

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARVA E. BROWN and DEPARTMENT OF DEFENSE,  
DEFENSE LOGISTICS AGENCY, Texarkana, TX

*Docket No. 01-1442; Submitted on the Record;  
Issued August 2, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective January 30, 2000 to reflect her capacity to perform the duties of a receptionist; (2) whether the Office properly determined that an overpayment occurred in the amount of \$17,573.70; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly recovered the overpayment.

With respect to the issue of whether the Office properly reduced appellant's compensation benefits effective January 30, 2000 to reflect her capacity to perform the duties of a receptionist, the Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the July 18, 2000 decision of the Office hearing representative is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.

Following the Office's July 18, 2000 decision, the Office made a preliminary determination on March 1, 2001, that an overpayment had occurred in the amount of \$17,573.70 because although, appellant properly reported that in 1992 and 1993 she earned wages as a licensed practical nurse, the Office failed to adjust appellant's compensation benefits accordingly.<sup>1</sup> The March 1, 2001 preliminary notice found that appellant was not at fault in the creation of the overpayment. The Office asked her to complete and return an enclosed overpayment questionnaire and advised appellant that if she disagreed with the amount of the overpayment, she could submit additional evidence or argument. Appellant was also informed of her right to request waiver of the overpayment, to request a prerecoupment hearing or to request a final decision based on a review of the written record.

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<sup>1</sup> The record indicates that appellant properly reported her earnings on Forms EN-1032, signed on April 9, 1993 and September 21, 1994.

In an April 18, 2001 decision, the Office noted that no reply had been received from appellant with respect to the preliminary overpayment notice. The Office found that appellant was not entitled to waiver of the overpayment. The Office advised her that the overpayment sum of \$17,573.70 would be recovered by withholding \$200.00 from each of her continuing compensation payments until the debt is satisfied.

The Board finds that the Office properly determined that appellant received an overpayment of compensation of \$17,573.70, as the Office failed to adjust appellant's compensation to account for her reported earnings as a licensed practical nurse in 1992 and 1993. The Board notes that the Office properly determined the amount of the overpayment by applying the *Shadrick* formula to compare the earnings reported with the full rate for temporary total disability actually paid to appellant and she has not challenged the amount of the overpayment on appeal.

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

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>2</sup> These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act, which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."<sup>3</sup> As the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it 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 regulations<sup>4</sup> provides that 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 or 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.<sup>5</sup> An individual is deemed to need substantially all of his or her

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<sup>2</sup> See *Robert Atchison*, 41 ECAB 83 (1989).

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> 20 C.F.R. § 10.436 (1999).

<sup>5</sup> An individual's assets must 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; see *Robert F. Kenney*, 42 ECAB 297 (1991).

income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>6</sup>

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.<sup>7</sup>

Under section 10.438 of the regulations it states that “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 on an overpayment would defeat the purpose of Act or be against equity and good conscience.”<sup>8</sup>

In this case, appellant did not complete an overpayment questionnaire as requested by the Office, nor did she provide any financial information to show that recovery of the overpayment would defeat the purpose of the Act. On appeal she contends that she did not receive the March 1, 2001 preliminary overpayment notice and accompanying questionnaire. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>9</sup> This presumption, commonly referred to as the “mailbox” rule, arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>10</sup>

The Office’s denial of waiver in this case rests on the strength of this presumption. Although, appellant currently contends that she did not receive proper notice of the overpayment finding, the March 1, 2001 letter notifying appellant of the overpayment and asking for her response was sent to her address of record, the same address to which all prior correspondence was sent, all of which was duly received by appellant. Therefore, as the record contains no explanation for her failure to respond to the Office’s preliminary overpayment notice and further contains no evidence which rebuts the presumption of receipt raised by the “mailbox rule, the Office’s April 18, 2001 decision was proper. In addition, appellant has not alleged and the evidence does not demonstrate that she relinquished a valuable right or changed her position for the worse in reliance on the erroneous amount of compensation benefits received in this case without adjustment for her earnings in 1992 and 1993. Because appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

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<sup>6</sup> See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

<sup>7</sup> 20 C.F.R. § 10.437 (1999).

<sup>8</sup> 20 C.F.R. § 10.438 (1999).

<sup>9</sup> *George F. Gidicsin*, 36 ECAB 175 (1984).

<sup>10</sup> *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The Board also finds that the Office acted properly in deciding to recoup the overpayment by deducting the \$200.00 from each of appellant's continuing compensation checks until the debt is satisfied.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the 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....”

In the present case, the Office requested that appellant provide financial information to enable it to determine the rate of recovery of the overpayment, having due regard to the factors noted above. Appellant, however, did not provide any information as requested to indicate that her financial circumstances were such that recovery of the overpayment from her continuing compensation would cause her undue financial hardship.<sup>11</sup> The Office's procedure manual notes that if a claimant is being paid compensation or is due accrued benefits from the Office and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.<sup>12</sup> The Board, therefore, finds that the Office did not abuse its discretionary authority in determining that the overpayment sum of \$17,573.70, would be recovered by deducting \$200.00 from each of appellant's continuing compensation checks until the debt is satisfied.

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<sup>11</sup> In establishing the initial collection strategy, the Office must weigh the individual's income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations. When an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collections guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *Gail M. Roe*, 47 ECAB 268 (1995); *see Nina D. Newborn*, 47 ECAB 132 (1995).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.4(c)(2) (September 1994).

The decisions of the Office of Workers' Compensation Programs dated April 18, 2001 and July 18, 2000 are hereby affirmed.

Dated, Washington, DC  
August 2, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member