

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNETHIA B. CALLIS and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, VA

*Docket No. 00-2795; Submitted on the Record;
Issued September 14, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$24,192.33 for the period August 28, 1997 through March 25, 2000, because the Office incorrectly applied night shift differential in computing the pay rate for appellant's weekly compensation checks for total disability; and (2) whether the Office abused its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

On March 26, 1997 appellant, a 43-year-old letter sorting machine operator, filed a claim for benefits, alleging that she sustained injuries to her neck, back and to both arms, which were caused by factors of her employment. On August 11, 1997 the Office accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent right carpal tunnel release surgery on August 28, 1997 and has not returned to work since filing her claim. The Office paid her total disability compensation for appropriate periods and placed her on the periodic roll.

On May 10, 2000 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$24,192.33 for the period August 28, 1997 through March 25, 2000 because she was paid weekly compensation at the incorrect rate of \$1,009.92, instead of the correct rate of \$771.54.¹ The Office found that appellant was without fault in the matter because she could not have been aware that the payments she had been receiving were incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised appellant

¹ A November 22, 1999 letter from the employing establishment to the Office stated that it had indicated erroneously as of August 28, 1997 that appellant was entitled to Sunday premium pay for 16 hours per week at 25 percent of her regular pay, although payroll journals did not indicate that she earned any Sunday premium on the day she was injured, nor in the year prior to the date of injury. The employing establishment noted that, despite the fact that her Sunday premium pay was eliminated in December 1997, the weekly rate of pay calculated by the Office was \$1,009.62, although the weekly rate of pay calculated in the injury compensation office was \$771.54, without the Sunday premium and \$844.29 if the Sunday premium was included.

that when she was found without fault in the creation of the overpayment, recovery might not be made if it can be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that she had the right to request a prerecoument hearing on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the May 10, 2000 letter.

By letter dated May 16, 2000, appellant stated she was entitled to waiver of the overpayment because it was caused by the negligence of the Office; she also claimed that repaying the overpayment would cause extreme hardship. Appellant indicated she was entitled to waiver and requested a decision on fault based on the written evidence. She also attached documents and correspondence from the Office she believed indicated that the overpayment was not her fault. Appellant, however, did not complete and submit the enclosed Form OWCP-20 questionnaire.

In a decision finalized on August 21, 2000, the Office found that appellant was not entitled to waiver. The Office noted that appellant had been advised in its May 10, 2000 letter, that she had 30 days complete and submit the Form OWCP-20 in order to provide the Office with financial information sufficient to determine whether she was entitled to waiver, but that she had failed to provide this information.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$24,192.33 for the period from August 28, 1997 through March 25, 2000. The record shows that appellant received augmented compensation during the period in question because the Office incorrectly applied night shift differential in computing the pay rate for appellant's weekly compensation checks for total disability. The Office calculated the amount of overpayment by taking the amount appellant was paid at the incorrect rate from August 28, 1997 to March 25, 2000, \$102,559.62 and subtracting this figure from the total compensation to which she was actually entitled during this period, \$78,369.29, which amounted to an overpayment of \$24,192.33. Based on this determination, the Office properly found that she received an overpayment of compensation in the stated amount during that period.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment in the amount of \$24,192.33 after finding that appellant was without fault with respect to that overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment 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." Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would "defeat the

² 5 U.S.C. § 8129(a), (b).

purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.436³ and 10.437⁴ of the implementing federal regulations.

With regard to the “defeat the purpose of the Act” standard, section 10.436 of the regulations provides:

“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 [the Office] 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 Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”

With regard to the “against equity and good conscience” standard, section 10.437 of the regulations provides:

“(a) 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.

“(b) 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 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 the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”

³ 20 C.F.R. § 10.436.

⁴ 20 C.F.R. § 10.437.

Finally, section 10.438 of the Office's regulations⁵ provides:

“(a) 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. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of the waiver and no further request for waiver shall be considered until the requested information is furnished.”

In the instant case, appellant did not submit any information regarding her financial situation in response to the Office's May 10, 2000 letter, regarding her overpayment of compensation.⁶ Appellant thus failed to submit sufficient evidence showing that she needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed, as requested by the Office in its May 10, 2000 letter. Therefore, she does not qualify for waiver under the “defeat the purpose of the Act” standard.⁷ Further, there is no evidence in this case nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation he received from August 28, 1997 through March 25, 2000. Accordingly, the Office properly found that appellant's failure to respond to its May 10, 2000 letter by submitting the requested financial information after informing her that she had 30 days, in which to respond and submit evidence supporting a waiver, was sufficient grounds to find that she does not qualify for waiver. Pursuant to its regulations, the Office, therefore, did not abuse its discretion by issuing its August 21, 2000 final decision denying waiver of recovery of the overpayment in the amount of \$24,192.33.

⁵ 20 C.F.R. § 10.438.

⁶ Appellant did submit some monthly bank statements with her appeal to the Board. The Board, however, does not have jurisdiction to review this evidence. 20 C.F.R. § 501.2(c). Appellant can submit these documents and any other evidence to the Office for reconsideration.

⁷ See *Nina D. Newborn*, 47 ECAB 132 (1995).

The August 21, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 14, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member