

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. ADAMS and TENNESSEE VALLEY AUTHORITY,
BROWN'S FERRY NUCLEAR PLANT, Decatur, AL

*Docket No. 00-1826; Submitted on the Record;
Issued December 21, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of cashier fairly and reasonably represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant received overpayments of compensation in the amounts of \$1,101.92 and \$2,070.00; (3) whether the Office abused its discretion by denying waiver of the overpayments; and (4) whether the Office properly required repayment of the overpayment by withholding \$42.00 and \$84.00 every four weeks from appellant's continuing compensation.

On February 13, 1991 appellant, then a 42-year-old carpenter, sustained an employment-related lumbar strain. He stopped work on February 20, 1991 and did not return. Appellant was referred for vocational rehabilitation in 1991 and 1997. The Office continued to develop the claim and, finding that a conflict existed between the opinions of appellant's treating physician, Dr. Robert A. Sparks and Dr. Howard G. Miller, who performed a second-opinion evaluation. Appellant was referred, together with a statement of accepted facts, a set of questions and the medical record to Dr. Dale Culpepper for an impartial medical evaluation.¹

In a report dated January 26, 1999, Dr. Culpepper diagnosed chronic lower back pain and advised that appellant could not return to his previous position as a carpenter. In a work capacity evaluation dated January 28, 1999, he advised that appellant could work eight hours a day with restrictions on his physical activity including walking, standing, pushing, pulling and lifting 4 hours a day and twisting, squatting and climbing 2 hours a day with a 20-pound weight restriction.

By report dated April 15, 1999, Ann Darnell, a rehabilitation counselor, completed a labor market survey and determined that the position of cashier, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's physical capabilities. By letter dated

¹ The three physicians are Board-certified in orthopedic surgery.

April 22, 1999, the Office notified appellant that it proposed to reduce his compensation, because he was no longer totally disabled due to residuals of the employment injury and could perform the duties of the selected position for eight hours a day. The Office advised that if appellant disagreed with its proposed action, he should submit contrary evidence or argument within 30 days.

In response, appellant submitted medical reports from Dr. Sparks and a letter dated May 3, 1999 in which he contended that he was still totally disabled and was not vocationally qualified to perform the duties of cashier as he did not have a high school diploma. After reviewing the specific educational and vocational requirements of the selected position, the Office determined that the position did not require that appellant possess a degree. By decision dated August 2, 1999, the Office determined that the cashier position fairly and reasonably represented appellant's wage-earning capacity and found that it was available in his commuting area. His compensation was to be reduced effective August 15, 1999.

On August 28, 1999 appellant requested a review of the written record. In a January 14, 2000 decision, an Office hearing representative affirmed the prior decision.

On March 2, 2000 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,101.92, which arose because no deductions were made for basic life insurance from April 13, 1991 through August 14, 1999. The Office further found that appellant was without fault in the creation of the overpayment.

On March 10, 2000 the Office issued a second preliminary determination that appellant received an overpayment of compensation in the amount of \$2,070.00, which arose because from August 15 to November 6, 1999 he had been paid \$1,901.20 for each compensation period rather than \$1,228.00, adjusted to reflect his wage-earning capacity as a cashier. The Office further found that appellant was at fault in the creation of the \$2,070.00 overpayment.

On April 11, 2000 a telephonic conference was conducted regarding both overpayments.

In separate decisions dated May 25, 2001, the Office finalized its preliminary determinations that appellant received two overpayments in compensation but found that he was without fault in the creation of both of them. The Office determined that recovery of the overpayments would be made from appellant's continuing compensation at a rate of \$126.00 every 28 days with \$42.00 being applied to the \$1,101.92 overpayment and \$84.00 being applied to the \$2,070.00 overpayment.

The Board finds that the Office met its burden of proof to reduce appellant's compensation, based on his ability to perform the duties of the selected position of cashier.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.² Under section 8115(a) of the Federal Employees'

² *Dorothy Lams*, 47 ECAB 584 (1996).

Compensation Act,³ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.⁴

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵

In this case, as provided by Office procedures, a rehabilitation counselor prepared a description of the selected cashier position, which included an indication of the physical requirements. While the description completed on April 15, 1999 indicates that, according to the *Dictionary of Occupational Titles*, the position is "sedentary," the position as described in the *Dictionary of Occupational Titles* indicates that the physical demands of the position are "light" rather than "sedentary." Dr. Culpepper, who prepared an independent medical evaluation for the Office, found that appellant could engage in occasional lifting of up to 30 pounds with frequent lifting in the range of 20 to 30 pounds, which is within "light" physical demands which are described as the lifting requirement of the selected position. The Board therefore finds that the position of cashier is medically suitable. The Office thus met its burden of proof in reducing appellant's compensation.

The Board further finds that appellant received overpayments in the amount of \$1,101.92 and \$2,070.00.

An overpayment in compensation based on underwithholding of optional life insurance is subject to the waiver provisions of 5 U.S.C. § 8129, as well as other statutes and regulations relative to overpayments and collection of debts.⁶

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

⁵ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

⁶ Under the FEGLI program, most civilian federal employees are eligible to participate in basic life insurance and one or more options. Basic life coverage is effective unless waived and premiums for basic and optional coverage are withheld from the employee's pay. The Act and its regulations provide that an employee entitled to disability compensation may continue basic life insurance without cost under certain conditions and may also retain the optional life insurance. At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status. If the compensation chooses to continue basic and optional coverage, the schedule of deductions made while the compensation was an employee will be used to withhold premiums from compensation payments. Thus, while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums. When an underwithholding of premiums occurs, the entire amount is an overpayment of compensation because the Office must pay the full premium to Office of Personnel Management upon discovery of the error. *James Lloyd Otte*, 48 ECAB 334 (1997).

The record in this case indicates that from April 13, 1991 to August 14, 1999 no deductions for basic life insurance were made from appellant's compensation. The Office, therefore, properly determined that this underdeduction constituted an overpayment of compensation in the amount of \$1,101.92. Furthermore, the record indicates that appellant had been paid at the full pay rate of \$1,901.20 for each compensation period from August 15 to November 6, 1999 rather than the \$1,228.00 adjusted rate. He therefore received an overpayment of compensation in the amount of \$2,070.00.

The Board further finds that, while appellant was not at fault in the creation of the overpayments, he is not entitled to waiver.

Section 8129(a) of the Act⁷ 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.⁸ 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 payments 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."⁹

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.¹⁰ The Office must 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," pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.¹¹

Section 10.436 of relevant Office regulations states:

"Recovery of an overpayment will defeat the purpose of the A[ct] if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) The beneficiary from whom [the] O[ffice] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) The beneficiary's assets do not exceed a specified amount as determined by [the] O[ffice] from data

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8129(a).

⁹ 5 U.S.C. § 8129(b).

¹⁰ See *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹¹ 20 C.F.R. §§ 10.434-10.437 (1999).

furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”¹²

During the telephone conference, appellant indicated that he had a total monthly income of \$4,027.83 and monthly expenses of approximately \$3,350.00. He listed assets totaling \$59,940.36. Because appellant’s monthly income exceeded his monthly expenses by at least \$600.00, the Office properly found that he did not need substantially all of his current income to meet ordinary and necessary living expenses and thus was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt,¹³ or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.¹⁴ In this case, appellant has submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines. The issue on appeal, therefore, is whether the Office’s denial of waiver constituted an abuse of discretion.¹⁵ 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. Therefore, the Office acted within its discretion.

Lastly, the Board finds that the Office properly required repayment by withholding \$126.00 every four weeks from appellant’s continuing compensation.

With regard to the amount withheld from appellant’s continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

¹² 20 C.F.R. § 10.436 (1999). Office procedures provide 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 the Act if both: (a) The individual from whom recovery is sought needs substantially all of his or her current income (including monthly benefits) to meet current ordinary and necessary living expenses and (b) 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. This base includes all of the claimants assets not exempted from recoupment in (iv) below. The first \$3,000.00 or more, depending on the number of the individual’s dependents, is also exempted from recoupment as a necessary emergency resource. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (September 1994).

¹³ 20 C.F.R. § 10.437(a) (1999).

¹⁴ 20 C.F.R. § 10.437(b) (1999).

¹⁵ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the] O[ffice] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the] O[ffice] shall decrease later payments of compensation, taking into account 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 hardship.”¹⁶

The record in this case indicates that appellant had disposable income totaling \$59,940.36 and that his monthly household income exceeded his monthly expenses by at least \$600.00. Hence, the Board finds that the Office gave due regard to appellant’s financial circumstances in determining the rate of repayment in this case and, thus, acted within its discretion in determining that repayment of the overpayment could be accomplished by withholding \$126.00 every four weeks from appellant’s compensation.

The decisions of the Office of Workers’ Compensation Programs dated May 25 and January 14, 2000 are hereby affirmed.

Dated, Washington, DC
December 21, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁶ 20 C.F.R. § 10.441(a) (1999).