

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRINA R. PETERS and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 00-2674; Submitted on the Record;
Issued August 20, 2001*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$2,180.04; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly sought recovery of the overpayment amount from appellant's schedule award entitlement.

On May 1, 1996 appellant, then a 33-year-old flat sorter machine operator, was injured in the performance of duty when her chair fell apart causing her to hurt neck and right shoulder. The Office accepted the claim for a neck sprain and later expanded it to include right shoulder tendinitis and right shoulder impingement. Appellant received compensation for intermittent periods of wage loss. She also received a schedule award on June 7, 2000 for five percent permanent impairment of the right upper extremity.

On March 6, 2000 the Office made a preliminary determination that an overpayment occurred in the amount of \$2,180.04.¹ The Office advised appellant that a finding had been made that she was without fault in the creation of the overpayment as she could not be expected to determine her pay rate or compute the amount compensation she was due based on the hours worked. The Office further informed appellant of her right to contest the amount of the overpayment or request a waiver of the overpayment by one of three methods which included a request for a telephone conference, a request for a written review of the record or a request for a

¹ The Office noted that appellant had received compensation based on work for 40 hours a week at the hourly rate of \$12.82 from June 17, 1996 to February 3, 1997. The weekly pay rate was calculated as \$571.21 (\$12.82 times 40 equals \$512.80 plus \$58.41 in Sunday premium pay and night differential). However, the employing establishment later clarified that appellant's average work hours on a weekly basis for the period in question was only 31 hours as a part-time employee. Accordingly, the Office calculated the correct weekly pay rate for compensation as \$429.52 (\$12.82 times 31 equals \$397.42 plus \$32.10 in Sunday premium pay and night differential). The Office indicated that appellant had received \$11,168.89 in compensation for the period of June 17, 1996 to February 3, 1997 although she was only entitled to receive \$8,988.85. The Office determined that an overpayment occurred in the amount of \$2,180.04.

prerecoupment hearing. If appellant wished to request a waiver of the overpayment, she was specifically directed to submit financial information by completing an Office overpayment recovery questionnaire.

In a decision dated May 26, 2000, the Office determined that the circumstances of appellant's case did not warrant a waiver of the recovery of the overpayment and directed recovery of the amount of the overpayment from appellant's future entitlement to a schedule award.²

The Board has duly reviewed the case record and finds that appellant received an overpayment in the amount of \$2,180.74. The calculation of the amount of the overpayment was explained in the Office's March 6, 2000 letter and is not disputed by appellant.

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

Section 8129 of the Federal Employees' Compensation Act³ 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.⁴

Section 10.436 of the implementing regulations⁵ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

"(a) The Beneficiary from who [the Office] seeks recovery means substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and

"(b) The Beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics."⁶

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience

² Appellant had filed a CA-7 claim for a schedule award on December 27, 1998.

³ 5 U.S.C. § 8129.

⁴ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁵ 20 C.F.R. § 10.436 (1999).

⁶ An individual's assets must 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 prerecoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁷

Section 10.438 of the regulations provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of [the Act] or be against equity and good conscience.”⁸

In the instant case, appellant failed to complete the overpayment recovery questionnaire as directed by the Office.⁹ Without an accurate and complete breakdown of appellant’s monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether monthly income exceeds monthly expenses by more than \$50.00 or whether assets exceed the specified resource base.¹⁰ There was also no information of record from which to conclude that appellant would be under severe financial hardship if recovery was sought because she had relinquished a valuable right or changed her position for the worse.¹¹

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines. As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.

The Board additionally finds that the Office properly elected to recover the overpayment by withholding the amount from appellant’s continuing compensation.

As noted above, the Office’s regulations provide that, in the case of an overpayment to an individual entitled to further compensation, proper adjustment will be made by reducing subsequent payments having due regard to the financial and other factors involved. In this case, appellant failed to submit any financial information to the Office as requested. The Office therefore reasonably determined to withhold the amount of overpayment from appellant’s

⁷ 20 C.F.R. § 10.437 (1999).

⁸ 20 C.F.R. § 10.438 (1999).

⁹ In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in denial of waiver, and no further requests for waiver shall be entertained until such time as the requested information is furnished. *See* 20 C.F.R. § 10.438 (1999).

¹⁰ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹¹ Although appellant submitted financial information subsequent to the Office’s May 28, 1999 decision, the Board does not have jurisdiction to consider evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

schedule award entitlement.¹² The Board finds that the Office did not abuse its discretion in making this determination.

The decision of the Office of Workers' Compensation dated May 26, 2000 is hereby affirmed.

Dated, Washington, DC
August 20, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹² See *Levon H. Knight*, 40 ECAB 658 (1989).