

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE A. BECKLEY and DEPARTMENT OF THE NAVY,
NAVAL MEDICAL COMMAND, OAK KNOLL NAVAL HOSPITAL,
Oakland, CA

*Docket No. 00-2282; Submitted on the Record;
Issued January 3, 2002*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that there was a \$3,843.07 overpayment of compensation in appellant's case; (2) whether the Office abused its discretion in denying appellant's request for waiver of the recovery of the \$3,843.07 overpayment; and (3) whether the Office properly required recovery of the overpayment by withholding \$54.16 from appellant's continuing monthly compensation benefits.

The Office accepted that, on September 8, 1990, appellant, then a 51-year-old practical nurse, sustained a lateral meniscal tear of the right knee stooping in a confined area. She underwent an arthroscopic partial lateral meniscectomy on November 7, 1990 and was totally disabled September 27, 1990 to May 3, 1991. The Office also accepted that appellant sustained a meniscal tear of the left knee on July 27, 1994 when she bumped her knee. She underwent arthroscopic repair of the left lateral meniscus on January 5, 1995 and was totally disabled for work through April 1, 1995.¹ The Office also accepted that appellant sustained a recurrence of disability beginning May 13, 1996 due to a recurrent right medial meniscus tear with compartmental arthritis requiring surgical repair on May 13, 1996.

The record demonstrates that the employing establishment closed on March 29, 1996. Appellant was separated from federal service effective March 29, 1996, due to a reduction-in-force when the employing establishment closed. She received severance pay of \$524.40 per week over a 21-week period beginning March 29, 1996 for a total of \$10,619.10. Appellant's

¹ By decision dated February 27, 1995, the Office awarded appellant a schedule award for a six percent permanent impairment of the right knee, with the period of award running from September 9, 1994 to January 7, 1995. This decision is not before the Board on the present appeal.

case was placed on the periodic compensation rolls effective May 13, 1996 with continuing payments of record through July 2000.²

In an August 10, 1998 report, Dr. David Wren, a Board-certified orthopedic surgeon and impartial medical examiner,³ found appellant able to perform restricted, sedentary duty, starting for four hours a day and working up to eight hours a day.

In an October 19, 1999 report, Dr. H.M. Reynolds, an attending orthopedic surgeon, noted that appellant was completely disabled for work, as she could lift no more than three pounds, could not perform fine manipulation, push, pull, reach above the shoulder, drive, lift, bend, squat, climb or kneel.

A January 21, 2000 file memorandum states that appellant received a lump sum severance payment of \$10,619.00, covering the 21-week period of March 29 to August 22, 1996. For the same period appellant received \$3,961.10 in wage-loss compensation for total disability, following the May 13, 1996 right knee surgery. The Office subtracted \$118.03 in health benefit premiums, leaving the amount of \$3,843.07.

In a February 1, 2000 letter, the Office advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$3,843.07 had occurred in her case as she received total disability compensation beginning May 13 to August 22, 1996 while also receiving severance pay. The Office found that these were dual benefits that appellant was not entitled to both and that she was without fault in the creation of the overpayment. Appellant was given 30 days in which to submit evidence and argument regarding the fault determination, as well as financial information.

In a February 1, 2000 memorandum, the Office found appellant not without fault in creation of the overpayment as she knew or should have known that she should not simultaneously receive compensation benefits and severance pay.

In a March 17, 2000 overpayment recovery questionnaire, appellant listed her expenses and assets. She reported an income of \$1,093.00 every four weeks in compensation benefits and \$9.00 in financial account interest, for a total net income of \$1,101.60. Appellant noted expenses of maintaining her own household of \$400.00 for food, \$250.00 for clothing, \$166.00 for utilities, \$200.00 for medical and dental, \$531.00 for her car, \$150.00 for home maintenance and \$17.00 for insurance, totaling \$1,534.00 every four weeks. Appellant also listed \$211.00 in credit card payments, bringing her living expenses every four weeks to \$1,745.00, which is \$643.40 more than her \$1,101.60 income. Appellant listed assets of \$51.00 in cash, a \$1,700.00 checking account, a \$3,763.00 savings account and \$432.00 in miscellaneous assets, for a total

² Appellant submitted affidavits of earnings and employment dated February 1, 1997, March 5, 1998 and March 24, 1999, indicating that she had not worked since March 29, 1996.

³ The Office appointed Dr. Wren to resolve a conflict of medical opinion between Dr. Michael Charles, a Board-certified orthopedic surgeon and second opinion physician, who submitted an April 8, 1998 report finding appellant capable of limited duty and Dr. Jerrald Goldman, an attending Board-certified orthopedic surgeon, who opined that appellant was totally disabled for work from June 1995 onward.

of \$5,946.00. She requested a telephone conference on the issues of fault and waiver. Regarding fault, appellant stated that she believed that severance pay did not constitute federal salary payments such that she could not receive compensation at the same time.

Accompanying the overpayment recovery questionnaire, appellant enclosed a copy of an employing establishment pamphlet regarding personnel procedures related to the employing establishment closing. In pertinent part, this pamphlet provided that the “[a]mount of severance payments will be the same as your basic pay immediately before your separation until severance pay is exhausted. Final payment shall consist of only that portion remaining. ... Any period covered by severance pay shall not be regarded as a period of federal service or employment.” Appellant asserted that this pamphlet provided that severance pay did not constitute “wages” or “earnings” precluding her from receiving compensation benefits under the Federal Employees’ Compensation Act for total disability.

In an April 25, 2000 letter, appellant noted that she would be moving to live with her daughter on or about June 1, 2000.

By decision dated June 14, 2000, the Office modified its preliminary notice, finding that appellant was without fault in creation of the overpayment. The Office found that appellant was “unaware of the overpayment” and while she should have been aware that she was “not entitled to receive two types of pay for the same period,” it was “reasonable to accept that [appellant] was not aware of the conflict because this office issued [her] no letters regarding [her] compensation payment and because [she] misunderstood the severance pay information from [her] employer.” The Office denied waiver of the overpayment as, according to her March 17, 2000 questionnaire, while her expenses exceeded her “known income, [she] reported assets in the form of cash, checking account, savings account and credit union account balances totaling \$5,946.00. An overpaid individual with more than \$3,000.00 is considered to have sufficient assets to warrant debt recovery.” The Office also noted that it appeared appellant overestimated certain expenses, as it was likely that her clothing “budget overlaps [her] credit card debt. Also, since [she had] moved in with [her] daughter,” it was likely that her cost of living and utility bills had decreased. The Office also noted that appellant had requested a telephone conference, but moved prior to the conference date and did not provide a new telephone number. The Office found, however, that as the fault finding was in appellant’s favor, no telephone conference was necessary. “While a conference could have clarified [her] economic status, it appears unlikely that it would have resulted in a waiver because of [her] assets.” The Office directed recovery of the overpayment by deducting \$54.16 from her continuing compensation payments every 4 weeks from July 2000 through June 2007, with a 5 percent interest rate.

Regarding the first issue, the Board finds that the Office properly found an overpayment of \$3,843.07 in appellant’s case.

The Board finds that the Office’s calculations and the factual information concerning appellant’s compensation and severance pay is accurate. She does not contend that the Office erred in calculating the amount of the overpayment. Rather, she asserts that the severance pay, which she received should not be accounted as “wages” which would have precluded her from simultaneously receiving compensation for total disability.

However, the Act specifically provides that an employee may not receive wage-loss compensation and severance pay simultaneously. Section 8116(a) of the Act⁴ states that, while an employee is receiving compensation under the Act, he or she “may not receive salary, pay or remuneration of any type from the United States,” except in return for service actually performed or for certain payments connected with service in the Armed Forces. Section 10.421(c) of the Office’s regulations⁵ states: “An employee may not receive compensation for total disability concurrently with severance pay or separation pay.”

In this case, appellant received \$3,843.07 in total disability compensation from May 13 to August 22, 1996, while also having received a lump sum severance payment of \$10,619.00, encompassing the same period, due to the closure of the employing establishment. This is precisely the dual benefit situation of simultaneous wage-loss compensation and severance pay prohibited by the Act and its regulations as set forth above. Thus, the Office was correct in finding the \$3,843.07 overpayment of compensation in appellant’s case.

Regarding the second issue, the Board finds that the Office did not abuse its discretion in refusing to waive recovery of the \$3,843.07 overpayment.

Section 8129(a) of the Act⁶ provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 10.441(a) of Title 20 of the Federal Code of Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides, “[a]djustment or recovery by the United States may not be made when incorrect payment had 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.”⁷

Appellant correctly asserts that she was not at fault in creating the overpayment. However, the fact that an individual is without fault does not, by itself, preclude the Office from adjusting later payments or recovering the overpaid amount, as explained by section 8129(b), *supra*. Thus, because appellant is without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b), adjust later payments or recover the overpaid amount only if adjustment or recovery would neither defeat the purpose of the Act nor be against equity and good conscience.

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.421(c).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Id.* at § 8129(b).

The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations. Section 10.436(a) provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses⁸ and if the individual's nonexempt assets do not exceed a resource base determined by the Office with advice from the Department of Labor's Bureau of Labor and Statistics, in this case, \$3,000.00.⁹ An overpaid individual must meet both of these criteria in order to establish financial hardship. Section 10.436 also provides that recovery of an overpayment is considered to be against equity and good conscience if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.¹⁰

In the instant case, appellant submitted a completed overpayment recovery questionnaire dated March 17, 2000, listing \$5,946.00 in assets, which exceeds the \$3,000.00 asset base allowed under section 10.436(a). Thus, appellant does not qualify for waiver by reason of financial hardship. Further, appellant did not argue or submit evidence to establish that recovery of the overpayment would be against equity or good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse.

As appellant submitted no evidence in this case to establish 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 in refusing to waive recovery of the overpayment.

Regarding the third issue, the Board finds that the Office improperly required recovery of the overpayment by withholding \$54.16 from appellant's continuing compensation benefits.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part: "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of further payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual."¹¹

With respect to the \$54.16 withheld from appellant's continuing compensation payments to recover the amount of the overpayment, the Board notes that the amount of adjustment lies

⁸ An individual is deemed to need substantially all of his or her current income to meet current 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 expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.

⁹ 20 C.F.R. § 10.436(a).

¹⁰ *Id.* at § 10.437(b)

¹¹ 20 C.F.R. § 10.441(a).

within the Office's discretion.¹² The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver. However, the Board finds that the Office had insufficient information regarding appellant's ordinary and necessary living expenses to determine whether withholding \$54.16 from appellant's continuing compensation payments would create a financial hardship.

Appellant completed her overpayment recovery questionnaire on March 17, 2000, based on her expenses living in her own household. This questionnaire demonstrated that appellant's expenses exceeded her income by \$643.40 every four weeks. However, in an April 25, 2000 letter, appellant advised the Office that, on or about June 1, 2000, she would move in with her daughter. The Office found in its June 14, 2000 decision that it was likely that appellant's expenses would decrease while sharing her daughter's residence. However, the Office did not base this assumption on any new financial information. The Office merely assumed that appellant's expenses would decrease, but did not conduct any further development to ascertain this. Considering that appellant's expenses exceeded her income by more than \$600.00 every four weeks, it is unclear that this shortfall would be remedied merely by appellant moving in with her daughter. The Board notes that appellant requested a telephone conference to discuss her financial hardships, but that the Office did not afford appellant this opportunity.

Therefore, the Board finds that the Office did not have sufficient financial information at the time it determined the method and amount of recovery of the overpayment. Thus, the case must be returned to the Office for further development, including but not limited to obtaining current financial information from appellant regarding her income, assets and expenses. Following this and such other development as the Office deems necessary, the Office shall issue an appropriate decision with regard to the method and amount of recovering the overpayment of compensation.

¹² See 20 C.F.R. § 10.441(a).

The decision of the Office of Workers' Compensation Programs dated June 14, 2000 is hereby affirmed in part regarding the denial of waiver of recovery and set aside in part regarding the method and amount of recovery and the case remanded for further development consistent with this decision.

Dated, Washington, DC
January 3, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member