

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE J. JOHNSON and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Fort Lauderdale, Fla.

*Docket No. 96-2583; Submitted on the Record;
Issued November 12, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are whether the Office of Workers' Compensation Programs correctly determined that appellant was overpaid compensation in the amount of \$4,484.00 and whether the Office properly denied waiver of recovery of an overpayment.

On September 8, 1989 appellant, then a 27-year-old distribution clerk, filed a notice of traumatic injury, claiming that she hurt her right leg and lower back and shoulder when the chair in which she was sitting flipped backward at work. The Office accepted the claim for shoulder and cervical strains as well as a torn medial meniscus of the right knee.¹ Following arthroscopic surgery on January 9, 1990, appellant returned to part-time light duty on February 21, 1990, which was made permanent on February 18, 1991.

On July 24, 1992 the Office informed appellant that she had been overpaid because she had received total disability benefits while working four hours a day, starting on November 17, 1991. The Office found appellant to be at fault in creating an overpayment of \$4,484.00.

Appellant requested a hearing and completed an overpayment recovery questionnaire. Following the hearing on January 13, 1993, the hearing representative determined that appellant was without fault in creating the overpayment because she was not advised in writing of the amount of compensation she would receive based on her loss of wage-earning capacity until August 11, 1992. However, the hearing representative found that appellant was not entitled to waiver of recovery of the overpayment.

Appellant sought review by the Board, which on September 14, 1994 found that the Office had abused its discretion in denying waiver of recovery of the overpayment because the

¹ Appellant received a schedule award for nine percent permanent impairment of her right leg. The award ran from September 13, 1990 to March 13, 1991.

hearing representative had arbitrarily refused to include two loan installment payments in his calculations. The Board remanded the case for further evidentiary development.²

On remand, the Office received a new listing of monthly income and expenses from appellant. In a telephone conference on March 12, 1996 appellant updated her financial data and informed the Office that she had paid off her automobile loan and the balance on one of the installment loans. Appellant added that she had a five-month-old son and lived with her parents.

On July 17, 1996 the Office denied waiver of recovery of the overpayment on the grounds that appellant's monthly income exceeded her monthly expenses by \$517.03.

The Board finds that the Office correctly determined the amount of the overpayment and properly denied waiver of recovery of the overpaid amount.

Section 8129(a) of the Federal Employees' Compensation Act³ provides that when a overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

"Adjustment or recovery 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 the Act or would be against equity and good conscience." (Emphasis added.)⁴

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁵ The Office must exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.322 and 10.323 of the implementing federal regulations.⁶

Section 10.322⁷ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses when 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 the individual's assets do not exceed the

² Docket No. 93-1215 (issued September 14, 1994).

³ 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁶ 20 C.F.R. §§ 10.322-23; *James M. Albers, Jr.*, 36 ECAB 340, 345 (1984).

⁷ 20 C.F.R. § 10.322.

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.

For waiver under the “defeat the purpose of the Act” standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.⁸ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.⁹

In this case, the Office informed appellant in a July 8, 1992 letter that she was being paid compensation incorrectly “due to an administrative error.” The Office explained that she had received total disability benefits instead of wage-loss benefits for four hours a day. Based on a leave analysis worksheet submitted by the employing establishment and a weekly pay rate of \$464.80, the Office determined that appellant was paid \$10,677.25 in compensation from November 17, 1991 through June 27, 1992 and should have been paid \$6,193.25, resulting in an overpayment of \$4,484.00.

The Board finds that the record evidence supports the Office’s calculation of the amount of the overpayment. The administrative error occurred because the Office failed to issue a formal decision that appellant had sustained a 58 percent loss of wage-earning capacity due to her work injuries. Thus, while the Office paid compensation correctly from March 14 through November 16, 1991 based on this calculation, the Office began paying appellant total disability benefits from November 17, 1991 until it discovered the error in July 1992.

On remand, the Office updated appellant’s financial status to reflect a monthly income of \$1,721.67, consisting of \$660.00 in wages and \$1,061.67 in compensation benefits. The Office then listed her monthly expenses, including food, car insurance and maintenance, clothing, utility bills, church donations, infant costs, and credit and store card payments. Based on these figures, the Office correctly found that appellant’s monthly income exceeded her expenses by \$517.03. Inasmuch as this figure exceeds the minimum of \$50.00, appellant was not entitled to waiver of recovery of the overpayment.¹⁰

Appellant argues that the Office based its calculations on her present income and expenses and should have used the 1993 figures to determine whether she was entitled to waiver of recovery of the overpayment. Also, appellant contends that the Office failed to consider her car expenses and the two installment loans.

The Act provides in part that waiver is possible when the individual from whom recovery is sought needs substantially all his or her “current income” to meet “current ordinary and

⁸ *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

⁹ *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

¹⁰ *Cf. Linda D. Lane*, 46 ECAB 727, 733 (1995) (remanding the case for the Office to allot reasonable amounts of money for clothing, home maintenance, and automobile expenses and then recalculate whether appellant’s monthly income exceeded expenses by more than \$50.00).

necessary living expenses.” Thus, the Office must use updated financial data in determining whether waiver of the recovery of the overpayment is permitted. In fact, the Board remanded the case specifically for the Office to obtain a new listing of appellant’s expenses and to develop the evidence regarding the two installment loans.

Appellant told the Office that her car payment ended in March 1996 and that one of the loans not previously considered by the hearing representative was paid off. In updating her monthly expenses during the March 12, 1996 telephone conference, she did not mention any monthly payment on the other installment loan. Therefore, the Board finds that the Office correctly listed appellant’s monthly expenses and rejects appellant’s arguments.

Section 10.323 of the regulations provides that 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. To establish that a valuable right was relinquished, the individual must show that the right was valuable, that it cannot be regained, and the action taken was based chiefly or solely on the payments or notice of such payments.¹¹

To establish a change in position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.¹² In making such a decision, the individual’s present ability to repay the overpayment is not considered.¹³

There is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received in 1991 through 1992 due to the Office’s error. The Board, therefore, finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.¹⁴

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1989).

¹² *John B. Moore*, 44 ECAB 709, 711 (1993).

¹³ *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).

¹⁴ Appellant’s notice of appeal states that she elected retirement benefits on April 1, 1995, but her monthly check is only \$400.00, and her expenses are \$1,240.00. Appellant submitted a listing of these expenses, but the Board’s jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *William A. Couch*, 41 ECAB 548, 553 (1990). Thus, the new evidence dated July 12, 1995 cannot be considered by the Board because it postdates the Office’s final decision dated May 12, 1995.

The July 17, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
November 12, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member