

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY M. MARKS and U.S. POSTAL SERVICE,  
POST OFFICE, Suitland, MD

*Docket No. 99-2221; Submitted on the Record;  
Issued February 20, 2001*

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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 determined appellant's pay rate for compensation purposes; (2) whether the Office properly determined that an overpayment of compensation of \$1,206.22 was created during the period May 28, 1995 to April 27, 1996; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the pay rate decision.

The case has been before the Board on prior appeals. In a decision dated April 20, 1998, the Board set aside a September 11, 1995 Office decision with respect to appellant's pay rate for compensation purposes.<sup>1</sup> The Office was directed to make findings as to whether appellant had returned to "regular" full-time employment and if so, whether appellant established a recurrence of disability on December 17, 1998 or May 15, 1989 that would entitle her to an adjusted pay rate under 5 U.S.C. § 8101(4). In a decision dated May 6, 1998, the Board set aside an October 17, 1996 overpayment decision, noting that it was not in posture for decision until the pay rate issue was resolved.<sup>2</sup> The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

In a decision dated October 29, 1998, the Office determined that appellant was not entitled to an adjusted pay rate because she had not returned to regular full-time employment. In a separate decision dated October 29, 1998, the Office determined that appellant had been paid at an incorrect pay rate for the period May 28, 1995 to April 27, 1996.

By letter dated October 26, 1998, the Office advised appellant that a preliminary determination had been made that an overpayment of \$1,206.22 was created during the period

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<sup>1</sup> Docket No. 96-460.

<sup>2</sup> Docket No. 97-776.

May 28, 1995 to April 27, 1996. She was advised that she was not at fault in creating the overpayment and could submit evidence with respect to waiver of the overpayment. In a decision dated January 25, 1999, the Office determined that an overpayment of \$1,206.22 was created and that appellant was not entitled to waiver of the overpayment.

In a decision dated February 8, 1999, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of its October 29, 1998 pay rate decision.

The Board finds that the Office properly determined that the pay rate should be based on the date of injury, not the date of a recurrence of disability.

Under the Federal Employees' Compensation Act,<sup>3</sup> compensation is based on the pay rate as determined under section 8101(4), which defines "monthly pay" as:

"The monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."<sup>4</sup>

The date of injury in this case is March 20, 1985. Appellant returned to a light-duty position in January 1988 and the initial question presented is whether this constituted "regular" full-time employment. In determining whether a claimant has returned to "regular" employment, the Board has indicated that several factors must be considered, including whether the claimant "was performing the duties of a regular position which would have been performed by another employee if appellant did not perform them or whether the job was one which was created especially for him to fill until such time as it could be determined whether he could physically return to the duties of the [date-of-injury job] or would have to be retired on disability."<sup>5</sup> The Board has further stated that "if appellant was placed in a regular classified position which would normally be filled by some other employee (who perhaps was absent because of sickness or other reason)" then it would appear that there was a resumption of "regular" employment.<sup>6</sup> On the other hand, if a job was temporary and merely created for the purpose of determining her future ability to perform the date-of-injury position, then it would not be considered "regular" employment.

The employing establishment stated in an October 23, 1998 letter that the light-duty position did not exist before it was created for appellant; that the work was made up of work that needed to be performed but did not exist as a specific position; that when appellant stopped working the position was not filled by another employee but the work was performed by other

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8101(4).

<sup>5</sup> *Eltore Chinchillo*, 18 ECAB 647 (1967).

<sup>6</sup> *Id.*

employees; and that after returning to work on January 16, 1988 the clerk position was the only one held by appellant and had she not left work she would have continued in this position.

Based on the above information, the Board must conclude that appellant did not return to “regular” employment. According to the employing establishment, the clerk position was not a regular, classified position that would have been performed by another employee if appellant did not perform the duties. It appears from the October 23, 1998 letter that the position was created to accommodate appellant and did not exist as a regular position that would normally be filled by a specific employee.<sup>7</sup> Accordingly, the Board finds that the evidence does not establish a return to “regular” employment and a pay rate based on a recurrence of disability is not appropriate under section 8101(4). The proper pay rate is the pay rate on the date of injury or March 20, 1985.

The Board further finds that an overpayment of \$1,206.22 was created during the period May 28, 1995 to April 27, 1996.

In this case, appellant was paid compensation during the period May 28, 1995 to April 27, 1996 using a pay rate in effect on November 16, 1988. As the above discussion indicates, the record does not establish that a pay rate for any date other than the date of injury and beginning of disability (March 20, 1985). The Office determined that appellant was paid \$22,947.43 in compensation during this period, but if the correct pay rate had been used in calculating appellant’s compensation, she should have been paid \$21,741.21. Accordingly, an overpayment of \$1,206.22 was created.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Act<sup>8</sup> provides: “Adjustment or recovery 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 the Act or would be against equity and good conscience.”<sup>9</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery 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, respectively, in sections 10.322 and 10.323 of Title 20 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

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<sup>7</sup> Cf. *Ralph W. Moody*, 42 ECAB 364 (1991), where the Board found that the clerk position performed by appellant was a regular classified position that normally would be filled by another employee.

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 5 U.S.C. § 8129(b).

\$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent).<sup>10</sup> Section 10.323 provides 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 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed her position for the worse.

With respect to the submission of financial evidence, the Office’s regulations provide in pertinent part:

“In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in [section] 10.322 [pertaining to waiver of the grounds that recovery would defeat the purpose of the Act], 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.”<sup>11</sup>

In this case, appellant was requested to submit relevant financial information regarding waiver of the overpayment, but there is no indication that appellant provided the necessary financial information. The Board accordingly finds that appellant did not establish entitlement to waiver of the overpayment in this case.

The Board further finds that the Office properly denied appellant’s requests for reconsideration without merit review of the claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>12</sup> the Office’s regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>13</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>14</sup>

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<sup>10</sup> To establish that recovery would defeat the purpose of the Act, appellant must show both that she needs substantially all her income to meet ordinary and necessary living expenses and that her assets do not exceed the established resource base. *See Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>11</sup> 20 C.F.R. § 10.324.

<sup>12</sup> 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

In this case, the record contains brief letters dated November 18, 1998 and January 10, 1999, requesting reconsideration on the pay rate issue. Appellant stated that the dates are incorrect and so is the job title, without providing any additional explanation. It is not clear what dates she believes are incorrect or how the alleged errors are relevant to the pay rate issue. The Board finds that appellant did not meet any of the requirements of section 10.606(b)(2) and therefore the Office properly refused to reopen the claim for merit review.

The decisions of the Office of Workers' Compensation Programs dated February 8 and January 25, 1999 and October 29, 1998 are affirmed.

Dated, Washington, DC  
February 20, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member