

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIE L. MARQUARDT and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

*Docket No. 01-1942; Submitted on the Record;
Issued June 10, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$2,613.77 overpayment of compensation from June 9 through December 30, 2000; and (2) whether the Office properly denied waiver of the overpayment.

On November 4, 1999 appellant, then a 40-year-old clerk, filed a claim alleging that she developed a rotator cuff condition as a result of her employment duties. The Office accepted her claim for right shoulder impingement syndrome and authorized right shoulder arthroscopic surgery. Appellant stopped work on August 31, 1999 and returned on November 4, 1999.¹

On July 10, 2000 appellant filed a claim for a schedule award. In a report dated December 18, 2000, the medical adviser determined appellant sustained a 10 percent permanent impairment of the right upper extremity.

The Office granted a schedule award for 10 percent permanent impairment of the right extremity. The period of the schedule award was June 9 to December 30, 2000. The pay rate was \$831.99.

On March 8, 2001 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$2,613.77. The Office noted that the overpayment occurred because the Office used the incorrect pay rate of \$831.99 when calculating appellant's schedule award for the right upper extremity. Appellant was paid \$18,273.99 for the period of June 9 to December 30, 2000. The Office determined the correct pay rate to be \$669.24 for a total payment of \$15,660.22 for the period of June 9, 2000 to January 13, 2001 resulting in an overpayment of \$2,613.77. The Office also determined that appellant was without fault in the matter of the overpayment. The Office indicated that she had the right to submit, within 30 days,

¹ The record reflects appellant resigned from the employing establishment on June 8, 2001.

evidence or arguments regarding the overpayment and her eligibility for waiver of the overpayment.

By decision dated March 12, 2001, the Office granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity for the period of June 9, 2000 to January 13, 2001. The pay rate was \$669.24.

In a letter dated April 4, 2001, appellant requested waiver of the overpayment. Appellant indicated that she did not have the means to repay the overpayment. She also indicated that she was attending college and assisting her husband with a new business venture, which had no income at the present time. Appellant submitted an overpayment questionnaire indicating that her monthly income varied but was approximately \$750.00 and expenses of \$2,479.00. She also submitted the first page of her 2000 federal tax return.

In a letter dated April 12, 2001, the Office requested supporting financial documentation in order to determine appellant's eligibility for waiver of the overpayment. The Office specifically requested a complete 2000 federal income tax return; proof of payments of debts and usual expenses; evidence of the \$400.00 listed on the overpayment questionnaire listed as "other expenses;" and an explanation of appellant's mortgages.

Appellant submitted attachments to her 2000 federal income tax return. She indicated that the \$400.00 expense listed on the overpayment questionnaire was for a baby-sitter; and noted that her rental property generated \$750.00 a month, with a first mortgage of \$605.00 a month and a second mortgage of \$238.00 a month. Appellant requested an extension to file additional documents.

By decision dated June 25, 2001, the Office found that appellant received a \$2,613.77 overpayment of compensation from June 9 to December 30, 2000 for which she was without fault in creating. In an accompanying memorandum, the Office indicated that appellant submitted an overpayment questionnaire, which was incomplete and lacking supporting financial documentation. In a letter dated April 12, 2001, the Office requested she submit supporting financial documentation; however, appellant submitted only attachments to her tax return and requested an extension. No additional financial evidence or argument was submitted by her to support eligibility for waiver and, therefore, waiver of overpayment was not granted. The Office advised that the overpayment would be recovered in full.

The Board finds that appellant received an overpayment of \$2,613.77 in compensation from June 9 to December 30, 2000.

The record indicates that appellant was overpaid compensation benefits because the Office used the incorrect pay rate of \$831.99 when calculating her schedule award for the right upper extremity. As a result she was paid \$18,273.99 for the period of June 9 to December 30, 2000. The Office determined that the correct pay rate was to be \$669.24 for a total payment of \$15,660.22 for the period of June 9, 2000 to January 13, 2001. Consequently, appellant received an overpayment of compensation in the amount of \$2,613.77.² The Office

² See 5 U.S.C. §§ 8105(a), 8110(b).

properly determined that for the period of June 9 to December 30, 2000 appellant received an overpayment of \$2,613.77. She does not dispute that she received the overpayment in question and the Board finds that the Office properly determined the amount of the overpayment that covered the period of June 9 to December 30, 2000.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act³ provides that an overpayment 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 the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁴

Section 10.436 of the implementing federal regulations⁵ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to "defeat the purpose of the Act." Section 10.438 of the regulations⁶ provides that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office ... failure to furnish the information within 30 days of the request shall result in denial of waiver...."

In this case, appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on March 8, 2001 if she wanted to request waiver. On April 4, 2001 appellant submitted an overpayment recovery questionnaire noting monthly expenses of \$2,479.00 and income which varied of approximately \$750.00 and the first page of her 2000 federal income tax. However, appellant failed to provide any supporting data. The Office advised appellant in a letter dated April 12, 2001 that she would be eligible for a waiver of the overpayment if she could furnish copies of the documents substantiating her financial status. Appellant filed the attachments to her 2000 federal income tax return; she noted that the \$400.00 expense listed on the overpayment questionnaire was for a baby-sitter; and her rental property generated \$750.00 per month but had a first mortgage of \$605.00 per month and a second mortgage of \$238.00 per month. She requested an extension to file additional documents; however, after two additional months no documents were received in support of waiver of overpayment. Appellant failed to submit financial information supporting

³ 5 U.S.C. § 8129.

⁴ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁵ 20 C.F.R. § 10.436.

⁶ 20 C.F.R. § 10.438.

her assertions. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.⁷

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse. Appellant indicated that she did not have the financial means to repay the debt and was assisting her husband in his new business venture, which was not producing income. However, she did not submit any financial information to show that she would experience severe financial hardship; that she relinquished a valuable right; or showed that her position changed for the worse. The Office specifically requested appellant provide a complete 2000 federal tax return; proof of payment of debts; and evidence of \$400.00 “other expenses.” Although she noted the \$400.00 “other expenses” was for babysitting services and indicated the amounts of her mortgages, she failed to furnish any supporting financial documentation and, therefore, the Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that she changed her position for the worse. The evidence does not demonstrate, that she relinquished a valuable right or changed her position for the worse in reliance on the overpayments. As stated previously, appellant failed to submit the financial information required by section 10.438 of the Act⁸ which was necessary to determine whether appellant detrimentally relied on the overpayments. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The Board further finds that it does not have jurisdiction to review the Office’s finding that recovery of the overpayment of compensation would be obtained through a lump-sum collection from appellant. The Board’s jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits. As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment.⁹

⁷ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

⁸ 20 C.F.R. § 10.438.

⁹ See *Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

The decision of the Office of Workers' Compensation Programs dated June 25, 2001 is affirmed.

Dated, Washington, DC
June 10, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member