

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAE J. STEPHENS and U.S. POSTAL SERVICE,
POST OFFICE, Itasca, TX

*Docket No. 00-1640; Submitted on the Record;
Issued January 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$27,116.94; and (2) whether appellant was at fault in the creation of the overpayment of compensation.

The Office of Workers' Compensation Programs accepted that appellant sustained a lumbar strain and a cervical strain on September 9, 1986 when she slipped on steps while delivering mail as a letter carrier. Appellant stopped work on September 9, 1986 and received continuation of pay until October 27, 1996, followed by compensation for temporary total disability until she returned to work to limited duty on September 11, 1989.

Appellant stopped work on July 31, 1990 and used annual and sick leave until October 13, 1990, on which date the Office resumed payment of compensation for temporary total disability. She returned to limited duty on January 22, 1991. Appellant again stopped work on January 29, 1991 and the Office resumed payment of compensation for temporary total disability.

On July 9, 1998 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$27,116.94 that arose because she was a part-time flexible employee averaging 24 hours of work per week, but was paid compensation at the rate for a full-time employee for the periods October 28, 1986 to September 11, 1989 and from October 13, 1990 to October 19, 1991. The Office also preliminarily determined that appellant was at fault in the creation of this overpayment on the basis that she accepted a payment which she knew or should have been expected to know was incorrect.

Appellant requested a hearing, which was held on June 16, 1999. By decision dated March 8, 2000, an Office hearing representative found that appellant received an overpayment of compensation in the amount of \$27,116.94 that arose because she was a part-time flexible employee averaging 24 hours of work per week, but was paid compensation at the rate for a full-time employee for the periods October 28, 1986 to September 11, 1989 and from October 13,

1990 to October 19, 1991. The Office hearing representative further found that appellant was at fault in the creation of this overpayment on the basis that she accepted a payment which she knew or should have been expected to know was incorrect. The Office hearing representative also found that appellant had refused to submit evidence on her income and expenses, that a determination of her ability to repay the debt could not be made, and that the overpayment therefore was due in full.

The Board finds that appellant received an overpayment of compensation during the periods October 18, 1986 to September 10, 1989 and from October 13, 1990 to November 14, 1992, but that the case is not in posture for a decision on the amount of the overpayment.

At the time of her September 9, 1986 employment injury and the times of her recurrences of disability, appellant was employed as a part-time flexible carrier, working about 24 hours per week. During the periods in question, the Office incorrectly based appellant's pay rate for her compensation on a 40-hour work week. This resulted in an overpayment of compensation.

The case, however, is not in posture for a decision on the amount of the overpayment, because the Office did not properly determine the amount of compensation to which appellant was entitled. To determine appellant's entitlement the Office multiplied the hourly wage appellant received at the time of her injury and her recurrences by the 24 hours that the employing establishment estimated appellant worked, on the average, each week.¹

The employing establishment's estimate that appellant worked, on the average, 24 hours a week is too imprecise to form a basis of appellant's pay rate, especially since appellant testified, at a June 16, 1999 hearing, that she worked "a little bit more than the average of 24 hours" a week during the year immediately preceding her September 9, 1986 employment injury. As appellant worked the whole year immediately preceding her injury, the Office, in order to properly calculate appellant's pay rate for compensation purposes, should have applied the provisions of section 8114(d)(1)(B) of the Federal Employees' Compensation Act.² The case will therefore be remanded to the Office for a proper calculation of appellant's entitlement to compensation during the periods October 18, 1986 to September 10, 1989 and from October 13, 1990 to November 14, 1992, and, based on this calculation, for a new determination of the amount of appellant's overpayment of compensation.

The Board further finds that appellant was at fault in the creation of the overpayment of compensation.

¹ The amount of the overpayment was mitigated by the Office's incorrect payment of compensation at the two-thirds rate for beneficiaries without dependents rather than at the correct three-fourths rate for beneficiaries with dependents.

² 5 U.S.C. § 8114(d)(1)(B) states that average annual earnings in a position for which an annual rate of pay was not fixed is determined by multiplying the average of a fluctuating daily wage by 300 if the employee was employed, as was appellant, on the basis of a 6-day work week. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.4(c)(2) (December 1995) states that the pay rate of a part-time flexible employee who works substantially the entire year prior to the employment injury would be computed under section 8114(d)(1)(B) of the Act rather than under section 8114(d)(3).

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known was incorrect. (This provision applies only to the overpaid individual.)”⁴

The Office properly found that appellant accepted a payment she should have known was incorrect. In an October 14, 1986 letter, sent to appellant before she began receiving compensation, the employing establishment advised appellant that compensation would be paid at $66 \frac{2}{3}$ or 75 percent of her salary. Appellant at the time of her September 9, 1986 injury was earning \$9.92 per hour, which would amount to \$238.08 for 24 hours a work as a part-time flexible carrier. The Office’s first check to appellant, for seven days of compensation from October 28 to November 3, 1986, was in the amount of \$263.83, which is more than appellant was receiving in salary immediately before her injury. When the Office informed appellant of the amount of compensation she would receive on the periodic rolls, its May 27, 1987 letter stated that the weekly rate of pay used to compute her compensation was \$396.80, almost twice what appellant earned as salary. Following her recurrence of disability on July 31, 1990, appellant received compensation payments similarly disproportionate to her earnings as salary immediately preceding the recurrence, and similar advice of a weekly pay rate used to compute compensation that was almost twice her salary. Appellant should have known that the compensation payments she accepted were incorrect.

³ 5 U.S.C. § 8129.

⁴ 20 C.F.R. § 10.433(a).

The decision of the Office of Workers' Compensation Programs dated March 8, 2000 is affirmed with regard to the existence of an overpayment of compensation and the finding that appellant was at fault in the creation of the overpayment. With regard to the amount of the overpayment, the March 8, 2000 decision is set aside and the case remanded to the Office for a proper determination of the amount of the overpayment consistent with this decision of the Board.

Dated, Washington, DC
January 17, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member