

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL L. SIBISKI and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, Md.

*Docket No. 95-2705; Submitted on the Record;
Issued November 23, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$4,605.93 because health benefit premiums and optional life insurance premiums were not deducted from her monthly compensation between December 29, 1990 and July 24, 1993; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly reduced appellant's compensation based on her actual earnings as a mail processor.

On February 13, 1990 appellant, then a 28-year-old flat sorter machine operator, filed a notice of occupational disease alleging that she suffered bilateral wrist tendinitis and bilateral carpal tunnel syndrome in the course of her federal employment. Following the development of the medical evidence, the Office accepted the claim for bilateral tenosynovitis and provided appellant with compensation for partial and total temporary disability.

On June 3, 1991 the Office accepted appellant's claim for bilateral carpal tunnel syndrome. In a letter also dated June 3, 1991, the Office advised appellant that she would receive compensation on the periodic rolls effective April 6, 1991. The letter indicated that no deductions were being made for health and optional life insurance benefits and that, if appellant had these benefits, she should contact the Office as she was responsible for these payments.

In a letter dated June 13, 1991, appellant indicated that she wanted to arrange to have health benefit premiums taken out of her compensation checks.

On March 10, 1992 the Office completed a "Notice of Health Benefits Enrollment" which indicated that appellant's health benefits enrollment was transferred to the Office effective December 29, 1990.

On July 26, 1992 appellant again wrote the Office requesting that it straighten out her medical benefits. Appellant subsequently sent another undated letter indicating that she wanted

her health and insurance benefits straightened out. On September 14, 1993 appellant again requested information regarding these benefits deductions.

On September 26, 1994 the Office approved surgery for a left and right carpal tunnel release.

Office "Case History Inquiry Reports" and "Daily Computation Logs," however, indicated that the Office did not make deductions for health benefit premiums and optional life insurance premiums from appellant's compensation beginning December 29, 1990 and continuing through July 24, 1993. The Office calculated the amount of these premiums by relying on one computer generated "Daily Compensation Log" which indicated that for the period December 29, 1990 through July 24, 1993 appellant should have paid \$4,218.33 in health benefits premiums and \$387.60 in optional life insurance premiums. The Office used the amounts shown on this "Daily Compensation Log" when completing its "Disability Benefits Payment Worksheet." On this worksheet, the Office added the amounts the "Daily Compensation Log" showed that appellant owed for health and optional life insurance premiums and found that appellant owed an overpayment of \$4,605.93.

Consequently, on March 2, 1995 the Office made a preliminary determination that an overpayment of \$4,605.93 existed because appellant received compensation from December 29, 1990 through July 24, 1993 and the Office failed to deduct \$4,218.33 for health benefits and \$387.60 for option life insurance. The Office advised appellant that it found her without fault in the creation of the overpayment and that she could submit additional evidence if she disagreed with the fact or the amount of the overpayment. The Office noted that, because appellant was not at fault in the creation of the overpayment, recovery of the overpayment could not be made if it would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office advised appellant of her right to a preresumption hearing and requested that she complete an overpayment recovery questionnaire.

On March 6, 1995 appellant requested waiver and provided a completed overpayment recovery questionnaire. Appellant reported that her total monthly income was \$2,591.32. This was based on \$1,076.00 in Social Security benefits that appellant, her husband, and her son received, and \$1,515.32 in workers' compensation. With regard to assets, appellant indicated that the total was \$3,763.53 and that it included \$100.00 cash on hand, \$1,576.75 in her checking account, \$1,286.78 in her savings account and \$800.00 in household items. Appellant noted that there were three people in her household and provided the following estimates of monthly expenses: \$585.00 for mortgage; \$400.00 for food; \$50.00 for clothing; \$200.00 for utilities; and \$250.00 in other expenses.

Appellant stated that she paid monthly installments of: \$224.00 to FNANB; \$103.00 to Capital One; \$105.00 to Chevy Chase Bank; \$50.00 to Choice; \$20.00 to Consumers Edge; \$20.00 to Crestar; \$105.00 to Marine Midline Bank; \$15.00 to Nationsbank; \$45.00 to Montgomery Wards; and \$20.00 to AT&T Universal. Appellant also indicated that she paid \$20.00 to Gerber Life Insurance and \$50.00 to Veteran's Life Insurance. Consequently, appellant stated that her total monthly expenses were \$2,262.00.

Appellant returned to work on March 25, 1995 in a limited-duty position as a mail processor at a salary of \$11.77 per hour.

By decision dated March 27, 1995, the Office terminated appellant's benefits effective March 25, 1995 based on her actual earnings as a mail processor.

In a June 1, 1995 memorandum of conference, an Office claims examiner described the substance of a telephone call with appellant. The claims examiner reported that appellant had a total income each month of \$3,854.67. The claims examiner noted monthly payments that included: \$585.00 first mortgage; \$363.74 second mortgage; \$400.00 food; \$50.00 clothing; \$200.00 utilities; \$250.00 other expenses; \$42.21 Franklin Life Insurance; \$224.00 FNANB; \$103.00 Capitol One Payment; \$105.00 Chevy Chase; \$50.00 Choice; \$20.00 Consumer's Edge; \$20.00 Crestar; \$105.00 Marine Midline payment; \$15.00 Nationsbank; \$45.00 Montgomery Ward; \$20.00 AT&T; \$20.00 Gerber Life Insurance; \$50.00 Veteran's Life Insurance; \$60.00 physical therapy for dependent's cerebral palsy; and \$50.00 use and maintenance of minivan. The Office claims examiner noted that these expenses totaled \$2,777.95 per month and that, therefore, appellant had \$1,076.72 per month available for debt repayment. He then indicated that waiver would not be available and recommended that appellant make monthly installment payments of \$130.00 to repay her debt.

On June 9, 1995 appellant indicated that she neglected to list some monthly expenses and that she underestimated other monthly expenses. In this regard, she revised her monthly food expenses to \$600.00 and her clothing expenses to \$130.00. She also increased her other expenses to \$750.00 to reflect expenses for eye care, dental care, household needs, doctors, prescriptions, school needs, and disposable medical supplies not covered by insurance. She further noted that she increased the amount for physical therapy for her dependent to \$75.00. Appellant stated that she neglected to include monthly expenses of \$91.37 for health insurance premiums; \$15.38 for federal life insurance; \$125.00 for automobile insurance. Appellant also stated that her bi-weekly deduction for health benefits in 1991, 1992 and 1993 was \$31.07, \$31.77, \$38.34, respectively. Appellant noted that she missed 25 bi-weekly payments for health benefits in 1991; 27 bi-weekly payments in 1992 and 15 payments in 1993. Multiplying the payments missed by the amount that should have been deducted in each respective year, appellant indicated that she owed \$776.75 for 1991, \$857.79 for 1992 and \$575.10 for 1993. Appellant totaled this amount at \$2,209.64. Because the Office indicated that appellant owed \$4,218.33 for unpaid health benefits, appellant asserted that the Office overstated the overpayment amount by \$2008.69. Appellant did not dispute the amount of the overpayment attributable to unpaid optional life insurance premiums.

The Office indicated that appellant agreed to monthly payments of \$130.00 on June 28, 1995.

By decision dated June 28, 1995, the Office denied appellant's waiver request, finding that the circumstances of her case did not warrant waiver. The Office requested that appellant make monthly repayments of \$130.00 until the debt is repaid. In an accompanying memorandum, the Office indicated that an overpayment of \$4,605.93 occurred from December 29, 1990 through July 24, 1993 and that appellant was not at fault in its creation. The Office indicated that during the June 1, 1995 conference appellant indicated that her income was

\$3,854.67 and that her expenses were \$2,777.95. The Office stated that it informed appellant that unless her expenses were within \$50.00 of her income waiver would probably not be granted. The Office noted that appellant then increased her monthly expenses in a June 9, 1995 letter by \$1,026.75 so that she only had \$49.97 left from her monthly income. The Office noted that appellant erred in adding expenses for Federal health and life insurance as these were included in calculating appellant's income. Moreover, the Office reduced appellant's amount of "other expenses" from \$750.00 to \$500.00. It, therefore, found that appellant had \$406.72 in income in excess of expenses. The Office noted that recovery of the overpayment would not defeat the purposes of the Act because appellant could clearly repay the debt and meet ordinary and necessary living expenses. It further found that recovery was not against equity and good conscience because appellant would not experience severe hardship repaying the debt. Finally, the Office noted that detrimental reliance is not appropriate because appellant did not relinquish a valuable right or change her position based on the payments received. The Office, therefore, denied waiver and requested that appellant repay the debt in \$130.00 monthly installments.

In a decision dated September 8, 1995, the Office indicated that appellant had been reemployed as a mail processor beginning March 25, 1995 at wages of \$681.31. The Office stated that this fairly and reasonably represented appellant's wage-earning capacity. Pursuant to 5 U.S.C. § 8106 and 5 U.S.C. § 8115, the Office adjusted appellant's compensation so that effective the date of her reemployment her compensation payments were based on 75 percent of the difference between her pay rate as determined for compensation purposes and her ability to earn wages in her new position.

The Board initially finds that the Office erred in determining the amount of appellant's overpayment.

Once the Office has accepted a claim and pays compensation, it has the burden or proof of justifying a modification of compensation benefits.¹

In the instant case, the Office calculated the amount of the overpayment for the unpaid health insurance and optional insurance premiums by relying on a "Daily Computation Log" which showed that appellant should have paid \$4,218.33 in health insurance premiums and \$387.60 in optional life insurance premiums for the period December 29, 1990 through July 24, 1993. Appellant, however, disputed the amount of the overpayment created by the unpaid health insurance premiums during this period on the basis that the Office utilized a higher premium than she actually owed. In this regard, appellant asserted that she only owed \$2,209.64 in health insurance premiums based on a bi-weekly premium of \$31.07 for 25 pay periods in 1991, a premium of \$31.77 for 27 pay periods in 1992 and a premium of \$38.34 for 15 pay periods in 1993.

Although the Office "Daily Computation Log" indicated the total amounts of health insurance and option life insurance premiums that appellant owed for the periods in which they were not paid, the log failed to indicate that the amount of the bi-weekly premiums owed for the insurance for each of the years the premiums were not paid. Without this information, the Board

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

cannot verify whether the overpayment amount calculated by the Office is correct. Consequently, the Board will remand this case to the Office to further develop the evidence concerning the bi-weekly premiums for both the health and optional life insurance premiums in each year they were owed and for the Office to issue an appropriate decision regarding the amount of appellant's overpayment.

The Board, however, finds that the Office properly determined that appellant was without fault in the creation of the overpayment and it did not abuse its discretion by denying waiver of the overpayment.²

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office's refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.³

Section 8129 of the Act⁴ provides that an overpayment of compensation must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of this subchapter [Act] or would be against equity and good conscience."⁵ (Emphasis added.) Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the [Act]" or the "against equity and good conscience" standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office's regulations respectively.⁶

With regard to the "defeat the purpose of the Act" standard, section 10.322(a) of the regulations provides in relevant part:

"(a) ... Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent:

² The Board has held that Office Form CA-1049, advising of the conditions of receipt of compensation, which leaves a blank space for the dollar amount of the premium does not put an individual on notice that she is responsible for payment of such premium and that the premiums are to be deducted from compensation payments; see *Ian Manson Graham*, 40 ECAB 1103 (1989).

³ *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129(b).

⁶ *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. §§ 10.322-23.

(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(2) The individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.”⁷

For waiver under this 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 resource base of \$3,000.00.⁸ In the present case, the Office found that recovery would not defeat the purpose of the Act as appellant's current monthly income of \$3,854.67 exceeded her current monthly expenses of \$2,777.95. In reaching this determination, the Office properly noted that monthly charges for federal health and life insurance benefits had previously been deducted from appellant's income and, therefore, were not relevant in determining appellant's monthly expenses. Moreover, the Office properly exercised its discretion and reduced appellants monthly expenses listed under “other expenses” from \$750.00 to \$500.00 because the former amount was inconsistent with appellant's early statement of these expenses. An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁹ As appellant's monthly income exceeds her ordinary and necessary monthly living expenses by more than \$50.00, appellant does not qualify for waiver under the “defeat the purpose of the Act” standard.¹⁰

With regard to the “against equity and good conscience” standard, section 10.323(b) of the regulations provides:

“Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered....”¹¹

⁷ 20 C.F.R. § 10.322(a).

⁸ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

⁹ Federal (FECA) Procedural Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹⁰ 20 C.F.R. § 10.323(b).

¹¹ 20 C.F.R. § 10.323(b).

The evidence in this case does not establish that appellant relinquished a valuable right or changed her position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that she made a decision she otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹² Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown. The Board therefore finds that the Office did not abuse its discretion in denying waiver of the overpayment of compensation in this case.¹³

Finally, the Board finds that the Office properly reduced appellant's compensation based on her actual earnings as a mail processor.

In the present case, appellant had actual earnings as a mail processor beginning March 25, 1995. It was, therefore, proper for the Office in its September 8, 1995 decision, to use appellant's actual earnings as the basis for her loss of wage-earning capacity, as there is no evidence that her actual earnings did not fairly and reasonably represent her wage-earning capacity effective March 25, 1995. This determination is consistent with Board precedent which provides that, generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonable represent the injured employee's wage-earning capacity, must be accepted as such measure.¹⁴ The Office, therefore, properly reduced appellant's compensation to reflect her wage-earning capacity.¹⁵

¹² *Forrest E. Brown, II, supra* note 7 at 285-86; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1994).

¹³ Inasmuch as appellant agreed to repay the overpayment in monthly installments of \$130.00, the method of recovery is not at issue in this case.

¹⁴ *Floyd A. Gervais*, 40 ECAB 1045 (1989); *Clyde Price*, 32 ECAB 1932 (1981).

¹⁵ An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes (defined at 20 C.F.R. § 10.5(a)(20)) by the percentage of wage-earning capacity and subtracting the result from the pay rate of compensation purposes to obtain the employee's loss of wage-earning capacity; see 20 C.F.R. § 10.303; see also *Albert C. Shadrick*, 5 ECAB 376 (1953).

The decisions of the Office of Workers' Compensation Programs dated September 8, 1995 is affirmed; the decision of the Office dated June 28, 1995 with respect to the amount of the overpayment regarding life insurance premiums is affirmed; and that part of the June 28, 1995 decision regarding an overpayment with respect to health insurance benefits premiums is set aside and the case is remanded for further development and a *de novo* decision.

Dated, Washington, D.C.
November 23, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member