

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WANDA F. WHITE and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, Va.

*Docket No. 97-947; Submitted on the Record;
Issued March 10, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$3,551.77 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; and (3) whether the Office abused its discretion in denying waiver of recovery of the overpayment.

The Office accepted appellant's claim for a sprain to both wrists, and aggravation of degenerative joint disease of the right wrist with triangular surgery and a fibrocartilage tear. Appellant received compensation for intermittent periods from August 5, 1989 to May 14, 1993. The Office subsequently found that appellant was entitled to a schedule award for a 12 percent permanent impairment to her right upper extremity and then upgraded the award to a 16 percent permanent impairment.

By letter dated February 21, 1996, the Office made a preliminary determination that an overpayment to appellant had occurred in the amount of \$3,551.57. The Office stated that the overpayment occurred because the Office erroneously paid appellant \$17,551.57 from May 28, 1994 to March 29, 1995 for an additional 14 percent permanent impairment to her right upper extremity when appellant was only due an additional 4 percent award. The Office noted that appellant repaid the Office \$14,000.00 and, therefore, the overpayment balance was reduced to \$3,551.57. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that if she disagreed with the fact of the amount of the overpayment, appellant had the right to submit new evidence in support of her contention. The Office described the specific information that appellant should provide pertaining to her income and her expenses if she should seek a waiver of repayment. The Office also stated that appellant could request a hearing.

By letter dated May 31, 1996, the Office indicated that it had tried to reach appellant four times by phone, three times on May 30, 1996 and once on May 31, 1996 to arrange a telephone

conference to resolve the matter of the overpayment and requested that appellant contact the office. Appellant subsequently submitted a partially completed overpayment recovery questionnaire, Form OWCP-20, in which she requested waiver of repayment and listed her expenses including rent, food, clothing, utilities, automobile, medical and monthly credit payments. She also submitted a copy of her 1995 tax return and a March 1996 bank statement.

By decision dated November 18, 1996, the Office stated that appellant did not list her monthly income on the overpayment recovery questionnaire and, therefore, waiver of the repayment could not be granted because appellant had made only a partial financial disclosure despite numerous attempts to conference the matter with appellant. The Office, therefore, informed appellant that she was obligated to repay the Office the overpayment balance of \$3,551.77.

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$3,551.77. The Office determined that appellant had been erroneously paid an additional 10 percent schedule award for her right upper extremity from May 28, 1994 to March 29, 1995 which totaled \$17,551.77 based on appellant's employment records. Appellant did not dispute the amount as shown by the fact that she repaid \$14,000.00 leaving an overpayment balance of \$3,551.77. The Office, therefore, properly determined the amount of the overpayment.

The Board also finds that the Office properly determined that appellant was without fault in the creation of the overpayment as the Office conceded that it erroneously paid appellant an additional 10 percent schedule award for her right upper extremity during the relevant time period.

Further, the Board finds that the Office properly denied appellant's request for a waiver of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act¹ provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments 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."²

¹ 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8129(b).

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.323(b) of the Office's regulations³ 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 her position for the worse.... 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 on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”

In this case, the evidence does not show that appellant relinquished a valuable right or changed her position for the worse in reliance on the overpayment. Further, section 10.322(a) of the Office's regulations⁴ provides that recovery of an overpayment would 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: (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 or \$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.⁵

In the February 21, 1996 preliminary determination, the Office advised appellant that she should submit the appropriate financial information to establish whether she was eligible for a waiver. Subsequent to that determination, appellant submitted the overpayment recovery questionnaire, in which she provided some financial information by listing her monthly expenses but failed to indicate her monthly income. The Office made several attempts by phone and by letter to contact appellant to discuss the matter but appellant did not respond. The Office was, therefore, unable to make the proper analysis of appellant's finances to determine if appellant was eligible to have recovery of the overpayment waived. The burden is on appellant to establish her eligibility for waiver within the meaning of the Act.⁶ Since appellant did not submit the requisite financial data as advised by the Office, thereby precluding the Office from making the appropriate analysis under the Act, she failed to establish that she was entitled to waiver of recovery of the overpayment.

³ 20 C.F.R. § 10.323(b).

⁴ 20 C.F.R. § 10.322(a).

⁵ See *Blaine E. Bedeger*, 48 ECAB _____ (Docket No. 95-1334, issued March 25, 1997).

⁶ See *Richard S. Gumper*, 43 ECAB 811, 817 (1992).

The decision of the Office of Workers' Compensation Programs dated November 18, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 10, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member