

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNNE M. INFANTINO and U.S. POSTAL SERVICE,
GREECE BRANCH OFFICE, Rochester, NY

*Docket No. 02-1120; Submitted on the Record;
Issued November 27, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of compensation of \$1,513.51; (2) whether the Office properly refused to waive recovery of the overpayment; and (3) whether the Office abused its discretion in recouping repayment from appellant's continuing compensation benefits.

Appellant's claim, filed on May 1, 2001, was accepted for a lateral meniscus tear after appellant, then a 39-year-old clerk who was on permanent restricted duty due to a previous work injury,¹ twisted her right knee while processing mail.² Appellant underwent arthroscopic surgery on July 24, 2001 and claimed wage-loss compensation from May 1, 2001 and continuing.³

On October 29, 2001 the Office preliminarily determined that an overpayment of \$1,513.51 had occurred from June 30 to August 11 and from August 25 to September 21, 2001, because it miscalculated how much wage-loss compensation was to be paid to appellant. The Office informed appellant that she could request a waiver of the overpayment, with a written decision, telephone conference or a hearing and had 30 days to decide. The Office added that appellant should complete the enclosed overpayment recovery questionnaire and submit supporting financial documents.

On December 7, 2001 the Office issued a final decision that appellant was without fault in creating the \$1,513.51 overpayment. The Office noted that appellant had failed to complete

¹ Appellant returned to work for six hours a day and was paid compensation for the remaining two hours.

² The 1996 knee injury was claim number 02-0718507. The 2001 claim number is 02-2011850.

³ Appellant received a schedule award for the 1996 knee injury, which ran from June 18, 2000 through October 14, 2001. The schedule award was terminated on July 14, 2001.

an overpayment recovery questionnaire and was, therefore, not entitled to waiver of recovery of the overpayment.⁴

On December 10, 2001 the Office informed appellant that the amount payable on her claim for compensation from November 3 to 16, 2001 was \$846.57 and that, following its procedures, it would apply this amount to the overpayment. The Office then deducted \$300.00 from wage-loss compensation for November 17 to 30, 2001 and \$366.94 from appellant's compensation check for December 15 to 28, 2001.

The Board finds that the Office correctly determined the fact and amount of the overpayment.

The basic rate of compensation under the Federal Employees' Compensation Act⁵ is 66 2/3 percent of the injured employee's monthly pay.⁶ When the employee has one or more dependents as defined by the Act, she is entitled to have her compensation augmented at eight and one-third percent.⁷ Appellant was entitled to the three-quarters rate because of her dependent husband.

In its October 29, 2001 memorandum, the Office noted that appellant was paid \$1,167.46 in wage-loss benefits for June 30 through July 17, 2001, based on a weekly pay rate of \$778.30 less deductions for health insurance. Further, she was paid \$2,362.51, covering July 14 through August 11, 2001 and \$2,276.86 for August 25 to September 21, 2001. However, the weekly pay rate should have been \$583.73 or 75 percent, because appellant was working only 30 hours a week -- she received wage-loss compensation for the remaining 10 hours. Thus, her compensation for the first period should have been \$875.60, for the second period, \$1,724.58 and for the third period, \$1,693.14. The amount paid -- \$5,806.83 -- minus the amount that should have been paid -- \$4,293.32 -- resulted in the overpayment of \$1,513.51.⁸ The Office noted that three of the five payments made to appellant were incorrect. Appellant was found to be without fault in the creation of the overpayment.

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

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁹ The only exception to this requirement must meet

⁴ The December 7, 2001 memorandum contains a typographical error in the last paragraph, stating that the preliminary finding of fault should be made final. Appellant was properly found to be without fault.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8105(a).

⁷ 5 U.S.C. § 8105(b).

⁸ The Office did not address the overlapping compensation payments for appellant's wage-loss claim and schedule award from June 30 to July 17, 2001.

⁹ 5 U.S.C. § 8129(a).

the tests set forth in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁰ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹¹

In this case, appellant was without fault in creating the overpayment because the Office miscalculated her weekly wage in determining the amount of compensation.

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436 provides:

“(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) 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.”¹²

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

¹² 20 C.F.R. § 10.436.

(2) To establish that an individual's position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."¹³

The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁴ The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.¹⁵

For waiver under the first standard, appellant must show both that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed a specific resource base. An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁶

Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁷ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office will result in denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹⁸

In this case, appellant failed to complete the overpayment recovery questionnaire. She listed no monthly income on the form yet at the time she was working 30 hours a week and receiving wage-loss compensation for 10 hours under another claim, No. 02-0718507. Further, appellant claimed her husband as her dependent yet listed no income from that source. While appellant detailed her expenses totaling \$2,889.00, she provided no supporting documentation such as bills, bank or credit card statements, or receipts.

¹³ 20 C.F.R. § 10.437.

¹⁴ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹⁵ *Linda Hilton*, 52 ECAB ____ (Docket No. 00-2711, issued August 20, 2001). Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Nor did appellant claim any lost right or detrimental reliance; *see Christine P. Burgess*, 50 ECAB 444, 449 (1999) (appellant sustained no loss due to detrimental reliance because her compensation was offset by her wage-earning capacity).

¹⁶ *Jan K. Fitzgerald*, 51 ECAB 659 (2000); *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹⁷ 20 C.F.R. § 10.438(a).

¹⁸ 20 C.F.R. § 10.438(b).

The preliminary determination of overpayment, dated October 29, 2001, asked appellant to submit documentation, such as “copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records which support the income and expenses listed.” The Office letter explained that this information would be used to determine whether to waive the overpayment or, if not waived, how to collect repayment.

Because appellant failed to list sources and amounts of income or submit supporting financial documentation, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Therefore, the Board finds that the Office properly denied waiver of recovery of the overpayment on this ground.¹⁹

The Board finds that the Office acted within its discretion in recouping the amount of the overpayment from appellant’s continuing wage-loss compensation.

Section 10.441(a) states in relevant part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other factors, so as to minimize any hardship.”²⁰

The Office’s procedures permit an overpayment to be recovered from a claimant’s continuing compensation within certain guidelines.²¹ If compensation is owed to a claimant, the overpayment may be recovered from the compensation due or from a sufficiently large lump-sum payment for a single period of past entitlement.²²

In this case, appellant failed to inform the Office of her financial circumstances. Therefore, the Office had no information upon which to base a determination of the amount to be deducted from appellant’s compensation. Based on her bi-weekly claim forms, the Office owed appellant \$846.57 covering wage-loss compensation from November 3 to 16, 2001. The Office properly informed appellant that it would apply this amount to the overpayment debt, leaving a balance of \$666.94 and asked her to contact the Office to make other arrangements if she could not retire this debt within 30 days.

¹⁹ See *John Skarbek*, 53 ECAB ____ (Docket No. 01-1396, issued June 21, 2002) (finding that the Office properly denied waiver of recovery of the overpayment because appellant failed to submit financial information supporting his claimed monthly income and expenses).

²⁰ 20 C.F.R. § 10.441(a).

²¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.0300.8 (September 1994).

²² *Id.* at Chapter 6.0300.8.b.

Appellant did not respond and the Office, therefore, deducted \$300.00 from appellant's compensation covering November 17 to 30, 2001 and \$346.94 from wage-loss benefits covering December 15 to 28, 2001, thus fully recovering the overpayment.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²³ Here, appellant failed to respond to the preliminary notice of overpayment and the record contains no evidence that the Office abused its discretion in finding that appellant could repay the overpayment in three installments.

Further, the record demonstrates that the Office gave due regard to the factors enumerated in section 10.441(a)²⁴ and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal. Therefore, the Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment in three installments from her wage-loss compensation payments.²⁵

²³ *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

²⁴ 20 C.F.R. § 10.441(a).

²⁵ *See Donzel R. Yarbour*, 50 ECAB 179, 185 (1998) (finding that the Office's decision to withhold 10 percent or \$200.00 a month from appellant's continuing compensation was appropriate under the circumstances of the case).

The December 7, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 27, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member