

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Erie, PA

*Docket No. 00-1074; Submitted on the Record;
Issued July 2, 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 in the amount of \$9,560.80 was created; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$90.00 per month from appellant's continuing compensation.

In the present case, the Office accepted that appellant sustained a lumbar sprain in the performance of duty on July 8, 1988 and began receiving compensation for temporary total disability. She returned to work part time on or about January 8, 1990. Appellant was placed on disability retirement commencing November 30, 1996.

By letter dated March 31, 1999, the Office advised appellant that it had made a preliminary determination that she had received a \$9,560.80 overpayment of compensation. The Office advised her that an audit of her case revealed that from March 11 to August 12, 1990 appellant worked four hours a day but received compensation for total disability; from August 13 to 17, 1990, appellant worked six hours a day but received compensation for total disability and from August 20 to March 9, 1991, she worked five hours a day but received compensation for total disability. The Office advised appellant that it found her without fault in the creation of the overpayment and that she could submit additional evidence if she disagreed with the fact or amount of the overpayment. The Office noted that, because appellant was not at fault in the creation of the overpayment, recovery of the overpayment could not be made if it would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office advised appellant of her right to a precoupment hearing and requested that she complete an overpayment recovery questionnaire.

In response to the March 31, 1999 letter, appellant requested a waiver of her overpayment and a telephone conference or a personal interview with the claims examiner. She also submitted a completed overpayment recovery questionnaire, which was received by the Office on May 3, 1999. In the overpayment recovery questionnaire, appellant indicated that her monthly

family income totaled \$1,812.80 and that her monthly expenses totaled \$1,773.00 per month. She indicated that she had total assets of \$64,490.09 consisting of \$60.00 cash on hand, \$337.00 checking account balance, \$1,154.66 savings account balance, \$6,174.94 stocks and bonds and \$5,6743.49 for personal property. Under expenses, for the 1-year period from 1998 to 1999, appellant noted that she paid \$3,338.25 in property taxes and stated that her expenses were varied on a monthly basis and indicated that she would provide evidence of her expenses for the past 12 months. She noted that she spent \$451.00 on property insurance, \$336.00 on dental and medical, \$1,315.08 on electric, \$468.81 on oil, \$1,200.00 on lawn maintenance, \$641.00 on auto insurance, \$674.44 on telephone, \$408.00 on cable television, \$120.00 on newspaper, \$132.00 on security system, \$650.00 on donations and contributions, \$300.00 on clothing, \$900.00 on car expenses, \$1,200.00 on holiday and birthday gifts for 5 children and 11 grandchildren, \$2,700.00 on food and household expenses, \$2,400.00 per year on car payments, \$144.00 for garbage removal, \$280.00 for the water conditioner rental and \$64.00 for salt for the conditioner. Appellant also submitted additional miscellaneous expenses including \$535.00 for removal of a large tree, \$165.00 for scaling the driveway, \$125.00 for excavating the drain line, \$1,000.00 for future removal of 2 trees interfering with the drain lines and an unknown cost for replacement of the drain lines to ditch, plus replacement of the garage door opener \$282.00, \$1,377.98 for a special mattress to alleviate back pain and \$71.54 for a special pillow resulting in total expenses of \$21,279.10, which was the equivalent of \$1,773.00 per month. Accompanying the form, appellant submitted documentation for all of her expenses.

In a memorandum to file dated October 15, 1999, the Office noted that a telephone call was made to appellant regarding her request for a telephone conference. The Office noted that she did not have any additional information to support her allegation that there was no overpayment, and that she had provided all of her financial information with her letter requesting a conference. Since appellant did not have any new information no conference was held. The Office also stated that she also noted that she did not believe that she received extra money nor did she rely on the overpaid funds for anything other than normal expenses.

By final decision dated October 15, 1999, the Office determined that an overpayment had occurred in appellant's case in the amount of \$9,560.80 and that appellant was not at fault in the creation of the overpayment but waiver was not warranted. The Office directed repayment at the rate of \$90.00 per periodic rolls check commencing November 7, 1999 until the overpayment was absorbed on or about August 31, 2008. The Office also indicated that charges and interest would be waived. The Office noted that appellant's monthly income was \$1,877.00 with monthly expenses totaling \$1,773.00 and an excess of \$104.00 per month.

The Board finds that the Office properly determined that an overpayment of \$9,560.80 was created in this case.

The record establishes that appellant returned to work at the employing establishment for four hours per day from March 11 through August 12, 1990 but received compensation benefits for total disability for that same period. The record also establishes that appellant worked 6 hours a day from August 13 to 17, 1990 and that appellant worked 5 hours a day from August 20, 1990 to March 9, 1991 but received compensation for total disability for those periods. Therefore, the record establishes that the Office correctly determined that appellant

received an overpayment of compensation benefits in the amount of \$9,560.80 for the period March 11, 1990 to March 9, 1991.

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment and did not abuse its discretion by denying waiver of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter, which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office's refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.¹

Section 8129(a) of the Act² provides that when an overpayment of compensation has been made because of an error or fact of law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. Section 8129(b) describes the only exception to the Office's obligation to adjust later payments.

“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.”³

Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the “defeat the purpose of the [Act]” or the “against equity and good conscience” standards pursuant to the guidelines set forth in sections 10.436 and 10.437 of the Office's regulations respectively.⁴

With regard to the “defeat the purpose of the Act” standard, section 10.436 of Title 20 of the Code of Federal regulations⁵ provides in relevant part:

“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 whom Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by Office from data furnished by the

¹ *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.436 and 20 C.F.R. § 10.437 (1999).

⁵ 20 C.F.R. § 10.436 (1999).

Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”⁶

The Office’s procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including monthly [compensation] 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.”⁷

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.⁸ 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 \$50.00.⁹

In this case, the evidence shows that appellant’s monthly income exceeds her monthly expenses. The record establishes that appellant had a monthly income of \$1,877.00 while her monthly expenses totaled \$1,773.00. Appellant thus had an excess of \$104.00 per month and, therefore, does not need substantially all of her current income to meet ordinary and necessary living expenses and waiver of recovery would not “defeat the purpose of the Act” standard.

With regard to the “against equity and good conscience” standard, section 10.437 of Title 20 of the Code of Federal regulations¹⁰ provides:

“Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(1) (September 1994); see *Robert Wehholz*, 38 ECAB 311 (1986).

⁸ *Forest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (September 1994).

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹⁰ 20 C.F.R. § 10.437 (1999).

made, gives up a valuable right or changes his or her position for the worse. In making such a decision, the Office does not consider appellant's current ability to repay the overpayment."¹¹

The evidence in this case does not establish that appellant would experience severe financial hardship, relinquished a valuable right or changed her position for the worse in reliance on the payment of compensation. To show that a valuable right has been relinquished under section 10.437(b)(1), appellant must show that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹² To show that an individual's position has changed for the worse, it must be shown that the decision would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.¹³ Appellant did not allege that she would experience severe financial hardship, nor did she allege that she relinquished a valuable right or changed her position for the worse in reliance on the payment of compensation.¹⁴

The Board, therefore, finds that the Office did not abuse its discretion in requiring repayment of the overpayment by withholding \$90.00 from appellant's continuing monthly compensation benefits.

Section 10.441(a) of Title 20 of the Code of Federal regulations¹⁵ provides:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to Office 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] Office 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. Should the individual die before collection has been completed, collection shall be made by decreasing later payments, if any, payable under the Act with respect to the individual's death."¹⁶

Based upon appellant's information regarding her income, assets and expenses, the Office's decision to withhold \$90.00 every 4 weeks from appellant's continuing compensation payments was made with due regard to appellant's monthly household income and expenses and is, therefore, appropriate under the circumstances of the case. Therefore, the Board finds that

¹¹ *Id.*

¹² 20 C.F.R. § 10.437(b)(1) (1999).

¹³ 20 C.F.R. § 10.437(b)(2) (1999).

¹⁴ Following the issuance of the Office's October 15, 1999 decision, appellant stated that withholding of funds would affect her ability to pay current and future expenses. However, the Board may not consider such evidence for the first time on appeal.

¹⁵ 20 C.F.R. § 10.441(a)(1999).

¹⁶ *Id.*

recovery of the overpayment by withholding \$90.00 every 4 weeks from appellant's compensation does not constitute an abuse of discretion.

The decision of the Office of Workers' Compensation Programs dated October 15, 1999 is hereby affirmed.

Dated, Washington, DC
July 2, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member