

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANTOINETTE L. ROSS and U.S. POSTAL SERVICE,  
SOUTH SUBURBAN POST OFFICE, Bedford Park, IL

*Docket No. 98-1165; Submitted on the Record;  
Issued January 19, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that there was an overpayment in the amount of \$12,552.40 during the period August 1, 1994 through November 30, 1996 inasmuch as appellant received compensation based on an incorrect pay rate effective date; and (2) whether the Office abused its discretion in denying waiver of recovery of the overpayment.

On January 23, 1996 appellant, then a 44-year-old letter sorting machine operator, filed a claim for an occupational disease (Form CA-2) alleging that she first became aware of her carpal tunnel syndrome on July 3, 1982.<sup>1</sup> Appellant also alleged that she first realized that her condition was caused or aggravated by her employment on June 3, 1985.

By letter dated August 7, 1996, the Office accepted appellant's claim for bilateral tendinitis and thoracic outlet syndrome. By letter dated August 16, 1996, the Office additionally accepted appellant's claim for left carpal tunnel syndrome.

In a February 19, 1997 letter, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$12,552.40 because compensation had been paid based on an incorrect effective date and pay rate. The Office further advised appellant that she was without fault in the creation of the overpayment. The Office also advised appellant that she had the right to submit any additional evidence or arguments if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment and if she believed that recovery of the overpayment should be waived. Additionally, the Office advised appellant that she could request a precoupment hearing before an Office representative. In a March 14, 1997 letter, appellant requested a precoupment hearing accompanied by financial documents.

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<sup>1</sup> Appellant resigned from the employing establishment on September 17, 1994.

By decision dated December 12, 1997, the hearing representative finalized the Office's preliminary determination that an overpayment had occurred in the amount of \$12,552.40 and that appellant was without fault in the creation of the overpayment. The Office found that appellant was not entitled to a waiver of recovery of the overpayment. The Office further requested repayment of the overpayment in full.

The Board has duly reviewed the case record in this appeal and finds that the Office properly found that there was an overpayment in the amount of \$12,552.40 during the period August 1, 1994 through November 30, 1996 inasmuch as appellant received compensation based on an incorrect pay rate effective date.

In this case, the record contains evidence which shows that appellant received an additional \$12,552.40 in compensation during the period August 1, 1994 through November 30, 1996 for her accepted employment injuries. The Office determined that appellant received compensation based on an incorrect pay rate effective date according to information received from the employing establishment. Specifically, in a November 7, 1996 letter regarding appellant's receipt of a lump-sum payment, the employing establishment advised the Office that the correct effective date should have been February 1, 1994 rather than August 1, 1994 and the correct pay rate should have been 66 2/3 percent rather than 75 percent. At the hearing, appellant testified that when she received her lump-sum payment on October 28, 1996 she did not know that it was based on an incorrect pay rate and effective date. Inasmuch as appellant did not allege or submit evidence to show that she did not receive a \$12,552.40 overpayment, the Board finds that appellant received such an overpayment. Further, since appellant did not know that her lump-sum compensation was based on an incorrect effective date and pay rate, the Office properly found that appellant was without fault in the creation of the overpayment.

The Board further finds that the Office did not abuse its discretion in denying waiver of 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>2</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>3</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 only 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

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<sup>2</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>3</sup> 5 U.S.C. § 8129(b).

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>4</sup> For waiver under this standard, appellant must show both that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base.<sup>5</sup> An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>6</sup>

In this case, appellant completed a Form OWCP-20 overpayment recovery questionnaire dated March 14, 1997, submitted additional financial documents and testified at an oral hearing regarding her income, expenses and assets. The questionnaire and appellant's hearing testimony revealed monthly expenses in the amount of \$2,781.00<sup>7</sup> subtracted from appellant's monthly income of \$2,200.00,<sup>8</sup> which leaves appellant with minus \$581.00. Although appellant's monthly expenses exceed her monthly income by more than \$500.00, appellant's questionnaire and hearing testimony revealed that appellant has assets that exceed \$5,000.00. Specifically, the record reveals that appellant has assets in the amount of \$10,344.00.<sup>9</sup> Inasmuch as appellant's

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<sup>4</sup> 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." See 20 C.F.R. §§ 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant 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. See *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if her monthly income does not exceed monthly expenses by more than \$50.00; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6-200.6(a)(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991).

<sup>5</sup> *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9-200(6)(a) (September 1989).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9-200.6(a)(1) (September 1989).

<sup>7</sup> The questionnaire revealed monthly expenses of \$364.00 for rent or mortgage, \$400.00 for food, \$250.00 for clothing, \$660.00 for utilities, \$981.00 for miscellaneous expenses, \$370.00 for a loan and \$100.00 for her mutual fund company. At the hearing, appellant's testimony clarified her monthly expenses which included \$600.00 for rent, \$590.00 for a home mortgage, \$300.00 for utilities, \$369.00 for a car payment, \$117.00 for car insurance, \$125.00 for gas and car maintenance, and \$30.00 for a credit card payment. Appellant testified that the \$370.00 on her questionnaire was for her car loan and that \$100.00 for her mutual fund company should not have been noted as a debt.

<sup>8</sup> The record indicated that, subsequent to the hearing, appellant received compensation in the amount of \$14,339.00 for the period April 12 through October 11, 1997, \$2,206.00 for the periods October 12 through November 7 and November 8 through December 6, 1997, and that appellant was placed on the periodic rolls to receive regular payments in the amount of \$2,207.00 every 28 days.

<sup>9</sup> Specifically, the questionnaire revealed that appellant had \$90.00 in cash on hand, \$2,500.00 in her checking account and \$23,000.00 in stocks and bonds. However, at the hearing, appellant testified that she currently had approximately \$7,754.00 in her mutual fund account.

assets exceed the maximum allowable, the Board finds that appellant is not entitled to waiver of recovery of the overpayment under the “defeat the purpose of the Act” standard. The Board does not have jurisdiction of recovery of the overpayment from receipts no longer receiving compensation payments.<sup>10</sup>

Regarding the standard “against equity and good conscience,” section 10.323(b) 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 payment which created the overpayment, relinquished a valuable right or changed his position for the worse.<sup>11</sup>

The evidence in this case does not establish that appellant would suffer undue hardship in repaying the overpayment in the amount of \$12,552.40. Further, the record does not establish that appellant relinquished a valuable right or changed her position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that she made a decision she otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.<sup>12</sup> Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown. Therefore, the Board finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

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<sup>10</sup> *Robert S. Luciano*, 47 ECAB 793 (1996); *Lewis George*, 45 ECAB 144 (1993).

<sup>11</sup> 20 C.F.R. § 10.323(b).

<sup>12</sup> *Forrest E. Brown, II*, *supra* note 5 at 285-86; Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayments Actions*, Chapter 9-200.6(b)(3) (September 1989).

The decision of the Office of Workers' Compensation Programs dated December 12, 1997 is hereby affirmed.

Dated, Washington, D.C.  
January 19, 2000

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member