salary, pay or remuneration of any type from the United States" unless certain exceptions apply such as when

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<sup>1</sup> 5 U.S.C. § 8116(a)(1)-(4).

the salary pay or remuneration is in return for a service actually performed or is a pension for service in the Army, Navy or Air Force.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

The Office determined that an overpayment of \$4,123.83 was created from September 10 through December 17, 1999 because appellant was paid temporary total disability benefits for that time period, when in fact she was receiving a salary and working for part of that time and she should have been paid compensation only for 176 hours of intermittent time missed from work. Pursuant to section 8116(a), appellant was not entitled to receive disability compensation and a salary for the same periods of time. The computer printout and February 27, 2001 worksheet document that, from September 10 through December 17, 1999, the difference between the amount of compensation appellant received, \$5,481.14 and the amount of compensation she should have received, \$1,357.31, was \$4,123.83. No evidence of record refutes the amount of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>3</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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."<sup>4</sup> 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.

Section 10.436<sup>5</sup> provides 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) [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." An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>6</sup> Further, an individual's assets must exceed a resource base of \$3,000.00 for an individual or

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<sup>2</sup> See, e.g., *Michael A. Grossman*, 51 ECAB 673, 676 (2000).

<sup>3</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.436.

<sup>6</sup> *Frederick Artters*, 53 ECAB \_\_ (Docket No. 01-1237, issued February 27, 2002); see *Howard R. Nahikian*, 53 ECAB \_\_ (Docket No. 01-138, issued March 4, 2002).

\$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 individual's assets not exempt from recoupment.<sup>7</sup> For waiver under the "defeat the purpose" of the Act standard, appellant must show both that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed the applicable resource base.<sup>8</sup> Section 10.437<sup>9</sup> 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.

### **ANALYSIS -- ISSUE 2**

In this case, in her overpayment recovery questionnaire dated March 19, 2001, appellant indicated that she had monthly income of \$1,550.00, monthly expenses of \$1,432.00 and funds of \$212.00. Her monthly income, therefore, exceeded her monthly expenses by \$118.00 (\$1,550.00 -- \$1,432.00). The Office hearing representative determined that appellant's monthly income of \$1,550.00 exceeded her monthly expenses of \$1,432.00 by at least \$50.00 and, therefore, she did not establish that she needed substantially all of her income to meet current ordinary and necessary living expenses. The Office hearing representative's determination is proper. Since appellant had monthly income in excess of \$50.00 recovery of the overpayment would not cause hardship to appellant and would not defeat the purpose of the Act. Further, recovery of the overpayment recovery is not against good conscience because appellant did not show that in reliance on such payments or on notice that such payments would be made, she gave up a valuable right or changed her position for the worse.

### **LEGAL ANALYSIS -- ISSUE 3**

Section 10.441(a) provides that, if an overpayment has been made to an individual who is 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 circumstance of the individual and any other relevant factors, so as to minimize any hardship."<sup>10</sup>

### **ANALYSIS -- ISSUE 3**

The Office determined that appellant's monthly income exceeded her monthly expenses by more than \$50.00 and in fact her excess monthly income was \$118.00. The Office noted that she was receiving compensation for two hours a day and determined that \$100.00 a month should be withheld from appellant's continuing compensation to recover the overpayment. Since she had \$118.00 in excess monthly income, the Office properly determined that deducting

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<sup>7</sup> *Id.*

<sup>8</sup> *John Skarbek*, 54 ECAB \_\_\_\_ (Docket No. 01-1396, issued June 21, 2002); *Jorge O. Diaz*, 51 ECAB 124, 127 (1999).

<sup>9</sup> 20 C.F.R. § 10.437.

<sup>10</sup> 20 C.F.R. § 10.441(a).

\$100.00 a month from appellant's continuing compensation to recover the overpayment was reasonable given her financial circumstances.

**CONCLUSION**

The Office properly determined that an overpayment of \$4,123.83 existed, that appellant was not entitled to waiver of recovery of the overpayment and that \$100.00 should be withheld from her continuing compensation to recover the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 19, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member