

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA E. CHAVEZ and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

*Docket No. 01-621; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly found a \$16,534.08 overpayment of compensation; and (2) whether the Office abused its discretion in denying appellant's request for waiver of recovery of the overpayment.

The Office accepted that on September 1, 1987 appellant, then a 38-year-old rural relief carrier, sustained a lumbar strain and a ruptured L4-5 disc requiring laminectomy and discectomy on October 8, 1987, when she caught her foot while dismounting her postal jeep. During the year prior to September 1, 1987, appellant worked an average of 21 hours and 32 minutes a week, at \$9.60 per hour. She stopped work on September 8, 1987. Appellant received wage-loss compensation for total disability through early 1988, when she returned to part-time light duty.

By decision dated April 27, 1990, the Office found that appellant was entitled to compensation based on a 44 percent loss of wage-earning capacity, given that she was working 12 hours a week light duty on a regular basis beginning on January 1, 1990. The Office found that the part-time position fairly and reasonably represented appellant's wage-earning capacity. The Office instructed appellant that her wage-loss compensation would be terminated without notice "whenever this Office is notified that you have earnings equal to or higher than the wages paid for the job you held when injured."

In an October 9, 1990 letter, the employing establishment advised appellant that she would be terminated effective November 12, 1990, because she was observed repeatedly performing activities outside of her work restrictions. At that time, appellant was working two hours a day, six days a week. However, a postal inspector observed appellant performing "extended walking, standing, running and dancing" at an August 10 and 11, 1990 celebration, standing, sitting and kneeling at a religious service on August 10, 1990 and carrying a heavy box at shoulder level for a half-mile procession. The employing establishment noted that these activities were all permanently prohibited by her attending physicians. Appellant remained unemployed through March 1993. During this period, she received compensation for the 44 percent loss of wage-earning capacity.

On March 12, 1993 appellant returned to limited-duty work as a modified general relief clerk for 20 hours a week. She received \$16,534.08 in wage-loss compensation from March 12, 1993 to November 9, 1996.

Appellant reported her return to work in affidavits of earning and employment dated September 19, 1993, December 8, 1994, October 17, 1995 and October 30, 1996.

By decision dated November 20, 1996, the Office reduced appellant's wage-loss compensation to zero on the grounds that she no longer had a loss of wage-earning capacity beginning March 12, 1993. The Office found that appellant's wages as a modified clerk were higher than the current pay rate for her job and step when injured. The Office determined that appellant's current weekly wages were \$297.20, whereas her weekly salary for the date-of-injury position, as of November 19, 1996, was \$206.88.¹

Appellant disagreed with this decision and requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held October 20, 1997. At the hearing, she asserted that she still had a loss of wage-earning capacity as she could not "do the job [she] was hired to do to begin with." Appellant admitted that she was currently earning more than in her date-of-injury position, but asserted that she was able to work fewer hours.

By decision dated and finalized December 1, 1997, an Office hearing representative affirmed the November 20, 1996 decision. The hearing representative found that the Office had properly reduced appellant's compensation to zero on the grounds that she earned more in her current job of modified clerk than the current pay rate for her date-of-injury position.

By notice dated November 24, 1998, the Office advised appellant of its preliminary finding of a \$16,534.08 overpayment of compensation in her case, as she received wage-loss compensation through November 12, 1996 although she had no loss of wage-earning capacity as of March 12, 1993.² The Office found appellant with fault in the creation of the overpayment.

In a December 18, 1998 overpayment recovery questionnaire, appellant listed monthly household income of \$3,314.90, monthly household expenses of \$1,969.08 and liquid assets of \$2,500.00.

By decision dated December 28, 1998, the Office finalized its preliminary determination of overpayment, finding that there was a \$16,534.08 overpayment of compensation in her case, as she received wage-loss compensation from March 12, 1993 through November 9, 1996, when she was employed 20 hours per week, "working 20 hours per week and earning more than what [her] date-of-injury position would have paid." The Office found appellant at fault in the creation of the overpayment as she accepted compensation payments which she "knew or should have been expected to know [were] incorrect.... Although the Office ... may have been at fault

¹ The Office noted that appellant's medical benefits were unaffected by the November 20, 1996 decision.

² In an August 11, 1998 letter, the employing establishment advised the Office that every four weeks during 1993, she received \$342.00, totaling \$4,316.00; in 1994, \$342.00 every four weeks for a total of \$4,456.00, in 1995, \$351.00 every four weeks for a total of \$4,563.00, and in 1996, \$360.00 every four weeks for nine individual payments, totaling \$3,240.00.

in making the overpayment,” this did not relieve appellant of “making a refund” as she was “also at fault.”

Appellant disagreed with this decision and, in a March 16, 1999 letter, requested an oral hearing before a representative of the Office’s Branch of Hearings and Review, held July 20, 2000. At the hearing, she asserted that she reported her return to work and her earnings on the periodic forms CA-1032. Yet, the Office continued to pay her wage-loss compensation, to which appellant assumed she remained entitled despite her reemployment.

By decision dated September 12, 2000 and finalized September 13, 2000, an Office hearing representative affirmed the fact and amount of the overpayment, but found appellant without fault in its creation. The hearing representative reviewed appellant’s December 18, 1998 overpayment recovery questionnaire, noting that “her household income exceeds expended by \$1,345.82 per month. The hearing representative estimated a \$672.91 monthly expense for food, leaving appellant with “discretionary income of another \$672.91 per month.” The hearing representative directed that the overpayment be collected at the rate of \$300.00 per month, finding that this amount “would not deprive [appellant] of income she requires to meet current ordinary and necessary living expenses....”

In her November 20, 2000 letter to the Board requesting an appeal, appellant states that she did not “seek review of that portion of [the] Hearing Representative’s ... decision that found ... *that the claimant was without fault in the creation of the overpayment.*” “Appellant did “seek review of that portion of [the] Hearing Representative[’s] decision, relating to *waiver and recovering.*”³ (Emphasis in the original.) Appellant alleged that recovering the overpayment would be against equity and good conscience as it would create a financial hardship, and that she relied on the overpaid amount each month in budgeting her household expenses.

The Board finds that the Office properly found an overpayment of \$16,534.08 in appellant’s case.

The record demonstrates, and appellant does not dispute, that she received \$16,534.08 in compensation for a 44 percent loss of wage-earning capacity from March 12, 1993 to November 9, 1996. However, appellant was employed as a part-time relief clerk during this time, with no loss of wage-earning capacity. As of November 19, 1996, the Office determined that appellant’s current weekly wages were \$297.20; her weekly salary for the date-of-injury position was \$206.88. The Board has reviewed the salary records and the Office’s calculations, and finds that the \$16,534.08 amount is accurate.

The Board finds that the Office acted within its discretion in refusing to waive recovery of the \$16,534.08 overpayment.

Section 8129(a) of the Federal Employees’ Compensation Act⁴ 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

³ As appellant does not contest the finding that she was without fault in creation of the overpayment, the Board will not review this aspect of the case.

⁴ 5 U.S.C. §§ 8101-8193.

which an individual is entitled. Sections 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.”⁵

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). 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.

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 expenses,⁶ and if the individual’s nonexempted 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, \$3,000.00.⁷ 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.⁸

Appellant submitted a completed overpayment recovery questionnaire dated December 18, 1998, listing \$2,500.00 in assets, \$3,314.90 in monthly household income, and \$1,969.08 in monthly expenses. Thus, while appellant’s assets are less than the \$3,000.00 asset base allowed under the Office’s regulations, she has not established financial hardship because her income exceeds her expenses by approximately \$672.91 a month, far more than the \$50.00 provided for by the Office’s regulations.⁹ Further, although appellant argued that recovery of the

⁵ *Id.* § 8129(b).

⁶ 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.

⁷ 20 C.F.R. § 10.436(a).

⁸ *Id.* § 10.437(b)

⁹ In her December 18, 1998 questionnaire, appellant did not list any expenses for food. Therefore, the hearing representative, in his decision dated September 12 and finalized September 13, 2000, estimated a \$672.91 monthly expense for food, leaving appellant with “discretionary income of another \$672.91 per month.”

overpayment would be against equity or good conscience because she relied on the overpaid compensation in budgeting household expenses, she did not submit evidence substantiating financial hardship or that 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.

The Board finds that it does not have jurisdiction to review the issue of the method of recovery of the overpayment, as appellant is no longer receiving compensation.¹⁰ Therefore, the Board cannot address whether the Office's decision to collect \$300.00 per month from appellant was proper.

The decision of the Office of Workers' Compensation Programs dated September 12, 2000 and finalized September 13, 2000 is hereby affirmed.

Dated, Washington, DC
January 25, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

¹⁰ *Robert S. Luciano*, 47 ECAB 793 (1996).