

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY BROWN and DEPARTMENT OF AGRICULTURE,
FARMERS' HOME ADMINISTRATION, Maryville, TN

*Docket No. 00-1899; Submitted on the Record;
Issued March 18, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability on October 1, 1992 causally related to her accepted employment injury; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$8,090.72; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly recovered the overpayment by withholding \$500.00 a month from appellant's continuing compensation.

On April 27, 1987 appellant, then a 39-year-old county program technician, filed a traumatic injury claim alleging that on March 31, 1987 she tripped on the carpet and hurt her back. The Office accepted appellant's claim for a lumbar strain. After a period of temporary total disability, appellant was awarded a contract by the employing establishment effective April 13, 1989 to conduct interviews of borrowers. In a November 2, 1989 decision, the Office determined that this position represented appellant's wage-earning capacity and she began receiving appropriate compensation.

The employing establishment did not renew appellant's contract and she stopped work on October 1, 1992. Appellant requested that the Office increase her compensation check for the full amount since she was no longer working.

On May 3, 1993 appellant filed a claim alleging that she sustained a recurrence of disability on October 1, 1992. By decision dated July 21, 1993, the Office found the evidence of record insufficient to establish that appellant's current back condition was causally related to her March 31, 1987 employment injury. The Office also found the evidence of record insufficient to modify appellant's loss of wage-earning capacity rating. By letters dated August 18, 1993 and February 14, 1994, appellant requested an oral hearing before an Office representative. In a February 23, 1994 decision, the hearing representative set aside the Office's decision.

By decision dated August 22, 1994, the Office terminated appellant's compensation on the grounds that appellant no longer had any residuals of her March 31, 1987 employment-

related back condition. Appellant requested a hearing by letter dated September 15, 1994. In a June 9, 1995 decision, the hearing representative set aside the Office's decision and remanded the case to resolve a conflict in the medical opinion evidence regarding the nature of appellant's current back condition. The hearing representative also remanded the case for further development of the medical evidence regarding a causal relationship between appellant's emotional condition and factors of her employment. The hearing representative's decision indicated that appellant was entitled to have her compensation reinstated at the former rate while a decision was being made.

On remand, the Office referred appellant along with medical records, a list of specific questions and a statement of accepted facts to Dr. Herbert S. Dodge, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated June 26, 1995. Dr. Dodge submitted a July 26, 1995 report finding that appellant did not have any residuals of her employment-related back injury.

By letter dated June 26, 1995, the Office referred appellant to Dr. Michael Pool for a second opinion examination regarding her emotional condition. He submitted reports dated August 1 and 28, 1995 finding that appellant had developed major depression, but that she was not disabled from work due to her employment-related emotional condition at the time of his examination.

The Office expanded the acceptance of appellant's claim to include major depression.

By decision dated October 8, 1996, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on October 1, 1992 causally related to her accepted employment injury.

In an October 9, 1996 decision, the Office terminated appellant's compensation for her back condition effective October 13, 1996 on the grounds that she no longer had any disability causally related to her March 31, 1987 employment injury. The Office determined that appellant was still entitled to medical compensation for her emotional condition. By letter dated November 3, 1996, appellant requested an oral hearing regarding the Office's October 8 and 9, 1996 decisions.

By notice dated October 17, 1996, the Office advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$8,090.72 which occurred because she was paid at an incorrect rate from September 18, 1994 through October 12, 1996. The Office explained that appellant received compensation based on total disability rather than partial disability, the rate reflected by her loss of wage-earning capacity. The Office advised appellant that she was at fault in the creation of the overpayment. The Office requested that appellant indicate whether she wished to contest the existence or amount of the overpayment or request waiver of the overpayment on an accompanying form.¹

¹ The form provides a claimant with three choices: (1) a request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

On November 12, 1996 appellant requested a hearing and submitted a completed overpayment questionnaire.

By decision dated February 11, 2000, the hearing representative affirmed the Office's finding that appellant failed to establish that she sustained a recurrence of disability on October 1, 1992 causally related to her March 31, 1987 employment injury.

By decision of the same date, the hearing representative finalized its preliminary determination regarding the amount of the overpayment, but found that appellant was not at fault in the creation of the overpayment. The hearing representative also found that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment as her family monthly income exceeded her expenses by more than \$1,200.00. The hearing representative required appellant to repay the overpayment in the amount of \$500.00 per month.

The Board finds that appellant has failed to establish that she sustained a recurrence of disability on October 1, 1992 causally related to her accepted employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a full-time light-duty position or the medical evidence of record establishes that she can perform the full-time light-duty position, to be entitled to further compensation the employee has the burden to establish by the weight of the substantial, reliable and probative evidence that she cannot continue to perform such light-duty full-time work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

In this case, appellant has not shown a change in the nature and extent of her light-duty requirements. Following the March 31, 1987 employment injury, appellant returned to light-duty work as a contract interviewer at the employing establishment effective April 13, 1989. The record does not establish, nor does appellant allege, that the claimed recurrence of total disability was caused by a change in the nature or extent of the light-duty job requirements. Further, appellant has not submitted sufficient medical evidence establishing that the accepted back condition has materially changed or worsened since her return to work in April 1989.

In resolving a prior conflict in the medical evidence, Dr. Dodge submitted a July 26, 1995 report revealing a history of appellant's March 31, 1987 employment injury, medical treatment and employment. Dr. Dodge noted his findings on physical and objective examination and an extensive review of medical records. In response to the Office's specific questions, he opined that appellant did not have any disabling residuals of her 1987 employment injury, a lumbar strain. Dr. Dodge further opined that there were no objective findings that would cause the prolonged disability that appellant had attributed to her injury. He stated that, based on his review of the medical records, there were no specific references to back problems experienced by appellant in October 1992. Dr. Dodge further stated that the evidence of degenerative disc disease at L5-S1 was in no way related to appellant's condition of lumbosacral strain rather this was the normal degeneration that occurs within the disc of most adults.

² See *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

A January 15, 1998 report of Dr. Rickey D. Manning, a Board-certified family practitioner and appellant's treating physician, noted appellant's March 31, 1987 employment injury and stated that it had significantly limited her ability to work since that time. He opined that appellant's degenerative disc disease was permanent in nature. Dr. Manning further opined that appellant could not return to work in any capacity requiring sitting or standing in one position for more than a few minutes at a time and that this would most likely be a permanent situation. He did not provide any medical rationale explaining how or why appellant's degenerative disc disease was causally related to her accepted employment injury. Thus, Dr. Manning's report is insufficient to establish appellant's burden.

Section 8123 of the Federal Employees' Compensation Act³ provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination. In situations where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁴

The Board finds that Dr. Dodge, the impartial medical specialist, thoroughly discussed the medical record, physical findings and objective test results to conclude that appellant's current back condition was not causally related to the accepted March 31, 1987 lumbar strain. Because Dr. Dodge's opinion is rationalized and based on a proper factual background, the Board finds that his opinion is entitled to the special weight given to the reports of an impartial medical specialist. Therefore, appellant has failed to establish her claim for a recurrence of disability.

The Board further finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,090.72.

Although appellant alleged that she was entitled to compensation for total disability after she stopped work on October 1, 1992, the record establishes that she was only entitled to compensation for partial disability based on her wage-earning capacity. The Office, however, paid appellant compensation for total disability during the period September 18, 1994 through October 12, 1996 resulting in an overpayment of \$8,090.72, the difference between the compensation she received in the amount of \$36,729.57 and the compensation she was due at the partial disability rate, \$28,638.85.

The Board also finds that the Office properly denied waiver of the overpayment.

Where an overpayment of compensation has been made because of an error of fact or law, collection of the compensation shall be waived when an overpayment has been made to an individual who is without fault and adjustment or recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. The waiver of an

³ 5 U.S.C. § 8107 *et seq.*

⁴ *Leanne E. Maynard*, 43 ECAB 482 (1992).

overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.⁵

Section 10.436 of the implementing regulations provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all her current income to meet current ordinary and necessary living expenses⁶ and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁷

Appellant completed the overpayment questionnaire indicating that she and her husband had a total monthly income of \$2,955.00. Expenses included: food, \$500.00; clothing, \$160.00; rent, \$90.00; utilities, \$235.00; home maintenance, \$200.00; gas and oil for car, \$60.00; car maintenance, \$30.00; car insurance, \$47.83; nonreimbursable medical expenses, \$20.83; regular charitable contributions, \$40.00; insurance, \$18.00; commuting, \$80.00; pest control, \$37.00; hospital bills, \$85.00; health club membership, \$30.00; Visa, \$27.00; and Gibson's, \$50.00. Appellant's monthly expenses totaled \$1,711.00.

Appellant's monthly income exceeds her monthly expenses by \$1,244.00. Therefore, recovery of the overpayment would not defeat the purpose of the Act.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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.⁸

The issue of financial hardship has already been addressed. Further, appellant has neither argued nor submitted evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation. Accordingly, the evidence fails to show that recovery of the overpayment would not be against equity or good conscience.

As the record establishes that the Office complied with applicable guidelines in finding that recovery should be made, the Board finds no abuse of discretion.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, as in this case,

⁵ *William Phillips, Jr.*, 39 ECAB 330 (1987).

⁶ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB ___ (Docket No. 98-2007, issued September 13, 2000).

⁷ 20 C.F.R. § 10.436 (1999). The resource base is \$3,000.00 for an individual, \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (September 1994).

⁸ 20 C.F.R. § 10.437 (1999).

the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.⁹

The February 11, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 18, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See *Lewis George*, 45 ECAB 144, 154 (1993).