United States Department of Labor
Employees' Compensation Appeals Board

K.N., Appellant	)	
and	)	**Docket No. 10-1884**
	)	**Issued: May 24, 2011**
U.S. POSTAL SERVICE, KENTUCKIANA PERFORMANCE CLUSTER, Louisville, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 12, 2010 appellant filed a timely appeal from the June 29, 2010 merit decision of the Office of Workers' Compensation Programs reducing her compensation based on her capacity to earn wages as a sales clerk. She also timely appealed a June 30, 2010 merit decision of the Office finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation effective July 4, 2010 based on her capacity to earn wages as a sales clerk; (2) whether appellant received a $2,290.09 overpayment of compensation; (3) whether the Office abused its discretion by refusing to waive recovery of the overpayment; and (4) whether the Office properly required

[1] 5 U.S.C. § 8108 *et seq.*

repayment of the overpayment by deducting $100.00 from appellant's compensation payments every four weeks.

FACTUAL HISTORY

The Office accepted that on August 14, 2006 appellant, then a 51-year-old rural mail carrier, sustained displacement of a cervical intervertebral disc at C5-6 without myelopathy and left brachial neuritis/radiculitis after she lifted her left arm to place a magazine in a mail case. She stopped work on August 14, 2006 and received compensation for periods of disability. On December 7, 2007 Dr. Sean P. McDonald, an attending Board-certified orthopedic surgeon, performed a discectomy and fusion surgery at C5-6 which was authorized by the Office.

Dr. McDonald treated appellant during her recovery from the December 7, 2007 surgery. Appellant reported experiencing chronic headaches and she was treated with Topamax and other medications. Dr. McDonald found her to be totally disabled.

The findings of a December 3, 2008 magnetic resonance imaging (MRI) scan showed a prior anterior cervical disc fusion at C5-6 and left paracentral spurring at C4-5 producing thecal sac compression but no cord compression. There was no significant spinal canal or foraminal stenosis.

On January 7, 2009 Dr. Deborah St. Clair, a Board-certified orthopedic surgeon serving as an Office referral physician, stated that appellant's problems at C5-6 had not fully resolved and she still experienced pain. She could find no objective evidence of myopathy or radiculopathy related to the cervical condition. Dr. St. Clair posited that, despite her pain complaints, appellant could return to work as a mail carrier.[2]

The Office determined that a conflict in the medical opinion arose between Dr. McDonald and Dr. St. Clair regarding appellant's ability to work. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of the Act, to Dr. Charles Barlow, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In an undated report received by the Office on June 4, 2009, Dr. Barlow stated that his physical examination of appellant showed cervical range of motion that was minimally limited in lateral flexion and rotation. There was light touch sensory deficit in the left thumb, index finger and dorsolateral forearm, but deep tendon reflexes and motor function were normal. Dr. Barlow found that appellant's right shoulder was subjectively tender over the biceps groove and posterior at the insertion of the infraspinatus, but noted that there was no tenderness at the supraspinatus insertion. Rotator cuff strength was excellent when significant force was applied downward with the shoulders abducted to 90 degrees. Dr. Barlow diagnosed postoperative anterior cervical fusion at C5-6, widespread cervical spondylosis and right shoulder degenerative joint disease and determined that appellant could perform light-duty work for eight hours a day.[3]

[2] Dr. St. Clair indicated that appellant had some continuing right shoulder problems.

[3] A functional capacity evaluation performed on May 12, 2009 showed that appellant could lift 30 pounds from floor to waist height and 15 pounds from waist to crown height and could front carry 30 pounds.

In a June 2, 2009 work restrictions form, he stated that appellant could push or pull up to 30 pounds for four hours a day and lift up to 30 pounds for six hours a day. Appellant could engage in repetitive wrist and elbow motion for four hours a day, but could not reach above her shoulders.[4]

In June 2009, the Office referred appellant for participation in a vocational rehabilitation program designed to return her to work. Attempts to place appellant in several retail positions were unsuccessful. Her rehabilitation counselor, Wes Cox, found that state labor market surveys from early 2010 showed that the position of sales clerk was reasonably available in appellant's commuting area at an average salary of $290.00 per week. The sale clerk position involved such duties as taking payment for items and restocking inventory. It required occasionally lifting, pushing, pulling or carrying up to 20 pounds and frequently lifting, pushing, pulling or carrying up to 10 pounds.

In a May 21, 2010 notice, the Office advised appellant of its proposed reduction of her compensation based on its determination that she was capable of earning wages in the constructed position of sales clerk at a rate of $290.00 per week. The opinion of Dr. Barlow established that she was physically capable of performing the position and noted that Mr. Cox had approved the sales clerk position and found it to be reasonably available in her commuting area. The Office provided appellant an opportunity to contest the proposed action.

Appellant submitted the findings of a May 3, 2010 MRI scan of her cervical spine. It showed no evidence of a herniated nucleus pulposus, spinal stenosis or neural foraminal stenosis at any level. There was evidence of multilevel degenerative arthrosis of the facet joints and small uncinate spurs and a prior anterior spinal fusion at C5-6 with good alignment.

The record contains payment records and worksheets showing that appellant earned $804.35 per month on August 14, 2006, the date that she sustained her work injury. Calculations show that, when using this pay rate for the period October 17, 2006 to May 10, 2010, she should have received $115,212.67 in wage-loss compensation. Other records show that appellant actually received $117,502.76 in monetary compensation.

In a May 28, 2010 notice, the Office advised appellant of its preliminary determination that she received a $2,290.09 overpayment of compensation for the period October 17, 2006 to May 10, 2010. It made a preliminary determination that she was not at fault in the creation of the overpayment. The Office advised appellant that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It requested that she complete and return an enclosed financial information questionnaire within 30 days even if she was not requesting waiver of the overpayment.

In several letters dated in June 2010, appellant argued that her compensation should not be adjusted because she could not perform the lifting requirements of the sales clerk position.

[4] On November 13, 2009 Dr. McDonald recommended similar restrictions. He stated that appellant was restricted from reaching above the shoulders and noted that repetitive movements of wrists and elbows and pushing and pulling were limited to four hours per day for each action. Appellant could push or pull a maximum of 30 pounds and lift up to 30 pounds for 6 hours a day.

She also claimed that her unsuccessful job search and her headache problems showed that she could not work. Appellant asserted that she was paid at a proper pay rate due to her entitlement to cost-of-living increases. In a May 27, 2010 report, Dr. McDonald indicated that appellant was tolerating her pain medication. Appellant submitted a financial information questionnaire completed on June 9, 2010 in which she reported $2,442.98 in income every four weeks,[5] $2,401.09 in monthly expenses and $67.50 in assets.

In a June 29, 2010 decision, the Office reduced appellant's compensation effective July 4, 2010 based on her capacity to earn wages in the constructed position of sales clerk. It found that the evidence established that she was medically and vocationally capable of earning wages as a sales clerk.

In a June 30, 2010 decision, the Office determined that appellant received a $2,290.09 overpayment of compensation. It found that she was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. The Office noted that the record showed that appellant's monthly income exceeded her monthly expenses.[6] It required repayment of the overpayment by deducting $100.00 from appellant's compensation payments every four weeks.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[7] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[9] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[10] The job selected for determining

[5] This figure included $2,213.98 in Office compensation received every four weeks.

[6] The Office indicated that the income figure reported by appellant ($2,442.98) was for income she received every four weeks, but calculated that her actual monthly income equaled $2,626.41. It indicated that appellant's monthly expenses were $2,011.07 and that her monthly income exceeded her monthly expenses by about $615.00.

[7] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[8] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[9] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[10] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[11] The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in her commuting area.[12]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[13]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[14] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[15] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

ANALYSIS -- ISSUE 1

The Office accepted that on August 14, 2006 appellant sustained displacement of a cervical intervertebral disc at C5-6 without myelopathy and left brachial neuritis/radiculitis after she lifted her left arm to place a magazine in a mail case. Appellant stopped work on August 14, 2006 and received monetary compensation for periods of disability. In a June 29, 2010 decision,

[11] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[12] *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

[13] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[14] 5 U.S.C. § 8123(a).

[15] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[16] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the Office reduced her wage-loss compensation effective July 4, 2010 based on her capacity to earn wages in the constructed position of sales clerk.[17]

The Office determined that there was a conflict in medical opinion between Dr. McDonald, an attending Board-certified orthopedic surgeon, and Dr. St. Clair, a Board-certified orthopedic surgeon serving as an Office referral physician, regarding appellant's ability to work. In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Barlow, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[18]

Dr. Barlow determined that appellant could perform light-duty work for eight hours per day. Appellant could push or pull up to 30 pounds for four hours a day and lift up to 30 pounds for six hours a day. She could engage in repetitive wrist and elbow motion for four hours a day, but could not reach above her shoulders. The Board finds that this well-rationalized opinion constitutes the weight of the medical evidence with respect to appellant's ability to work.[19] The Board further finds that the physical requirements of the sales clerk position are within the work restrictions recommended by Dr. Barlow and therefore appellant was capable of performing the sales clerk position.

On appeal, appellant claimed that she could not carry 20 pounds of weight as required by the sales clerk job. However, Dr. Barlow provided an opinion that she could lift, push or pull up to 30 pounds and there is no medical evidence of record to show that she could not carry the lesser weight of 20 pounds. On appeal, appellant also claimed that her headache condition prevented her from working as a sales clerk, but Dr. Barlow took into account her headache problems in arriving at his work restrictions.[20]

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of sales clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the sales clerk position. Appellant claimed that the fact that

[17] The sales clerk position involved such duties as taking payment for items and restocking inventory. It required occasionally lifting, pushing, pulling or carrying up to 20 pounds and frequently lifting, pushing, pulling or carrying up to 10 pounds.

[18] *See supra* notes 13 and 14.

[19] *See supra* note 15. Dr. Barlow explained that appellant still had residuals of the August 14, 2006 work injury but posited that the limited objective findings on examination and diagnostic testing meant that appellant could perform light-duty work for eight hours a day.

[20] Appellant claimed that the fact that Dr. Barlow placed limits on the amount of time per day that she could perform certain duties (such as lifting, pushing, pulling and engaging in wrist and elbow motion) showed that she could only work on a part-time basis. However, Dr. Barlow explicitly indicated that she could work eight hours a day and there is no evidence in the record that the sales clerk position required lifting, pushing, pulling or engaging in wrist and elbow motion beyond the time limitations delineated by Dr. Barlow. Appellant claimed that the sales clerk position would require her to engage in the prohibited action of reaching above her shoulders, but there is no indication that the position would require lifting above her shoulders.

her job search in the retail field was unsuccessful showed that she could not work as a sales clerk, but the Board has held that the fact that an employee has been unsuccessful in obtaining work in a given position does not establish that the work was not reasonably available in her commuting area.[21] She did not submit evidence or argument establishing that she could not vocationally or physically perform the sales clerk position.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of sales clerk represented appellant's wage-earning capacity.[22] The weight of the evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position of sales clerk and that such a position was reasonably available within the general labor market of her commuting area. Therefore, the Office properly reduced appellant's compensation effective July 4, 2010 based on her capacity to earn wages as a sales clerk.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.[23] Section 8129(a) of the Act provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[24]

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[25] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[26]

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[21] *See supra* note 11. On appeal, appellant claimed that she did not have computer skills in programs such as Excel to perform the sales clerk position, but there is no indication in the record that she would have to possess such skills.

[22] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

[23] 5 U.S.C. § 8102(a).

[24] *Id*. at § 8129(a).

[25] *Id*. at § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[26] 5 U.S.C. § 8101(4).

ANALYSIS -- ISSUE 2

The Board finds that appellant received a $2,290.09 overpayment of compensation. In the present case, appellant received compensation for the period October 17, 2006 to May 10, 2010 at an improper pay rate. The record contains payment records and worksheets showing that she earned $804.35 per month on August 14, 2006, the date that she sustained her work injury. When using this pay rate for the period October 17, 2006 to May 10, 2010, appellant should have received $115,212.67 in Office compensation, but evidence of record shows that she actually received $117,502.76 in Office compensation for the period October 17, 2006 to May 10, 2010. The Board notes that it was appropriate for the Office to base appellant's pay rate calculations on her date-of-injury pay. Appellant would not qualify for a recurrent pay rate as she did not sustain a recurrence of disability for pay rate purposes under the Act.[27] For these reasons, the Office properly determined that she received a $2,290.09 overpayment.

LEGAL PRECEDENT -- ISSUE 3

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.[28] 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 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."[29] If the Office finds a claimant to be without fault in the matter of an 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.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of her income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.[30] According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice

[27] *See supra* note 25. Appellant asserted that her entitlement to cost-of-living increases meant that she was entitled to the amount of compensation she received during the period in question. However, she did not explain the basis for this argument.

[28] *See Robert Atchison*, 41 ECAB 83, 87 (1989).

[29] 5 U.S.C. § 8129(b).

[30] 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than $50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). Office procedure provides that assets must not exceed a resource base of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or dependent plus $960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

that such payments would be made, gives up a valuable right or changes her position for the worse.[31] To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.[32]

ANALYSIS -- ISSUE 3

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. Her monthly income exceeds her monthly ordinary and necessary expenses by approximately $225.00.[33] As appellant's current income exceeds her current ordinary and necessary living expenses by more than $50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.[34] On appeal, she submitted additional information on her finances, but the Board cannot review such information for the first time on appeal.[35] Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.[36]

Because appellant has failed to establish that, recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, she has failed to show that the Office abused its discretion by refusing to waive the overpayment.

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[31] 20 C.F.R. § 10.437(a), (b).

[32] *Id*. at § 10.437(b)(1).

[33] The record reveals that appellant had monthly income of $2,626.41 and monthly expenses of $2,401.29. The Office properly indicated that appellant's income of $2,442.98 every four weeks was equivalent to income of $2,626.41 every month. It indicated that appellant's monthly expenses were $2,011.07, rather than $2,401.29, but even when using the higher monthly expenses figure, appellant's monthly income still exceeded monthly expenses by more than $50.00.

[34] *See supra* note 29 and accompanying text.

[35] *See* 20 C.F.R. § 501.2(c)(1).

[36] *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

LEGAL PRECEDENT -- ISSUE 4

Section 10.441 of Title 20 of the Code of Federal Regulations provides in pertinent part:

> "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 the same. 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."[37]

ANALYSIS -- ISSUE 4

The record supports that, in requiring repayment of the overpayment by deducting $100.00 from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting from appellant's compensation payments every four weeks.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective July 4, 2010 based on her capacity to earn wages as a sales clerk. The Board further finds that she received a $2,290.09 overpayment of compensation, that the Office did not abuse its discretion by refusing to waive recovery of the overpayment and that the Office properly required repayment of the overpayment by deducting $100.00 from her compensation payments every four weeks.

[37] 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ORDER

IT IS HEREBY ORDERED THAT the June 30 and 29, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 24, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board