

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLEN C. TIGHE and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Holtsville, NY

*Docket No. 99-1920; Submitted on the Record;
Issued June 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$29,654.92; (2) whether the Office properly determined that appellant was not entitled to waiver of the overpayment; and (3) whether the Office properly determined the rate of adjustment.

On February 5, 1987 appellant, then a 35-year-old tax examiner, injured her head and lower back when she fell at work. The Office accepted the claim for a contusion and hematoma to the head, a contusion to the right buttock and a lumbosacral strain. Appellant was off work from February 5, 1987 until she returned to part-time duty, working four hours per day, on April 28, 1988. Appellant was paid appropriate compensation for total and partial disability.

On July 11, 1998 the Office advised appellant that her wages as a tax examiner on a part-time basis, four hours per day, reasonably represented her wage-earning capacity.¹

On November 4, 1992 appellant sustained another injury at work when she slipped on a waxed floor and fell on her left arm, elbow and hip. The Office accepted the claim for cervical and lumbar sprain. On the CA-1 form, the employing establishment indicated that as of the date

¹ Appellant was advised of her responsibility to inform the Office if she was no longer disabled, if her earnings increased to be equal or higher than those wages paid on the date of injury, or if she was also receiving benefits from the Office of Personnel Management. She was also advised to notify the Office if there was a change in her employment or her wages to include self-employment.

of the November 4, 1992 injury, appellant was working 30 hours per week and was receiving compensation based on a prior claim for partial disability.²

On January 21, 1998 the Office made a preliminary determination that an overpayment occurred in the case from November 4, 1992 through January 3, 1998 in the amount of \$31,475.48 based on the fact that appellant had been working six hours instead of four hours per day for the stated period. The Office determined that appellant was not without fault in the creation of the overpayment since she failed to notify the Office of her increased work hours. The Office further found that appellant should have been reasonably aware that she was receiving compensation for which she was not entitled. Appellant was advised of her right to submit evidence or argument if she disagreed with the amount of the overpayment, if she believed the overpayment occurred through no fault of her own, or if she believed that she was entitled to waiver of the overpayment. She was also informed of her right to a precoupment hearing.

In a February 21, 1998 letter, appellant requested a hearing and challenged the Office's determination that she was at fault in the creation of the overpayment.

In a January 21, 1998 decision, the Office determined that the circumstances of appellant's case did not warrant a waiver of the recovery of the overpayment and directed appellant to reimburse the Office in the amount of \$31,475.48.

On March 15, 1999 appellant completed an overpayment questionnaire (Form OWCP-20) that reported a monthly income of \$885.00 for appellant plus \$795.17 in compensation benefits. Appellant's spouse has income in the amount of \$1,938.00 a month. The family receives \$150.00 per month in social security for a daughter and \$203.33 in rental income.³ This totals a combined income of \$3,972.04 per month.

Appellant also reported on the overpayment questionnaire the following monthly expenses: \$975.00 per month for food and clothing; \$820.00 for rent/mortgagee; \$395.00 for monthly utilities; \$184.00 for automobile payments; \$80.00 for gasoline; \$100.00 for car maintenance; \$150.00 for car insurance; \$300.00 for medical expenses; \$240.00 for charitable

² Appellant was placed on the periodic rolls during April 1988 and received compensation for four hours of wage loss. Based on her second traumatic injury claim, the Office determined that appellant was entitled to two hours of wage loss on the periodic rolls. Thus, appellant was receiving 4 hours of wages from the employing establishment and 6 hours of wage loss based on his 2 workers' compensation claims for a total of 10 hours per day.

³ Appellant submitted a schedule E from her 1997 federal tax forms, reflecting that she and her husband owned three rental properties and only two of which showed a profit/income after expenses. Property A had an annual income of \$6,300.00, minus expenses of \$5,956.00, for a total income of \$344.00. Property C had an annual income of \$6,325.00, minus expenses of \$4,229.00, for a total income of \$2,096.00. Adding the incomes from Properties A and C equals \$2,440.00. Dividing the combined annual income of \$2,440.00 by 12 (number of months per year) equates a total income from rental property of \$203.33 per month. In calculating the expenses from rental property, the Board has not considered depreciation.

contributions; \$170.00 for dental/Medicare expenses; \$455.00 in miscellaneous household expenses;⁴ and \$305.00 for expenses related to credit card debt.

In a decision dated April 29, 1999, an Office hearing representative modified the January 21, 1998 decision to reflect that the correct amount of the overpayment was \$29,654.92.⁵ The Office hearing representative further found that appellant was not at fault in the creation of the overpayment.⁶ However, he determined that recovery of the overpayment was not against good conscience and would not defeat the purpose of the Federal Employees' Compensation Act.⁷ Therefore, the Office hearing representative held that appellant was not entitled waiver of the overpayment and directed recovery from appellant's continuing compensation in the amount of \$250.00 per check until the overpayment was repaid in full.⁸

The Board finds that appellant received an overpayment in the amount of \$29,654.92 for compensation she received from November 4, 1992 through January 3, 1998 based on partial disability for four hours per day when appellant was in fact working six hours per day during that period. The Board notes that the amount of the overpayment is not contested by appellant. Because appellant has not shown, nor does the record otherwise establish, that the Office hearing representative erred in calculating the amount of the overpayment, the Board concludes that it is correct.

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

Section 8129(a) of the Act⁹ provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the

⁴ Appellant alleged expenses for Girl Scout dues of \$15.00, security system \$20.00, dance lessons \$60.00, haircuts \$60.00, entertainment \$120.00, speech therapy \$80.00, veterinary/pet expenses \$30.00 and cable \$70.00.

⁵ The Office hearing representative noted that appellant had reached a third-party settlement under her second traumatic injury claim (case file A02-655276) and that she had reimbursed the Office \$1,820.56 for compensation paid to her for the period of December 20, 1995 through January 6, 1996. Accordingly, the Office hearing representative subtracted the reimbursement payment from the total of the overpayment to reach a revised overpayment amount of \$29,654.92 ($\$31,475.48 - \$1,820.56 = \$29,654.92$).

⁶ The Office hearing representative noted that appellant's testimony established that she had not been specifically instructed by the Office to prove notice of an increase in her hours at work and since she was being paid compensation for two traumatic injury claims, he considered it reasonable to assume that appellant would be confused as to the amount of compensation she was entitled to receive under the *Shadrick* formula; see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ The Office hearing representative determined that appellant's income exceeded her ordinary and necessary living expenses. He specifically disallowed as an expense the alleged credit card payments per month and reduced appellant's food allotment to \$400.00 and clothing allotment to \$144.00 per month based on "the Bureau of Labor Statistic Consumer Expenditure Report for 1997."

⁸ The \$250.00 reduction began for the inclusive 28-day period of April 25 to May 22, 1999. In a decision dated September 28, 1999, the Office determined appellant's loss of wage-earning capacity based on her position as a tax examiner on November 4, 1992, wherein she was working 30 hours per week with wages of \$375.30 per week.

⁹ 5 U.S.C. §§ 8101-8193.

Secretary of Labor by decreasing later payments to which the individual is entitled. Section 8129(b) provides the only exception to this mandatory adjustment:

“Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience.”¹⁰

Because the Office hearing representative found appellant to be without fault in the creation of the \$29,654.92 overpayment, then in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹¹ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship by depriving a currently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that (1) the individual from who recovery is sought needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses and (2) the individual's assets do not 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 recoupment.¹²

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 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.¹³

The Board having duly considered the record finds that the case is not in posture for a decision on the issue of waiver.

Based on the overpayment questionnaire completed by appellant on March 15, 1999, appellant has a monthly income of \$203.33 from rental property and \$3,768.71 for wages and compensation benefits. This totals a combined monthly income of \$3,972.04. Appellant alleges monthly expenses totaling \$4,234.00, which exceeds her family income level.¹⁴

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.436 (1999).

¹² See *Robert F. Kenney*, 42 ECAB 297 (1991).

¹³ 20 C.F.R. § 10.437 (1999).

¹⁴ An individual is deemed to need substantially all of his or her current income to meet 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

The Board notes that in calculating appellant's monthly expenses the Office hearing representative disallowed a portion of appellant's alleged expenses for food and clothing citing a Bureau of Labor Statistics Table.¹⁵ The Office hearing representative, however, did not sufficiently explain why appellant's figure of \$625.00 per month for food and \$350.00 per month for clothing was unreasonable.¹⁶ Furthermore, the Office hearing representative entirely disallowed appellant's credit card expenses, even though appellant indicated that she was required to pay minimum monthly payments on them. The Office hearing representative assumed that appellant's credit card expenses were duplicative of her miscellaneous household expenses, but there is no support for that conclusion in the record. The Board notes that appellant made a specific and itemized list of her miscellaneous expenses, indicating that many items were paid with cash and not by credit card. As such, the Office hearing representative was obligated to ascertain whether appellant's alleged credit card expenses qualified as necessary living expenses. On remand, the Office should examine these amounts for reasonableness, recalculate where appropriate and provide explanatory rationale.

For the reasons stated above, the Board further finds that this case is not in posture for a decision on the issue of whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$250.00 every four weeks from appellant's continuing compensation payments. Consequently, the Board remands the case to the Office for recalculation of the monthly repayment amount, if necessary, based on a correct determination of appellant's ordinary and necessary living expenses in comparison with hers monthly income.

expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00. Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Initial Overpayment Actions*, Chapter 6.200(a)(1) (September 1994); *Stanley K. Hendler*, 44 ECAB 698 (1993).

¹⁵ The Office hearing representative determined that appellant's total income was \$3,972.04 and that her total expenses were \$3,498.00.

¹⁶ See *Linda D. Lane*, 46 ECAB 727 (1995).

The May 28, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
June 27, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member