

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELOISE C. LEE and DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE, Port Everglades, FL

*Docket No. 97-2841; Submitted on the Record;  
Issued November 4, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of compensation of \$7,131.30 for the period May 25 to November 12, 1994; and (2) whether the Office properly denied waiver of recovery of the overpayment pursuant to section 8129(b) of the Federal Employees' Compensation Act.

On January 3, 1994 appellant, then a 49-year-old customs inspector, filed a notice of traumatic injury and claim, alleging that on December 20, 1993 she injured her index finger, wrist and the elbows of both arms due to repetitive use. On January 7, 1994 appellant filed an occupational disease claim, alleging that beginning December 21, 1993 she sustained injury when she had to open 158 cartons with 12 boxes of shoes in each carton. She alleged injury due to the repetitive use of her arms. Appellant did not stop work. On March 8, 1994 appellant filed a claim for a traumatic injury she sustained on March 5, 1994 when she stepped on the wing flap of an airplane to disembark and it gave way. She fell to the ground. Appellant alleged injury to both arms and her left shoulder. The Office accepted appellant's January 1994 claim for bilateral wrist strain and left elbow strain. The Office accepted appellant's March 1994 claim for thoracic strain and left shoulder strain. The Office also authorized compensation for continuation of pay for intermittent dates beginning March 8, 1994 and calculated appellant's compensation based on the pay rate effective in March 1994. It determined that appellant was entitled to weekly compensation of \$997.90. In a letter dated November 18, 1994, the Office notified appellant that the "AUO" pay stipend was no longer to be considered part of her pay rate and therefore her weekly compensation would be reduced from \$997.90 to \$611.39 effective with the check she received December 10, 1994. The Office also advised appellant that in a separate action the difference in compensation paid for the period May 10 to November 12, 1994 would be declared an overpayment. The change in the compensation pay rate was due to the passage of Public Law 103-66 which amended 19 U.S.C. § 267 (a) to state unequivocally that additional pay for customs inspectors received between the hours of 5:00 p.m. to 8:00 a.m. on Sundays and holidays should be considered overtime pay.

In a letter dated June 1, 1995, the Office advised appellant that it had made a preliminary determination that there was a \$7,131.30 overpayment in compensation due to an AUO stipend

that was included in compensation appellant received for the period May 10 through November 12, 1994. The Office determined that the correct weekly pay rate was \$611.39 based on appellant's March 8, 1994 injury. The Office also determined that appellant was without fault in the creation of the overpayment but had been erroneously paid \$18,411.30 rather than \$11,280.08 to which she was entitled. The Office advised appellant to submit additional evidence if she disagreed with the preliminary determination and requested that she complete an overpayment questionnaire. By decision dated December 11, 1995, an Office hearing representative determined the case was not in posture for decision as the Office had not issued a formal decision on appellant's proper pay rate. In a decision dated June 12, 1996, the Office determined that appellant's proper weekly pay rate was \$611.39. The Office noted that while in the performance of duty in March 1994 appellant sustained thoracic and left shoulder strains. The Office accepted the case for temporary total disability and began payment of compensation May 25, 1994. The Office noted that appellant continued to work after she filed the earlier claim for bilateral arm strains and left elbow strain beginning December 20, 1993, and she did not stop work or become temporarily totally disabled until after her new injury in March 1994. The Office found that appellant's pay rate must be reduced effective November 13, 1994 and that there had been an overpayment in compensation for the period May 25 to November 12, 1994.

On June 29, 1996 appellant requested a preresumption hearing and submitted evidence, including an overpayment questionnaire which was signed April 27, 1997. In a decision dated May 30, 1997, an Office hearing representative affirmed the Office's June 12, 1996 decision that appellant improperly received an AUO stipend for the period in question creating an overpayment in compensation and was not entitled to waiver of recovery of the overpayment. The Office hearing representative determined that appellant was not temporarily totally disabled until March 1994, and therefore the proper pay rate was effective that date rather than December 20, 1993 as appellant argued. Consequently the Office hearing representative found that there had been a \$7,131.30 overpayment in compensation.

The Board finds that the Office properly found that there was an overpayment in compensation in the amount of \$ 7,131.30 and that appellant was not at fault in the creation of this overpayment.

In the present case, the Office initially determined that appellant was entitled to an AUO pay stipend as part of her normal compensation rate for temporary total disability beginning March 1994. However, due to passage of Public Law 103-66, which amended 19 U.S.C. § 267 (a), the regulation governing pay rates, the Office determined in November 1994 that appellant could no longer receive her AUO stipend because it had been determined that such stipend was overtime pay for all claims by customs inspectors after January 1, 1994. Therefore, appellant could no longer receive this increment of pay as compensation.<sup>1</sup> As the Office found, appellant was not deemed to be totally disabled until after her March 1994 injury. Contrary to appellant's arguments on appeal, this injury was not a recurrence of her December 1993 injury and was a new and separate traumatic injury caused by a fall from an airplane wing on March 5, 1994. Thus, the Office properly determined that appellant was not entitled to compensation until after January 1, 1994 and her compensation rate was governed by Public Law 103-66. Accordingly appellant was not entitled to the AUO pay stipend for the period beginning May 10, 1994

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<sup>1</sup> See 5 U.S.C. § 8114(e).

through November 12, 1994 when the Office corrected appellant's pay rate. In addition as the Office hearing representative found, this overpayment in compensation was not caused by appellant and she was not involved in the creation of the overpayment. Nonetheless, appellant is not permitted to accept any overpayment resulting from the Office's negligence.<sup>2</sup>

The Board also find that the Office properly denied waiver of recovery of the overpayment pursuant to section 8129 (b) of the Act.

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 this subchapter [Act] or would be against equity and good conscience."<sup>4</sup> 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.<sup>5</sup> The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purposes of the Act" or the "against equity and good conscience" standards<sup>6</sup> pursuant to the guidelines set forth in sections 10.322 and 10.323 of the regulations.<sup>7</sup>

Section 10.322 of the regulations<sup>8</sup> provides in pertinent 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 that:

"(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...."

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<sup>2</sup> See generally *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> *George E. Dabdoub*, 39 ECAB 929 (1988).

<sup>6</sup> See *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

<sup>7</sup> 20 C.F.R. §§ 10.322-23.

<sup>8</sup> 20 C.F.R. § 10.322

The terms “income,” “expenses,” and “assets” are defined in section 10.322(b), (c) and (d).<sup>9</sup> For waiver to “defeat the purpose of the Act” standard, appellant must show both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base.<sup>10</sup>

Section 10.323 of the regulations<sup>11</sup> provides in pertinent part:

“(a) Recovery of an overpayment is considered to be ‘against equity and good conscience’ when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in determining severe financial hardship are the same as in section 10.322.

“(b) 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....”

The Office hearing representative found that recovery of the overpayment would not defeat the purpose of the Act nor be against equity or good conscience. He indicated that appellant reported a monthly income of \$3,940.00 per month for her spouse, and \$1,804.00 every four weeks for herself for a total monthly income of \$5,872.00 for her household of four people. The Office hearing representative determined that some of the items listed on the overpayment questionnaire were excessive or did not constitute ordinary household expenses. He reduced appellant’s reported expenses in the following manner: clothing allowance of \$900.00 a month reduced to \$175.00 per month based on the Department of Labor Bureau of Labor Statistics (BLS) survey of consumer expenditures for 1991 which indicated a yearly average of clothing expenses for a family of 2.5 in the southern region of \$1,115.00 adjusted for a family of 4 and allowing for a 3 percent yearly cost adjustment for the intervening six years; and deletion of the American Express monthly bill of \$600.00 as it is not a revolving charge. Therefore, the Office hearing representative reduced appellant reported expenses of \$6,484.00 to \$5,159.00 after deducting the \$1,325.00 in expenses for clothing and American Express. Based on the total family income of \$5,872.00 dollars, he determined that because the family income exceeded the ordinary and necessary living expenses by \$713.00, recovery of the overpayment would not defeat the purposes of the Act and or be against equity and good conscience. Although appellant alleged that her husband was in ill health and that his future earning capacity was uncertain, this allegation is not relevant to appellant’s then present financial status. Therefore, the Office properly considered all of the relevant factors in determining that appellant did not need substantially all of her income to meet living expenses and did not qualify for waiver under the “defeat the purpose of the Act” standard. Moreover, appellant did not establish that she had

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<sup>9</sup> *Id.*

<sup>10</sup> See *George E. Dabdoub, supra* note 5; *Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>11</sup> 20 C.F.R. § 10.323.

relinquished any valuable right or changed her position for the worse. The Office did not abuse its discretion in denying waiver of recovery of the overpayment.

The Board further finds that the Office properly required repayment by withholding \$300.00 every four weeks from appellant's continuing compensation.

Section 10.321(a)<sup>12</sup> provides that if overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payment of compensation, "having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardships upon such individual."

The Office hearing representative determined that appellant could reasonably make payments of \$300.00 every four weeks to be deducted from future compensation payments in accordance with 20 C.F.R. § 10.321 (a) as her monthly family income exceeded her family expenses by \$713.00. The Board finds that, in determining this repayment schedule, the Office rendered due regard to the factors set forth in section 10.321<sup>13</sup> and the repayment schedule is not unreasonable under the circumstances.

The decision of the Office of Workers' Compensation Programs dated May 30, 1997 is hereby affirmed.

Dated, Washington, D.C.  
November 4, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>12</sup> 20 C.F.R. § 10.321(a).

<sup>13</sup> See *Carroll R. Davis*, 46 ECAB 361 (1994).