

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA FAIR and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, OH

*Docket No. 01-1559; Submitted on the Record;
Issued March 5, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$1,125.50 overpayment of compensation from May 27 through October 24, 1997; and (2) whether the Office properly denied waiver of the overpayment.

On February 15, 1996 appellant, then a 47-year-old clerk, injured her right knee when she was throwing bundles of mail. The Office accepted appellant's claim for right knee strain/sprain and later expanded this to include torn right medial meniscus; bilateral knee contusions and cervical strain. The Office authorized arthroscopic surgery to repair the right medial meniscus tear. Appellant stopped work on February 17, 1996 and returned to limited duty on March 14, 1996 and worked intermittently until July 2000 when she retired.

On December 23, 1997 appellant filed a CA-7 claim for compensation for the period of May 27 to October 24, 1997. On the CA-7 she indicated that her great nephew was her dependent. Appellant began receiving wage-loss compensation at the augmented three-fourths rate since she claimed her great nephew as a dependent.

In a letter dated May 8, 1998, the Office acknowledged receipt of the CA-7 filed by appellant on December 23, 1997. The Office requested that appellant clarify the status of her great nephew to determine if he fell within one of the accepted categories of dependency under the Federal Employees' Compensation Act.¹ The Office noted that if the dependency requirements were not satisfied appellant would be paid wage-loss compensation at the two-thirds rate opposed to the augmented three-fourths rate.

In an October 25, 2000 overpayment worksheet, the Office calculated that appellant received \$9,796.88, based on the augmented three-fourths rate, from May 27 through

¹ See 5 U.S.C. § 8110(a).

October 24, 1997. The Office also calculated that, at the two-thirds basic rate, appellant should have received \$8,671.38 during this period. The Office calculated that this resulted in a \$1,125.50 overpayment.

On November 1, 2000 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$1,125.50. The Office noted that the overpayment occurred because appellant claimed her great nephew as a dependent and continued to receive compensation at the higher three-fourths rate instead of the two-thirds rate for the period of May 27 through October 24, 1997. The Office determined appellant's great nephew was not a dependent as defined in the Act.² The Office also determined that appellant was without fault in the matter of the overpayment. The Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and eligibility for waiver of the overpayment.

Appellant submitted an overpayment recovery questionnaire dated November 27, 2000. She noted monthly expenses of \$1,780.04 and no monthly income. Appellant indicated that she submitted her guardianship documents for her great nephew to the Office and noted she was able to claim him as a dependent on her income tax returns.

On December 5, 2000 the Office conducted a conference call with appellant to determine whether waiver of the determined overpayment was appropriate. She noted that she had not worked since July 2000 and did not have any income at this time except for welfare payments of \$234.00 per month and food stamps for her great nephew. Appellant noted that she applied for disability retirement and anticipated it would commence in January 2001 with a payment of \$1,100.00 per month and also indicated that she may be eligible for Social Security payments. She noted that disability retirement and Social Security would barely be adequate to meet her financial needs. Appellant further noted that her residence was in foreclosure. The Office advised appellant that she would be eligible for a waiver of the overpayment if she could furnish copies of the documents substantiating her impoverished status. She agreed to send copies of the residential foreclosure; welfare payments for her great nephew; a food stamp card; and a denial of welfare benefits for herself.

By decision dated January 10, 2001, the Office found that appellant received a \$1,125.50 overpayment of compensation from May 27 through October 24, 1997 for which she was without fault in creating. In an accompanying memorandum, the Office indicated that appellant failed to support eligibility for waiver submitted no additional financial evidence or argument and, therefore, waiver of overpayment was not granted.

The Board finds that appellant received an overpayment of \$1,125.50 in compensation from May 27 through October 24, 1997.

The record indicates that appellant received compensation at the augmented three-fourths rate for her and her great nephew from May 27 through October 24, 1997. However, the record

² *Id.*

does not indicate that appellant had a dependent as defined under the Act³ from May 27 through October 24, 1997. Section 8110(a), entitled “Augmented compensation for dependents,” provides, so far as pertinent, that the term “dependent” includes an unmarried child “while living with the employee or receiving regular contributions from the employee toward his support.” The term “child” is defined as follows in paragraph (9) of the Act’s definition provision, section 8101:⁴

“(9) ‘[C]hild’ means one who is under 18 years of age or over that age and incapable of self-support and includes stepchildren, adopted children and posthumous children, but does not include married children.”

The Board finds that appellant’s great nephew is not among the categories of persons included in the term “child” for purposes of the Act. The definition of “child” in the above quoted section of the Act covers three specific relationships, in addition to the biological one between a person and his natural child. There are other close relationships between an adult and a child, such as that between a legal guardian and award as in the present case, which are not included.⁵ Consequently appellant received an overpayment for this period as compensation should have been paid at the basic two-thirds rate.⁶ The Office properly determined that for the period May 27 through October 24, 1997 appellant received an overpayment of \$1,125.50. 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 May 27 through October 24, 1997.

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

Section 8129 of the Act⁷ 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.⁸

³ 5 U.S.C. § 8110(a); see *Louis L. Jackson*, 39 ECAB 423 (1988); *Aretha Hudson*, 28 ECAB 169 (1977) (where the employee claimed entitlement or augmented compensation because of two minor nephews whom she supported and of whom she had legal custody. The Board found that while the employee was legal guardian of her nephews, she had not adopted the children and that a nephew was not included in the term “child” as defined by the Act).

⁴ See 5 U.S.C. § 8101(9).

⁵ See *Aretha Hudson*, *supra* note 3.

⁶ See 5 U.S.C. §§ 8105(a), 8110(b).

⁷ 5 U.S.C. § 8129.

⁸ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

Section 10.436 of the implementing federal regulations⁹ 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 regulations¹⁰ 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 November 1, 2000 if she wanted to request waiver. On November 27, 2000 appellant submitted an overpayment recovery questionnaire noting monthly expenses of \$1,780.04 and no monthly income. However, appellant failed to provide any supporting data. On December 5, 2000 the Office conducted a conference call with appellant whereby appellant noted that she had not worked since July 2000 and did not have any income at this time except for welfare payments of \$234.00 per month for her great nephew and food stamps. She noted that she applied for disability retirement and Social Security; however, this would be barely adequate to meet her financial needs. Appellant further noted that her home was in foreclosure. The Office advised appellant that she would be eligible for a waiver of the overpayment if she could furnish copies of the documents substantiating her impoverished status. Although appellant alleged recovery of the overpayment would be against equity and good conscience, she failed to submit financial information supporting 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.¹¹

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 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 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 Act¹² which was necessary to determine whether appellant detrimentally relied on the overpayments. As she has not shown

⁹ 20 C.F.R. § 10.436 (1999).

¹⁰ 20 C.F.R. § 10.438 (1999).

¹¹ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹² 20 C.F.R. § 10.438.

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 the overpayment of compensation would be obtained through deductions from her civil service retirement. The Board’s jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits. This is not the situation with respect to lump-sum collection.¹³

The decision of the Office of Workers’ Compensation Programs dated January 10, 2001 is affirmed.

Dated, Washington, DC
March 5, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ 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; *see Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).