

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERTA A. COUGHLIN and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

*Docket No. 98-1534; Submitted on the Record;
Issued May 26, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether an overpayment of compensation in the amount of \$10,746.00 occurred for the period January 29, 1996 through February 1, 1997; (2) whether appellant was at fault in the creation of the overpayment, such that she was not entitled to waiver of recovery of the overpayment; and (3) whether the Office of Workers' Compensation Programs properly required recovery of the overpayment at a rate of \$200.00 per four weeks.

The Office accepted that appellant sustained lumbar and pelvic sprains in the performance of duty on January 15, 1990. She stopped work, was placed on the periodic rolls and received compensation for temporary total disability until February 1, 1997.

Appellant returned to part-time work at the employing establishment effective January 29, 1996. She notified the Office three times that she had returned to part-time work, but she continued to receive and keep checks issued for total disability until February 1, 1997.

In a preliminary determination dated February 20, 1997 the Office found that an overpayment of compensation existed because appellant was receiving compensation for wage loss at total disability at the same time she was receiving a paycheck from the employing establishment for working four hours per day. The Office calculated that the overpayment amounted to \$10,746.00. Further, a preliminary determination was made that appellant was at fault in the creation of the overpayment as she kept and cashed compensation checks that she knew, or should have known, she was not entitled to for the same period during which she received wages from the employing establishment.

Appellant requested a precoupment hearing which was held on September 23, 1997. At the hearing she testified that although she knew she was receiving checks that she was not entitled to, she believed that she was not at fault in the creation of the overpayment because she had notified her employer and the district Office of the fact that she was receiving checks that she was not entitled to. The record supports that appellant had notified the Office of the fact that

she was erroneously receiving total disability compensation, but that the Office took no action until February 2, 1997. She claimed that she called the Office practically every month advising that she was being overpaid, but that since it continued, she kept spending and going on with life as usual. Appellant also provided testimony concerning the current financial situation of her family and stated that a previously submitted OWCP Form 20 dated March 20, 1997 was still an accurate assessment of her family's financial situation.¹

By decision dated December 19, 1997, the hearing representative found that the overpayment of compensation had occurred in the amount of \$10,746.00, that appellant was at fault in the creation of the overpayment, that a waiver could therefore not be considered and that appellant had \$600.00 discretionary income per month after expenses which was available from her continuing compensation benefits for partial disability, from which to recoup the overpayment at the rate of \$200.00 per month.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$10,746.00 for the period January 29, 1996 through February 1, 1997. The record establishes that during that time period she received and kept compensation checks for temporary total disability at the same time she was receiving wages for four hours per day employment.

The Board notes that appellant acknowledged that she kept the checks issued for temporary total disability during that period when she was also receiving wages from the employing establishment. Consequently, the Board finds that a \$10,746.00 overpayment occurred as alleged.

The Board finds that appellant was at fault in the creation of the overpayment, such that she is not entitled to waiver of recovery of the overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment of compensation shall be recovered by the Office 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." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320 of the implementing federal regulations³ provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and

¹ Appellant's request for a waiver of recovery of a previous \$6,073.52 overpayment was granted on January 27, 1997 following a hearing during which she was found to be without fault. The Office found at that hearing that appellant's expenses exceeded her income by just over \$100.00.

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.1 *et seq.*

mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

In this case, the Office properly determined that appellant was not without fault in the creation of the overpayment, as she acknowledged advising the district Office of the fact that she had received compensation for temporary total disability, to which she knew she was not entitled, while she was also receiving wages for working four hours per day. This evidence demonstrates that she knew that the payments she received were incorrect. The Office found that the third standard applied in this case as, even though appellant knew that she was not entitled to compensation for temporary total disability, she accepted, kept, cashed and used the erroneous checks for her benefit. As appellant is found to be at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment.⁴

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵ Section 8129(b) describes the only exception to the Office’s right to adjust later payments or to recover overpaid compensation:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”⁶

This section prohibits adjustment or recovery when the individual is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. However, in this case appellant is not without fault in the matter of the creation of the overpayment, such that the Office may, in accordance with section 8129(a), adjust later payments of continuing compensation to recoup the overpayment.

⁴ See e.g. *Larry D. Strickland*, 48 ECAB 669 (1997); *Nina D. Newborn*, 47 ECAB 132 (1995); *Bonnye Matthews*, 45 ECAB 657 (1994).

⁵ *Carol M. Gianfrancisco*, 47 ECAB 205 (1995).

⁶ 5 U.S.C. § 8129(b).

With respect to a determination of the amount of withholding from appellant's continuing compensation checks, 20 C.F.R. § 10.321(a) of the Office's regulations provides that, if an overpayment has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments 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 hardship upon such individual.⁷

In this case, the Office reviewed appellant's Form OWCP-20, which reveals that appellant receives \$893.00 every 28 days in the form of partial disability compensation, that appellant and her spouse receive \$2,676.00 each month in wages, that they own approximately \$2,700.00 in stocks and bonds, that appellant's family's monthly income is at least \$3,569.00 per month and that her family's ordinary and necessary monthly living expenses amount to \$2,965.00 per month. The Office determined this left approximately \$600.00 per month discretionary income available for recovery of the overpayment. The Office properly determined that appellant could afford to have \$200.00 deducted from her continuing compensation payments every 28 days in order to recover the overpayment.

The Board has frequently explained that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.⁸ Appellant's monthly income totals \$3,569.00; her ordinary and necessary monthly living expenses total \$2,965.00. Because this leaves \$604.00 in monthly funds available for debt repayment, the Board finds that appellant does not need substantially all of her current income to meet current ordinary and necessary living expenses.

With respect to the \$200.00 withheld from appellant's continuing compensation payments to recover the amount of the overpayment, the Board notes that the amount of adjustment lies within the Office's discretion⁹ and finds that the Office properly exercised that discretion in this case. The analysis that determines the amount of adjustment, including consideration of the factors articulated in section 10.321(a), is substantially similar to that used to determine waiver. The Office correctly considered the factors enumerated in section 10.32(a) and found that after \$200.00 is added to appellant's ordinary and necessary monthly expenses, her current monthly income still exceeds her expenses by significantly more than \$50.00, such that it was not

⁷ See *Larry D. Strickland*, *supra* note 4; *Ruth Moreno Rios*, 48 ECAB 587 (1997); *Norman R. Moon*, 42 ECAB 947 (1991); *Lucille Peacock*, 42 ECAB 470 (1991).

⁸ *Id.*

⁹ See 20 C.F.R. § 10.321(a).

unreasonable. Therefore, the Board finds that the Office did not abuse its discretion by withholding \$200.00 from appellant's continuing compensation payments.¹⁰

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹¹ No such evidence of abuse of discretion has been demonstrated in this case.

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 19, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 26, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ On appeal appellant submitted "new" evidence regarding her "actual" status of bills and monthly expenses, arguing that her automobile insurance had gone up, the value of her stocks had gone down and that her home insurance and utility bills had gone up, resulting in her discretionary monthly income being only \$317.00. The Board notes that even with this reduced amount of discretionary monthly income, appellant's income exceeds her monthly expenses plus \$50.00 by more than \$267.00 which leaves that amount of discretionary income available for repayment of the overpayment.

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).