

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN E. BLAIR and DEPARTMENT OF COMMERCE,
U.S. CENSUS, Charleston, WV

*Docket No. 02-888; Submitted on the Record;
Issued September 12, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$897.84; and (2) whether the Office properly denied waiver of the overpayment.

On May 3, 2000 appellant, then 53-year-old enumerator, was involved in a car accident injuring her neck and back while in the performance of duty. The Office accepted appellant's traumatic injury claim for cervical and thoracic sprains. Appellant received continuation of pay and compensation for wage loss.

On February 5, 2001 the employing establishment notified the Office that it had received a copy of a benefits statement for appellant for the period of June 16 through November 30, 2000 and considered the payrate of \$230.77 to be incorrect. It was noted that appellant had been employed as a census enumerator, a temporary and intermittent position. The employing establishment requested that appellant's payrate be determined based on her weekly earnings of \$187.50 and not be computed using a standard "150 formula."

In a memorandum to the case file, the Office noted as follows:

"The claimant had intermittent earnings as a census enumerator. She did not perform any work, other than as a census worker, during the one-year period prior to the injury. [Appellant] earned \$472.10 during her employment as a census worker. The employing agency did not provide the earnings of a similarly employed employee with the most hours during the year. The payment was based on the standard 150 formula, however, the employing agency has now advised that the average hours worked per day was only 6.5. Therefore, the pay rate should be computed as follows: $10.00 \times 6.5 \times 150$ divided by $52 = 187.50$."

On May 14, 2001 the Office made a preliminary finding that an overpayment had occurred in the case in the amount of \$897.84. The Office noted that from June 16 to

November 30, 2000, appellant was paid compensation based on a payrate of \$230.77 per week, but her compensation should have been paid at a payrate of \$187.50 per week.¹ The Office advised appellant that she was without fault in the creation of the overpayment. Appellant was further informed of her right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods: (1) a request for a telephone conference; (2) a request for a written review of the record; or (3) a request for a recoupment hearing. If appellant wished to request a waiver of the overpayment, she was specifically directed to submit financial information by completing an Office overpayment recovery questionnaire.

Appellant subsequently requested waiver of overpayment along with a telephone conference and review of the written evidence. She submitted a copy of her social security benefits statement showing a monthly income of \$946.00 and a copy of her student loan payments indicating that she was required to pay \$152.70 per month.

In the overpayment questionnaire completed by appellant she noted a total monthly income of \$946.00 and her total monthly expenses as \$946.00. Appellant noted that her rent was \$275.00 and utilities were approximately \$100.00. She did not provide any further itemized information.²

In a decision dated October 17, 2001, the Office determined that appellant was not entitled to waiver of the \$897.00 overpayment and ordered her to repay the entire amount.³

The Board finds that appellant received an overpayment in the amount of \$897.84.

During the period of September 16 through November 30, 2000, appellant was paid compensation based on an incorrect payrate. The Office incorrectly calculated appellant's pay based on a weekly payrate of \$230.77 when the correct payrate should have been \$187.50 reflecting that she worked six hours per day for five days per week.⁴ The pay rate used for computation of appellant's compensation was incorrectly determined based on a standard eight-hour workday for five days per week. Thus, appellant received an overpayment in the amount of \$897.84.

¹ Appellant received \$5,397.84 for the period in question when she should have received \$4,500.00. Thus the overpayment was calculated as follows: $\$5,397.84 - \$4,500.00 = \$897.84$.

² Appellant noted only that her clothes and food expenses are variable.

³ The Office determined that appellant had only a monthly payment of \$76.35 to the Department of Education for a student loan and was, therefore, able to repay the debt.

⁴ The pay rates for census workers are to be calculated in accordance with the Office Procedure manual which provides: "Enumerators and crew leaders ordinarily worked six and one-half hours per day, six days per week. Where disability extended beyond 90 days and the claimant had similar employment during the year prior to the injury, compensation should be paid according to 5 U.S.C. §§ 8114(d)(1) and (2). Otherwise, it should be paid on a weekly basis using the following formula: $150 \times$ the actual daily wage divided by 52 (the actual daily wage should be determined by multiplying the hourly pay rate by 6.5 hours). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9 (December 1995).

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

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁵ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act, which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."⁶ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulation⁷ provides that 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 or 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.⁸ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁹

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.¹⁰

In the instant case, appellant did not establish that she was entitled to waiver of the overpayment. Appellant contends that she is unable to repay the overpayment because she requires all of her social security income in the amount of \$946.00 to pay basic living expenses. However, her questionnaire only lists two itemized expenses, which include rent at \$275.00 per month and a monthly utility bill of \$100.00. The Office also noted that appellant was required to

⁵ See *Robert Atchison*, 41 ECAB 83 (1989).

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.436 (1999).

⁸ An individual's assets must exceed a 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 individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

⁹ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁰ 20 C.F.R. § 10.437 (1999).

pay \$76.35 per month for a student loan. This totals \$451.35 in monthly expenses. Although the Office did not take into account the rent and utility bills, the Office correctly found that appellant's monthly income exceeds her monthly expenses by more than \$50.00 such that she would not qualify for waiver of the overpayment.¹¹ Furthermore, there is no information of record from which to conclude that appellant would be under severe financial hardship if recovery was sought because she had relinquished a valuable right or changed his position for the worse.¹²

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹³ 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 by denying waiver of recovery.

The October 17, 2001 decision of the Office of Workers' Compensation is hereby affirmed.¹⁴

Dated, Washington, DC
September 12, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹¹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *See Leticia C. Taylor, supra* note 9.

¹² Although appellant submitted financial information subsequent to the Office's May 28, 1999 decision, the Board does not have jurisdiction to consider evidence that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

¹³ *Carroll R. Davis*, 46 ECAB 361 (1994).

¹⁴ The Board lacks jurisdiction to review evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501(2)(c).