

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHERYL A. ORR and U.S. POSTAL SERVICE,  
POST OFFICE, Zion, Ill.

*Docket No. 97-365; Submitted on the Record;  
Issued November 9, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$6,920.06 overpayment of compensation; (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by submitting \$100.00 to the Office every four weeks.

On January 31, 1986 appellant filed a claim for duodenitis and depression which she attributed to factors of her federal employment. The Office accepted appellant's claim for a permanent aggravation of atypical depression with symptoms of anxiety and paranoia. The Office paid appellant compensation for total disability from January 1, 1986 until January 9, 1994.<sup>1</sup> By decision dated September 25, 1996, the Office found that an overpayment of compensation in the amount of \$6,920.06 had occurred during the period from March 1, 1986 to December 31, 1987 because appellant received compensation for temporary total disability while having actual earnings. The Office further determined that appellant was without fault in the creation of the overpayment, that she was not entitled to waiver of the overpayment, and that she should submit \$100.00 per month to the Office as repayment.

The Board has reviewed the case record and finds that the Office properly found that appellant received a \$6920.06 overpayment in compensation.

In the present case, appellant's Social Security Administration records reveal that she had earnings during 1986 and 1987 from private employment. The Office subsequently paid appellant compensation benefits for temporary total disability throughout 1986 and 1987. Since appellant had actual earnings during this period, she is not entitled to compensation for total disability and thus received an overpayment. The Office calculated that appellant received

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<sup>1</sup> By decision dated January 12, 1994, the Office terminated appellant's compensation on the grounds that she had no further injury-related disability.

\$29,859.29 in compensation payments from March 1, 1986 to December 31, 1987. In determining what appellant should have been paid during this period, the Office calculated appellant's compensation rate using her actual earnings for the periods of March 1 to December 31, 1986; January 1 to February 28, 1987; and March 1 to December 31, 1987. Using the appropriate wage-earning capacity computations,<sup>2</sup> the Office determined that appellant's compensation rate should have been \$267.30 per week from March 1 to December 31, 1986; \$214.53 per week from January 1 to February 28, 1987; and \$216.00 per week from March 1 to December 31, 1987. The Office thus determined that appellant should have received payments totaling \$22,939.23 from March 1, 1986 through December 31, 1987. The difference between the \$29,859.29 that appellant received and the \$22,939.23 that she should have been paid results in an overpayment of \$6,920.06.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery 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.<sup>3</sup> 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."<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 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.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).<sup>5</sup> Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if:

- (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or
- (2) the individual, in reliance on the

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<sup>2</sup> See 20 C.F.R. § 10.303.

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

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.322(a).

payment which created the overpayment, relinquished a valuable right or changed position for the worse.<sup>6</sup>

Although appellant was found to be without fault in the matter of the overpayment, she nevertheless bears responsibility for providing the requisite information to support waiver of the overpayment. In this regard, section 10.324 of Title 20 of the Code of Federal Regulations provides:

“In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished.”<sup>7</sup>

In the present case, appellant failed to meet her responsibility for providing the requisite financial information to support waiver of the overpayment. In response to the Office’s notification of its preliminary finding of an overpayment, appellant submitted bills and factual evidence pertaining to 1986. Appellant further submitted a statement arguing that she was entitled to waiver of the overpayment because she sustained severe financial hardship during the period in question due to the Office’s slowness in adjudicating her claim. However, appellant did not submit a completed overpayment recovery questionnaire or any current financial information; and thus the Office was unable to determine whether recovery would defeat the purpose of the Act. Appellant further has not alleged, and the evidence does not demonstrate, that she relinquished a valuable right or changed her position for the worse in reliance on the erroneously augmented compensation which formed the basis for the overpayment. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience,” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The Board also finds that appellant should submit \$100.00 per month as repayment of the overpayment.

The Office’s implementing regulations provide:

“Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office shall proceed to recover the same.”<sup>8</sup>

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<sup>6</sup> 20 C.F.R. § 10.323.

<sup>7</sup> 20 C.F.R. § 10.324; *see John B. Moore*, 41 ECAB 804 (1990).

<sup>8</sup> 20 C.F.R. § 10.321(b).

As appellant failed to submit any current financial information, there was no evidence from which the Office could determine what amount she could afford to repay per month. Therefore, the Board finds that the Office's decision to recover from appellant \$100.00 per month is appropriate.

The decision of the Office of Workers' Compensation Programs dated September 25, 1996 is hereby affirmed.

Dated, Washington, D.C.  
November 9, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member