

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAWN R. SOMMERS and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, OAKLAND CENTER, Fremont, CA

*Docket No. 02-1933; Submitted on the Record;
Issued December 27, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in compensation in the amount of \$20,603.17; (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 \$1,300.00 every four weeks from her continuing compensation.

On May 3, 1998 appellant, then a 35-year-old air traffic controller, filed a traumatic injury claim, alleging that stress at work caused knotting in her shoulders, upper back and neck. She stopped work that day and returned to limited duty on July 13, 1998. By decision dated March 26, 1999, the Office denied the claim, finding the medical evidence insufficient to establish causal relationship. On April 19, 1999 appellant, through counsel, requested a hearing. On August 5, 1999 appellant filed an occupational disease claim, alleging that factors of her employment caused injury to her neck and upper back. The hearing regarding the traumatic injury claim was held on September 28, 1999 and in a December 9, 1999 decision, an Office hearing representative affirmed the March 26, 1999 decision. On January 12, 2000 the Office doubled the claims¹ and on June 6, 2000, accepted that appellant sustained employment-related chronic left trapezius strain and myofascial pain syndrome. In October 2001, she retired from the employing establishment.

By letter dated July 26, 2001, the Office issued a preliminary determination that an overpayment of compensation in the amount of \$20,603.17 occurred in appellant's case because an incorrect pay rate had been used to determine her wage-loss compensation for the period. The

¹ The traumatic injury claim was adjudicated by the Office under file number 13-1161907 and the occupational disease claim under file number 13-1205497, then later became the master file.

Office requested that appellant indicate whether she wished to contest the existence or amount of the overpayment or to request waiver of the overpayment on an attached Office form.² The Office also asked her to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether appellant was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. On August 14, 2001 appellant requested a hearing and submitted financial information.

At the hearing, held on January 28, 2002, appellant testified regarding her income and expenses. In a May 9, 2002 decision, an Office hearing representative finalized the overpayment decision. The hearing representative determined that, while appellant was not at fault, she was not entitled to waiver as her income exceeded her necessary living expenses by at least \$1,300.00 a month. The hearing representative further noted that appellant's \$400.00 monthly charitable contribution and previous loans and gifts to family members were not considered in her ability to repay the overpayment in compensation and found that she had sufficient cash on hand to repay the overpayment in full. By letter dated June 25, 2001, the Office informed appellant that it would withhold \$1,300.00 every 28 days from her continuing compensation. The instant appeal follows.

The Board finds that appellant received an overpayment in compensation in the amount of \$20,603.17.

Section 8116(a) of the Federal Employees' Compensation Act provides:

“(a) While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive a salary, pay or remuneration of any type from the United States, except

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the [Department of Veterans Affairs] unless such benefits are payable for the same injury or the same death.
- (4) Retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services.”

The record in this case indicates that, when determining appellant's pay rate, the Office misread her annual payment as \$89,744.02 when it was actually \$69,744.02. Thus, for the

² The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

period October 9, 1999 to July 14, 2001, she was paid \$133,992.00 when she should have been paid \$113,388.83, yielding an overpayment in compensation of \$20,603.17.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, she is not entitled to waiver.

Section 8129(a) of the Act³ provides that, where an overpayment of compensation has been made “because of an error or fact of law” adjustments shall be made by decreasing later payments to which an individual is entitled.⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments or recovery by the United States may not be made when incorrect payments 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.”⁵

Thus, a finding that appellant was without fault is insufficient in and of itself, for the Office to waive the overpayment.⁶ The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.⁷

Office regulations provide 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.⁸ The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁹ Additionally, the guidelines for recovery of an overpayment from an individual who is without fault were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

⁷ 20 C.F.R. § 10.434-437 (1999).

⁸ *Frederick Arters*, 53 ECAB ____ (Docket No. 01-1237, issued February 27, 2002).

⁹ *Id.*

his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.¹⁰

Office procedures provides that recovery will defeat the purpose of the Act if 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. This base includes all of the claimant's assets that are not exempted from recoupment.¹¹ The first \$3,000.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.¹²

In the instant case, in determining that appellant was not entitled to waiver of the overpayment, the hearing representative reviewed the overpayment questionnaire and financial information submitted by appellant. On the overpayment questionnaire, appellant indicated that she had savings accounts totaling \$53,400.00 and a total monthly income of \$6,345.00 with expenses of approximately \$5,000.00. Thus, as appellant's asset base substantially exceeds the resource base outlined above, the Office properly found that she was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt¹³ or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.¹⁴ In this case, appellant submitted no evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines. The issue on appeal, therefore, is whether the Office's denial of waiver constituted an abuse of discretion.¹⁵ As the evidence in

¹⁰ *John Skarbek*, 53 ECAB ___ (Docket No. 01-1396, issued June 21, 2002).

¹¹ The Office Procedure Manual provides that an individual's assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, etc. Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (September 1994).

¹³ 20 C.F.R. § 10.437(a) (1999).

¹⁴ 20 C.F.R. § 10.437(b) (1999).

¹⁵ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion.¹⁶

Lastly, the Board finds that the Office properly required repayment by withholding \$1,300.00 from appellant's continuing compensation.

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.¹⁷

With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“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.”¹⁸

In the instant case, the Office hearing representative found appellant's overpayment in compensation “due and payable,” based on her listed assets. The Office then informed appellant that it would withhold \$1,300.00 every 28 days from her continuing compensation. The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case and found that appellant's assets were sufficient to require repayment in full. The Office thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$1,300.00 every four weeks from appellant's compensation.

¹⁶ Subsequent to the Office decision dated April 20, 2001, appellant submitted additional evidence regarding her expenses. The implementing regulations of the Office, found at 20 C.F.R. § 10.440(b) provide that the only review of a final decision concerning an overpayment is to the Board and that there is no right to a hearing under section 8124(b) or for reconsideration under section 8128(a) of the Act. The Board has given effect to the Director's exercise of discretion in enacting such regulation and has found that this exercise of discretion by regulation is not in conflict with the intent of the statute as codified in sections 8124(b), 8128(a) or 8129. The regulatory exercise of discretion at section 10.440(b) preserves the opportunity for a prerecoupment hearing in accord with *Califano v. Yamasaki*, 422 U.S. 682 (1979); see *Philip G. Feland*, 48 ECAB 485 (1997).

¹⁷ *Howard R. Nahikian*, 53 ECAB ___ (Docket No. 01-138, issued March 4, 2002).

¹⁸ 20 C.F.R. § 10.441(a) (1999).

The decision of the Office of Workers' Compensation Programs dated May 9, 2002 is hereby affirmed.

Dated, Washington, DC
December 27, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member