

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHAWNTONNA D. HARRIS and U.S. POSTAL SERVICE,  
POST OFFICE, Columbus, OH

*Docket No. 01-1968; Submitted on the Record;  
Issued May 28, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$684.00 for the period December 19, 1999 to December 3, 2000; and (2) whether the Office abused its discretion by denying waiver of the overpayment.

On December 1, 1999 appellant, then a 26-year-old mailhandler, filed an occupational disease claim, alleging that factors of employment caused a uterine prolapse. By letter dated January 6, 2000, the Office accepted that appellant sustained an employment-related uterine prolapse and approved corrective surgery. She underwent corrective surgery on December 22, 1999 and submitted Forms CA-7, claims for compensation, for the period December 16, 1999 to April 21, 2000 and received appropriate compensation. On January 18, 2001 appellant retroactively filed a Form CA-7, claim for compensation, for the period June 24 to July 2, 1999, during which she underwent an initial corrective procedure on June 24, 1999. She received compensation for this period and returned to work on July 25, 1999.<sup>1</sup> Appellant underwent further surgery on May 2, 2000. The Office also accepted that appellant sustained an employment-related depression. She returned to a rehabilitative job on December 5, 2000.

By letter dated February 22, 2001, the Office informed appellant that it had made a preliminary determination that she had received an overpayment in compensation in the amount of \$684.00 for the period December 19, 1999 to December 3, 2000 because her compensation had been based on an incorrect pay rate. The Office noted that the initial pay rate of \$707.75 was based on her disability beginning December 19, 1999 but that she subsequently filed for compensation beginning June 24, 1999 when her pay rate was \$694.21. The Office explained that, as she had not been back at work six months when she stopped work on December 19, 1999, she was not entitled to a recurrent rate of pay. The Office further stated that it had found appellant to be without fault in the creation of the overpayment and requested that she indicate

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<sup>1</sup> The record indicates that for the period July 2 to 25, 1999 appellant was on annual leave.

on an attached Office form whether she wished to contest the existence or amount of the overpayment or the fault determination.<sup>2</sup> The Office also requested that she complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether she was entitled to waiver should she be found to be without fault and informed her that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment.

By letter dated March 15, 2001, appellant stated that repaying the overpayment would create a financial hardship to her family and submitted the overpayment questionnaire and supporting documentation regarding expenses. She further elected to have a decision based on the written record. Nonetheless, a telephonic conference was held on March 28, 2001 between appellant and an Office claims examiner at which time appellant's income and expenses were discussed. On April 3, 2001 appellant submitted further documentation of expenses. By decision dated April 20, 2001, the Office finalized its overpayment determination and found that, as appellant's income exceeded her expenses by \$211.14 month, she was not entitled to a waiver. The Office set a repayment schedule of \$50.00 per month.<sup>3</sup>

The Board finds that appellant received an overpayment in compensation in the amount of \$684.00 for the period December 19, 1999 to December 3, 2000.

Section 8101(4) of the Federal Employees' Compensation Act<sup>4</sup> defines monthly pay as the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>5</sup>

The record in this case indicates that appellant's pay rate on June 24, 1999, the day she initially stopped work, was \$694.12 and on December 19, 1999, when she again stopped, was \$707.75. Based on the latter pay rate, the Office paid appellant compensation totaling \$26,436.16 for the period December 19, 1999 to January 3, 2000. Inasmuch as Office procedures provide that to be entitled to a recurrent pay rate, the disability must recur more than

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<sup>2</sup> 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.

<sup>3</sup> On May 10, 2001 appellant submitted a claim alleging that she sustained a recurrence of disability on May 3, 2001 when she stopped work. She returned on May 5, 2001. After development of the claim, in a July 30, 2001 decision, the Office denied the recurrence claim. On June 22, 2001 appellant requested a hearing regarding this decision. The Office issued a second decision on July 30, 2001 in which it found that appellant's actual earnings represented her wage-earning capacity. Appellant did not appeal either of these decisions to the Board.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8101(4); *see Dr. Alan T. Webb*, 47 ECAB 395 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.5(c) (December 1995).

six months after the employee resumes regular full-time employment with the United States,<sup>6</sup> appellant's compensation should have been based on a pay rate of \$694.12 or \$25,752.16 for the period December 19, 1999 to January 3, 2000. In this case, after her initial absence beginning on June 24, 1999, appellant resumed work on July 25, 1999 and next stopped work on December 16, 1999, less than six months later. The Office thus, properly found that appellant was not entitled to a recurrent pay rate where she had not worked at least six months after her initial return to work before stopping work again, as required under section 8101(4) of the Act and Office procedures.<sup>7</sup> An overpayment in compensation in the amount of \$684.00 was thus created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, she is not entitled to waiver.

Section 8129(a) of the Act<sup>8</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled.<sup>9</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "[a]djustments or recovery by the United States may not be made when incorrect payments 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."<sup>10</sup> Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>11</sup> The Office must 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," pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.<sup>12</sup>

Section 10.436 of relevant Office regulations states:

"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) [t]he beneficiary's assets do not exceed a specified amount as determined by [the Office] from data

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<sup>6</sup> *Id.*

<sup>7</sup> See *Donzel R. Yarbour*, 50 ECAB 179 (1998).

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 5 U.S.C. § 8129(a).

<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>12</sup> 20 C.F.R. § 10.434-437 (1999).

furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”<sup>13</sup>

In determining that appellant was not entitled to waiver of the overpayment, appellant submitted an overpayment questionnaire and the Office conducted a telephone conference in which appellant provided further information regarding her income, expenses and assets. She indicated that she had a total monthly income of \$3,498.00 and allowable monthly expenses totaling approximately \$3,326.00.<sup>14</sup> Thus, as appellant’s monthly income exceeds her monthly expenses by at least \$172.00, the Office properly found that she did not need substantially all of her current income to meet ordinary and necessary living expenses and thus, was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt<sup>15</sup> or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.<sup>16</sup> In this case, appellant submitted no evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

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<sup>13</sup> 20 C.F.R. § 10.436 (1999). Office procedures provide recovery of an overpayment will “defeat the purpose of [the Act]” if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of the Act if both: (a) The individual from whom recovery is sought needs substantially all of his or her current income (including monthly benefits) to meet current ordinary and necessary living expenses, and (b) The individual’s assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent. This base includes all of the claimants assets not exempted from recoupment in (iv) below. The first \$3,000.00 or more, depending on the number of the individual’s dependents, is also exempted from recoupment as a necessary emergency resource. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (September 1994).

<sup>14</sup> At different times appellant submitted differing amounts regarding her expenses. She indicated that her expenses totaled \$3,326.00 during the telephone conference. Based on the documentation she submitted on April 3, 2001, her expenses totaled \$3,286.86. The record further indicates that appellant’s utility expenses of \$355.00 per month include premium cable television services and cellular telephone service.

<sup>15</sup> 20 C.F.R. § 10.437(a) (1999).

<sup>16</sup> 20 C.F.R. § 10.437(b) (1999).

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines. The issue on appeal, therefore, is whether the Office's denial of waiver constituted an abuse of discretion.<sup>17</sup> As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion.<sup>18</sup>

Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.<sup>19</sup>

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<sup>17</sup> *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

<sup>18</sup> Subsequent to the Office decision dated April 20, 2001, appellant submitted additional evidence regarding her expenses. The implementing regulations of the Office, found at 20 C.F.R. § 10.440(b) provide that the only review of a final decision concerning an overpayment is to the Board and that there is no right to a hearing under section 8124(b) or for reconsideration under section 8128(a) of the Act. The Board has given effect to the Director's exercise of discretion in enacting such regulation and has found that this exercise of discretion by regulation is not in conflict with the intent of the statute as codified in sections 8124(b), 8128(a) or 8129. The regulatory exercise of discretion at section 10.440(b) preserves the opportunity for a prerecoumpment hearing in accord with *Califano v. Yamasaki*, 422 U.S. 682 (1979); see *Philip G. Feland*, 48 ECAB 485 (1997).

<sup>19</sup> *Robert S. Luciano*, 47 ECAB 793 (1996).

The decision of the Office of Workers' Compensation Programs dated April 20, 2001 is hereby affirmed.

Dated, Washington, DC  
May 28, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member