

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARCIA P. KAY and DEPARTMENT OF HEALTH & HUMAN SERVICES,  
SOCIAL SECURITY ADMINISTRATION, Richmond, CA

*Docket No. 01-952; Submitted on the Record;  
Issued June 13, 2002*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied waiver of a \$49,374.01 overpayment.

On February 5, 1983 appellant, then a 34-year-old caseworker, filed an occupational disease claim asserting that her emotional condition was a result of her federal employment. The Office accepted her claim for adjustment disorder with depressed mood and paid compensation for temporary total disability on the periodic rolls.

On June 26, 1996 the Office made a preliminary determination that an overpayment of \$49,374.01, occurred for periods beginning September 1, 1987 because appellant found employment and earned wages while at the same time receiving compensation for total disability for work. The Office found that she was not at fault in the creation of the overpayment because she had reported her employment and wages to the Office, which failed to adjust her compensation.

On July 19, 1996 appellant requested a prerecoupment hearing before an Office hearing representative. At the hearing, which was held on September 18, 2000, she contested neither the fact nor the amount of the overpayment. She testified that she was requesting waiver based on detrimental reliance and did not seek waiver based on financial hardship.

When her workers' compensation benefits were approved in 1984, appellant decided not to pursue her claim for Civil Service disability because her workers' compensation benefits were more favorable. Further, she withdrew her contributions from the Civil Service Retirement Fund. She explained that she would not have relinquished her Civil Service Retirement benefits had the Office not approved her claim. Asked whether she could again become vested or "invest back" in the Civil Service Retirement System, appellant replied, "Well, I doubt it but I do n[o]t know for sure." Although she doubted she could, the hearing representative speculated: "I guess you [woul]d have to pay that back in. You [woul]d probably then have to continue to work to get the years in."

The hearing representative explained to appellant that she would have to show that compensation she should not have received resulted in her making a decision she would not have otherwise made. Appellant testified that, had she known the Office was going to reduce her compensation, she would have made a different decision because she would have been better off under the Civil Service Retirement System.

Appellant submitted evidence that she had applied for federal jobs but was unable to secure employment. She also submitted a page from the Office's Procedure Manual showing an example of detrimental reliance that she believed paralleled her case:

“Example 1: After being advised of entitlement to temporary total disability benefits and being placed on the periodic rolls, the claimant resigned [her] job and withdrew [her] contributions to the Civil Service Retirement Fund, under the assumption that she would receive regular monthly benefits. Three years later it was discovered that her award was erroneous. [Appellant] had lost [her] retention rights, was unable to get [her] old job back and could not secure other employment. Recovery of any of the overpayment would be ‘against equity and good conscience’ in this situation because the individual gave up a valuable right. Recall that in the situation where the claimant gives up a valuable right his present ability to repay is not taken into consideration, as the forfeiture of the right is in itself the grounds for waiver.”<sup>1</sup>

In a decision dated January 3, 2001, the Office hearing representative denied waiver of the overpayment. The hearing representative found that appellant had no valid reason to believe that her work activities would have no impact on her future entitlement to compensation. She, therefore, failed to establish that her decision to withdraw her Civil Service Retirement contributions was based chiefly on notice of entitlement to workers' compensation benefits.

The Board finds that the Office properly denied waiver of the \$49,374.01 overpayment.

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that where an overpayment of compensation has been made because of an error or fact of law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) describes the only exception:

“Adjustment 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.”<sup>3</sup>

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<sup>1</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.2006b(3) (February 1995).

<sup>2</sup> 5 U.S.C. § 8129(a).

<sup>3</sup> *Id.* at § 8129(b) (emphasis added).

The Office found that appellant was not at fault in the creation of the overpayment in this case because she had reported her employment and wages. Although she was not at fault in the creation of the overpayment, the overpayment nonetheless occurred and, under section 8129 of the Act, “adjustment shall be made” unless adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.

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 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. A higher amount is specified for a beneficiary with one or more dependents.<sup>4</sup>

Appellant made clear that she does not seek waiver based on financial hardship. Waiver, therefore, depends on whether adjustment or recovery would be against equity and good conscience.

Recovery of an overpayment is considered to be against equity and good conscience when any 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. In making such a decision, the Office does not consider the individual’s current ability to repay the overpayment. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights. To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.<sup>5</sup>

The facts of this case do not support detrimental reliance. When appellant made her decision in 1984 not to pursue Civil Service disability and to withdraw her contributions from the Civil Service Retirement Fund, she was in receipt of workers’ compensation benefits for temporary total disability. The payments she received were proper at that time and remain proper today, unaffected by the overpayment that began on September 1, 1987. Because appellant was not in receipt of overpaid compensation in 1984, she cannot claim that she relied on the overpayment when she made her decision. The overpayment would not begin for another three years.

This is the essential distinction between appellant’s case and the example of detrimental reliance drawn from the Office’s Procedure Manual. In the example, the claimant made a decision while in receipt of and in reliance on, compensation she should not have received. In

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

<sup>5</sup> *Id.* at § 10.437.

the present case, appellant's compensation was not erroneous, when she made her decision in 1987.

When she decided not to pursue Civil Service disability and to withdraw her contributions from the Civil Service Retirement Fund, appellant was neither in receipt of erroneous compensation nor in receipt of erroneous notice of entitlement. The Office did not misinform her that she would receive payments for total disability after returning to work. Appellant cannot argue, therefore, that she relied on notice of such payments when she made her decision.

In addition, the Board notes that the factual evidence developed in this case is insufficient to establish that appellant relinquished a right that cannot be regained or that she changed her position for the worse. Comments by both appellant and the hearing representative during the September 18, 2000 precoupment hearing are speculative in this respect and the record contains no proof that Civil Service benefits would have been more favorable than the benefits to which appellant is entitled through workers' compensation.<sup>6</sup>

As appellant has failed to establish detrimental reliance, the Board finds that the Office acted within its discretion to deny waiver.<sup>7</sup>

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<sup>6</sup> The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, has no jurisdiction to review evidence submitted for the first time on appeal.

<sup>7</sup> With respect to whether interest should be applied to the overpaid amount, the Board notes that the Office has statutory authority to charge such interest. The statutory authority for the Office to charge interest on an overpayment under the Act is found in 31 U.S.C. §§ 3717(a)(1) and 3717(g)(1). Section 3717(a)(1) provides, in part, that the head of an executive branch or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person. Section 3717(g)(1) provides that the section shall not apply if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges. The Act does not prohibit the charging of interest on overpayments. Accordingly, the Office has the requisite statutory authority to assess interest on overpayments under the Act. *Marie D. Sinnett*, 40 ECAB 1009 (1989).

The January 3, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
June 13, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member