

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELOISE K. HAHN and ENVIRONMENTAL PROTECTION AGENCY,
Chicago, IL

*Docket No. 01-1199; Submitted on the Record;
Issued June 25, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty by being exposed to radioactive sludge; (2) whether appellant received an overpayment of compensation in the amount of \$1,438.77; and (3) if so, whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of this overpayment of compensation.

On July 26, 2000 appellant, then a 46-year-old environmental engineer, filed a claim for an occupational disease for stress resulting from problems regarding her time cards and from harassment regarding her use of the gym for physical therapy.

On September 6, 2000 appellant submitted a request for reimbursement by the Office of medical expenses: "(a) travel expenditures to Argonne National Laboratories to undergo sodium iodine radionuclide test on August 15, 2000 in the total amount of \$48.50; (b) travel expenditures to Hegulson Scientific in Pleasanton, Calif. to undergo radium whole body count on August 23, 2000 in the total amount of \$1,390.00,¹ which includes the \$400.00 testing fee for whole radium body count; and (c) orthopedic surgeon consultation fees each in the amounts of \$12.00 each for services on July 7 and 17, 2000." Appellant stated that this testing was undergone at the advice of her physician "regarding thyroid malfunction while employed at the Metropolitan Water Reclamation District of Greater Chicago in 1989." On October 5, 2000 the Office issued appellant a check in the amount of \$1,438.77 for reimbursement of bills from August 15 and 21 to 23, 2000.

On October 16, 2000 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,438.77 that arose because the Office reimbursed appellant for travel and medical expenses not accepted by the Office. The Office preliminarily found appellant at fault in the matter of the overpayment on the basis that she accepted a payment she knew or should have been expected to know was incorrect.

¹ As shown by appellant's travel voucher submitted to the employing establishment, this expense was actually \$1,390.27.

By letter dated October 19, 2000, appellant stated that she performed 12 sludge inspections for the employing establishment from April to June 1999 and that she requested reimbursement from the Office for testing for radiologic exposure after the employing establishment refused to pay for such testing. In an earlier letter to the Office, appellant contended that she was exposed to low-level radioactive sludge when she performed inspections for the employing establishment. In a letter dated October 30, 2000, the employing establishment stated that appellant's job on occasion required inspection of waste water treatment facilities, but that appellant reviewed records during these inspections and had no sampling of or direct contact with sludge.

By decision dated November 13, 2000, the Office found that the evidence was not sufficient to show that appellant was exposed to radioactive sludge in the performance of her duties at the employing establishment and that she therefore had not established that she sustained an injury in the performance of duty.

By letter dated January 9, 2001, the Office requested that appellant submit supportive documents to show that her expenses far outweighed her income, as appellant indicated in a January 9, 2001 telephone conference regarding her overpayment of compensation.

Appellant submitted documents verifying her expenses and also submitted an updated Office overpayment recovery questionnaire dated January 30, 2001. On this questionnaire appellant indicated that she had monthly income of approximately \$5,215.00 including \$2,100.00 from rental property and monthly expenses of \$6,730.00. In a listing of her assets and liabilities, appellant indicated that she had \$30,511.17 in her Thrift Savings Plan in connection with the Federal Employees' Retirement System and two loans against her Thrift Savings Plan. As of October 31, 2000 the outstanding balance remaining on these loans was \$5,225.04. Appellant also listed as assets her personal home with an appraised value of \$397,000.00² and a personal second home lot with an appraised value of \$35,000.00.

By decision dated February 23, 2001, the Office found that appellant received an overpayment of compensation in the amount of \$1,438.77 that occurred because she was reimbursed for expenses incurred from August 15 to 23, 2000 on her compensation case that was not accepted by the Office. The Office found that appellant was without fault on the basis that she believed that the Office, by sending her a check, had reconsidered and authorized reimbursement of her expenses for testing for radiologic exposure. The Office found that appellant's monthly expenses exceeded her monthly income of \$3,115.00, which did not include her rental income and that her net worth was \$427,511.17, consisting of a second home with an appraised value of \$397,000.00 and a Thrift Savings Plan balance of \$30,511.17. The Office found that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act or be against equity or good conscience on the basis that appellant's assets far exceeded the resource base of \$5,600.00 for a claimant with two dependents.

The Board finds that appellant has not established that she sustained an injury in the performance of duty by being exposed to radioactive sludge.

² The telephone conference on January 9, 2001 and a lease agreement show that this property is actually a second home which appellant rents.

An employee seeking benefits under the Act has the burden of proof to establish that essential elements of his or her claim. When an employees claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure at the time, place and in the manner alleged.³ In an occupational disease claim, the claimant must show that he or she was exposed to the conditions claimed.⁴

Appellant has not met her burden of proof. Although she alleged that she was exposed to radioactive sludge in the performance of her duties as an environmental engineer for the employing establishment, she did not submit any corroborating evidence. The employing establishment reported that appellant's job on occasion required inspection of waste water treatment facilities, but that appellant reviewed records during these inspections and had no sampling of or direct contact with sludge. Appellant has not established that she was exposed to sludge while working at the employing establishment or that the sludge at the waste water treatment facilities she inspected was radioactive.

The Board finds that appellant received an overpayment of compensation in the amount of \$1,438.77.

By check dated October 5, 2000, the Office reimbursed appellant for expenses incurred to undergo a sodium iodine radionuclide test and a radium whole body count. These tests were undergone to ascertain any effects of exposure to radioactivity appellant might have experienced. As the Office, in a November 13, 2000 decision, properly found that appellant had not shown that she was exposed to radioactive sludge in her federal employment, these expenses were improperly paid and constitute an overpayment of compensation.

The Board further finds that the case is not in posture for decision on the issue of waiver of recovery of the overpayment.

Section 8129 of the Act⁵ provides that an overpayment of compensation must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter of the [Act] or would be against equity and good conscience." 20 C.F.R. § 10.436 provides:

"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

³ *O. Paul Gregg*, 46 ECAB 624 (1995).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3a (April 1993).

⁵ 5 U.S.C. § 8129.

(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."

The Office found that appellant was without fault in the creation of the overpayment in the amount of \$1,438.77 and that appellant's current income exceeded her current ordinary and necessary living expenses. The Office found that recovery of the overpayment would not defeat the purpose of the Act on the basis that appellant's assets exceeded the resource base of \$5,600.00 for a beneficiary with two dependents.

The Office's determination that recovery of the overpayment would not defeat the purpose of the Act on the basis of appellant's assets is incorrect. The resource base is no longer defined in the Office's regulations as \$5,000.00 for an individual with a dependent and \$600.00 for each additional dependent, as it was before the regulations were amended effective January 4, 1999. The new regulations, which are applicable to this overpayment, set the resource base as "a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics." By relying on the old regulations and not ascertaining the amount determined by the Office as the resource base under the new regulations, the Office did not properly consider waiver in conformance with the applicable regulations.

The Office also incorrectly assessed appellant's assets. As provided by the Office's procedure manual,⁶ assets include "the fair market value of an owner's equity in property such as a ... second home...." The Office's February 23, 2001 decision did not assess appellant's equity in the second home, which would be the value less any outstanding mortgage, but rather relied on the appraised amount of the property.

The Office also incorrectly considered the total amount in appellant's Thrift Savings Plan as an asset, presumably a liquid asset, defined in the same section of the Office's procedure manual as "cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like." Although the Board has indicated that amounts in an individual retirement account (IRA) can be considered assets in considering whether an overpayment should be waived,⁷ there are differences between an IRA and an account in the government's Thrift Savings Plan. The operative difference here is that regulations restrict withdrawals from Thrift Savings Plan accounts for those, such as appellant, who have not separated from government service, to two situations: age based, which does not apply to appellant,⁸ and financial hardship withdrawals.⁹ Financial hardship withdrawals, unlike age-based withdrawals, allow the participant to withdraw only his or her own contributions and their attributable earnings, not the total amount in the account. The Office considered the entire amount in appellant's Thrift Savings Plan account an asset; the Office should have delineated the amount of

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200a(4) (September 1994).

⁷ *Alfonso S. Gonzalez*, 45 ECAB 200 (1993).

⁸ 5 C.F.R. § 1650.30 allows age-based withdrawals at age 59½. At the time of the Office's final overpayment decision on February 23, 2001, appellant was 46 years old.

⁹ Financial hardship withdrawals are allowed under 5 C.F.R. § 1650.31.

appellant's contributions versus the government's contribution and considered only the amount contributed by appellant an asset, as only this amount is available for withdrawal by appellant.

The November 13, 2000 decision of the Office of Workers' Compensation Programs is affirmed. The Office's February 23, 2001 decision is affirmed with regard to the finding that appellant received an overpayment in the amount of \$1,438.77. The Office's February 23, 2001 decision is set aside with regard to waiver of recovery of the overpayment and remanded for further development on this issue.

Dated, Washington, DC
June 25, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member