

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MAXINE T. CHANDLER and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Gainesville, Fla.

*Docket No. 97-827; Submitted on the Record;  
Issued July 1, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$6,970.50; and (2) whether the Office properly denied waiver of the overpayment.

On August 1, 1990 appellant, then a 42-year-old ward clerk, filed a notice of traumatic injury, alleging that she fell at work and injured her back. The Office accepted the claim for thoracic and lumbar strain, chronic pain disorder and depression. Appellant has not worked since November 20, 1991 and was placed on the periodic rolls.

By letter dated November 30, 1992, the Office stated that it had been informed that appellant was receiving or might be entitled to receive benefits provided by the Office of Personnel Management (OPM) under the Civil Service Retirement System Act (CSRS) or the Federal Employees' Retirement System Act (FERS). The Office stated that annuity benefits paid by OPM including any lump-sum payments made as a part of an alternative annuity under CSRS and benefits for wage loss paid by the Office under the Federal Employees' Compensation Act (FECA) were not payable for the same period of time and employees entitled to both OPM and FECA benefits must elect which benefit to receive.

In a December 10, 1992 letter, appellant elected to receive CSRS benefits from OPM.

In a decision dated March 14, 1995, the Office made a preliminary determination that an overpayment to appellant had occurred in the amount of \$6,970.50 because appellant had received dual benefits from OPM and the Office for the period December 10, 1992 through May 29, 1993.<sup>1</sup> The Office further found that appellant was at fault in the creation of the overpayment, noting that appellant willfully negotiated checks from both agencies, even though she was aware that she was not entitled to receive dual benefits following her election.

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<sup>1</sup> The amount of overpayment was calculated based on copies of the periodic rolls.

Appellant was advised of her right to submit additional medical evidence and request a review of the written record or a recoupment hearing.

Appellant submitted an overpayment recovery questionnaire on April 11, 1995 which was received by the Office on April 12, 1995. Appellant informed the Office that OPM had been withholding \$157.00 from her CSRS benefit check since April 23, 1993 for an overpayment. Appellant expressed her belief that the OPM and the Office were both trying to recoup money from her for the same period. Appellant identified her total monthly income to be \$508.00 (\$655.00 in disability retirement minus \$157.00 recouped by OPM).

In conjunction with the overpayment recovery questionnaire, appellant requested a telephone conference and also submitted copies of Office and OPM documents sent to her which were marked as Attachments A and B.

Attachment A was a "notice of debt due because of annuity overpayment" issued by OPM in the amount of \$3,297.00 for the period December 10, 1992 to April 30, 1993. The OPM advised appellant that she had been paid more annuity than she was entitled to under CSRS and that her benefits would be reduced by \$157.00 for 21 installments. The cause of the overpayment was listed as "special pay."

Attachment B was a March 3, 1993 letter, addressed from the Office to OPM advising that appellant had elected to receive CSRS benefits and requesting that OPM commence monthly annuity payments.

Attachment C was a May 27, 1993 letter, addressed from OPM to the Office which stated that appellant received benefits as a civil service retiree and that there was no accrued annuity, for which OPM could reimburse the Office for overpayment of compensation benefits. The Office was advised to either seek reimbursement of the overpayment from appellant directly or submit a government claim for collection with the allotment branch at OPM.

In an Office memorandum dated March 25, 1996, an Office claims examiner indicated that a telephone conference was held with appellant on March 22, 1996. He noted that OPM had declared an overpayment in the amount of \$3,297.00 for the period December 19, 1992 through April 30, 1993 and that it was likely that there was no dual benefits paid by the Office for that period. He advised that he would contact OPM and request information as to why that agency had requested an overpayment. He further found that due to the confusion surrounding her benefit payments, appellant was not at fault in the creation of the overpayment. Appellant was advised to submit financial information if she wished to apply for a waiver.

By decision dated December 16, 1996, the Office found that an overpayment of compensation occurred in appellant's case in the amount of \$6,970.95 due to receipt of dual benefits from the Office and OPM for the period December 10, 1992 to May 29, 1993.<sup>2</sup> The Office determined that the circumstances of appellant's case did not warrant recovery of the

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<sup>2</sup> In a memorandum attached to the Office's December 16, 1996 decision, it was noted that OPM was contacted by phone and verified that appellant was in continuous receipt of OPM benefits since December 10, 1992.

overpayment. The Office also determined that the overpayment would be recovered by monthly installment payments of \$193.62.

The Board finds that appellant received an overpayment in the amount of \$6,970.95.

Despite appellant's contention that she has already paid \$3,297.00 to OPM, the overpayment amount of \$3,297.00 calculated by OPM was not based on appellant's receipt of dual benefits from OPM and the Office for the period December 10, 1992 through May 29, 1993. Rather the \$3,297.00 represented an overpayment by OPM based on an improper calculation of appellant's retirement annuity. The Office's calculation of the amount of overpayment as \$6,970.95 is supported by documentation in the record.

The Board also finds that the Office properly denied waiver of an overpayment of compensation.

Section 8129 of the Act<sup>3</sup> 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 the Act or would be against equity and good conscience." (Emphasis added). Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then 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.<sup>4</sup>

Section 10.322(a) of the implementing regulations<sup>5</sup> provides that 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. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed a 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. This base includes all of the individual's assets not exempt from recoupment.<sup>6</sup>

In the instant case, appellant submitted an incomplete overpayment recovery questionnaire. Appellant provided only her total monthly income and did not account for any monthly expenses or otherwise provide financial information needed by the Office in order to consider whether waiver of recovery of the overpayment was warranted. The Office was,

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<sup>3</sup> 5 U.S.C. § 8129.

<sup>4</sup> See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>5</sup> 20 C.F.R. § 10.322(a).

<sup>6</sup> *Robert F. Kenney*, 42 ECAB 297 (1991).

therefore, unable to determine that recovery of the overpayment would defeat the purpose of the Act.<sup>7</sup>

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations<sup>8</sup> provides that “[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant 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 erroneous wage-loss 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.

Finally, with respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Because appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.<sup>9</sup>

The decision of the Office of Workers’ Compensation Programs dated December 16, 1996 is hereby affirmed.

Dated, Washington, D.C.  
July 1, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> The Office advised appellant to submit financial information to support wavier during the March 22, 1996 telephone conference. Appellant, however, did not provide any additional information.

<sup>8</sup> 20 C.F.R. § 10.323(b).

<sup>9</sup> *Lewis George*, 45 ECAB 144 (1993).