

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL LYNN WESTINE and U.S. POSTAL SERVICE,
POST OFFICE, Chester, VT

*Docket No. 01-140; Submitted on the Record;
Issued April 3, 2003*

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 met its burden of proof to modify its December 3, 1999 wage-earning capacity determination; (2) whether appellant received an overpayment of compensation in the amount of \$6,071.06 for the period November 8, 1997 to May 20, 2000 because the Office used an incorrect pay rate; (3) whether the Office abused its discretion in denying waiver of the overpayment created from November 8, 1997 to May 20, 2000; (4) whether appellant received an overpayment in the amount of \$2,173.52 for the period January 4 through February 27, 1999 because she received compensation for temporary total disability after she returned to work part time; (5) whether the Office properly found that appellant was at fault in the creation of the overpayment for the period January 4 through February 27, 1999; and (6) whether the Office properly determined that \$150.00 per month should be withheld from appellant's continuing compensation checks to recover the overpayment.

On September 10, 1995 appellant, then a 34-year-old part-time flexible postal clerk, filed an occupational disease claim alleging that she sustained carpal tunnel on the right side due to factors of her federal employment. The Office accepted appellant's claim for right and left-sided carpal tunnel syndrome and authorized right carpal tunnel surgery and a right tennis elbow release.¹ Appellant resumed her regular employment on December 4, 1995.

The Office accepted that appellant sustained a recurrence of disability and began paying her compensation for temporary total disability on September 3, 1997. The Office issued appellant compensation based on its finding that she worked a 40-hour week with a pay rate of \$737.20 per week.

By letter dated January 26, 1998, the Office requested pay rate information from the employing establishment. The Office noted that it was paying appellant based on a recurrent pay rate effective September 3, 1997. The Office requested that the employing establishment

¹ Appellant subsequently underwent surgery for left carpal tunnel syndrome on November 10, 2000.

provide the number of hours worked in the prior year, her hourly pay rate if she worked a regular schedule and her total earnings for the prior year if she worked an irregular schedule.

On December 5, 1997 the Office placed appellant on the periodic rolls effective November 8, 1997. The Office paid appellant based on a pay rate of \$737.20 per week.

By decision dated December 3, 1999, the Office adjusted appellant's compensation based on its finding that her actual earnings as a part-time modified clerk, 15 hours per week effective January 4, 1999 fairly and reasonably represented her wage-earning capacity.

On May 31, 2000 the Office informed appellant of its preliminary determination that an overpayment of compensation in the amount of \$2,173.52 existed because she continued to receive compensation for temporary total disability through February 27, 1999 after she returned to work part time on January 4, 1999. The Office also preliminarily determined that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known was incorrect.

By decision dated May 31, 2000, the Office modified its December 3, 1999 wage-earning capacity on the grounds that it had used an incorrect pay rate in computing appellant's compensation. The Office recalculated appellant's loss of wage-earning capacity based on her actual earnings as a modified clerk effective January 4, 1999 after finding that her correct weekly pay rate was \$635.10.

On June 21, 2000 the Office informed appellant of its preliminary determination that an overpayment of compensation in the amount of \$6,071.66 existed because it used an incorrect pay rate in processing her compensation from November 8, 1997 to May 20, 2000. The Office found that appellant was without 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 to request waiver of the overpayment. The Office further requested that appellant complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

By decision dated August 10, 2000, the Office finalized its preliminary determination that an overpayment of \$2,173.52 occurred from January 4 through February 27, 1999 because appellant received compensation for total disability after she returned to work part time. The Office further found that appellant was at fault in the creation of the overpayment and that therefore it was not subject to waiver.

In another decision dated August 10, 2000, the Office finalized its determination that an overpayment in the amount of \$6,071.06 occurred because the Office used an incorrect pay rate to process compensation from November 8, 1997 to May 20, 2000. The Office further found that appellant was not entitled to waiver as she did not require substantially all of her income to meet ordinary and necessary living expenses. The Office concluded that \$150.00 should be withheld from appellant's continuing compensation payments effective September 9, 2000 for repayment of both overpayments.

The Board finds that the Office met its burden of proof to modify appellant's December 3, 1999 wage-earning capacity determination. The Board further finds, however, that the Office improperly calculated appellant's pay rate effective January 4, 1999.

Once the Office properly determines the wage-earning capacity of an injured employee, modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.²

In this case, the Office modified its wage-earning capacity determination on the basis that the original determination was erroneous. The Office calculated appellant's loss of wage-earning capacity in its original decision based on its finding that she was employed full time on the date of her recurrence of disability.³ Appellant, however, worked only part time as a flexible employee at the time of her injury and subsequent recurrence of disability. The Office, therefore, properly determined that its December 3, 1999 wage-earning capacity determination should be modified to reflect appellant's appropriate pay rate.

In its May 31, 2000 modification of appellant's wage-earning capacity, the Office computed appellant's pay rate for her position when the compensable disability recurred by multiplying the hourly rate for the position, \$18.51 per hour, by 34.46, the number of hours the employing establishment estimated that she worked per week in the preceding year. The Office determined appellant's current pay rate for her position by multiplying the current hourly rate for the position, \$19.76 by the estimated hours per week that she worked in the year preceding her recurrence of disability, 34.46.

Regarding computation of pay, the Federal Employees' Compensation Act⁴ provides:

“Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day work

² *Penny L. Baggett*, 50 ECAB 559 (1999).

³ The Office properly selected September 3, 1997, the date appellant's disability recurred, as the appropriate date for calculation of her pay rate for compensation purposes. Section 8105(a) of the Act provides, “If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 of his monthly pay, which is known as his basic compensation for total disability.” Section 8101(4) of the Act 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.” In this case, appellant resumed her regular employment on December 4, 1995 and is, therefore, eligible for a recurrent pay rate due to her subsequent recurrence of disability on September 3, 1997.

⁴ 5 U.S.C. § 8114(d).

week, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.”

Appellant worked as a part-time flexible employee for substantially the whole year prior to her employment injury and the September 3, 1997 recurrence of disability. Therefore, to determine her pay rate for compensation purposes, a necessary calculation in the *Albert C. Shadrick*⁵ formula, the Office should have applied section 8114(d)(1)(B) for employees without fixed earnings. Accordingly, section 8114(d)(1)(B) is the applicable section of the statute for calculating appellant’s average annual earnings. As the Office did not address the relevant provisions of section 8114 in determining appellant’s pay rate, the case will be remanded to the Office for a determination of appellant’s pay rate at the time her disability recurred.

The Board further finds that appellant received an overpayment of compensation for the period November 8, 1997 to May 20, 2000 because the Office used an incorrect pay rate but that the case is not in posture for decision on the amount of the overpayment.

Appellant received compensation for the period November 8, 1997 through May 20, 2000 based on the Office’s weekly pay rate calculation which assumed that she worked 40 hours per week. However, since appellant, a part-time flexible employee, did not regularly work 40 hours per week, the Office’s pay rate calculation was incorrect and resulted in appellant receiving an overpayment of compensation. The Office, therefore, properly found that appellant received an overpayment of compensation for the period November 8, 1997 to May 20, 2000. However, as discussed above, the Office did not properly compute appellant’s appropriate pay rate under section 8114(d)(1)(B) of the Act in determining the amount of overpayment. On remand, the Office should redetermine appellant’s average weekly pay rate for the appropriate period and recalculate the amount of overpayment received by appellant.

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

Section 8129 of the Act 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.

Section 10.436 of the implementing federal regulations 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 10.437 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

⁵ 5 ECAB 376 (1953).

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.⁶

In this case, appellant did not establish that she was entitled to waiver of the overpayment. The Office correctly found that, as appellant's monthly income exceeds her monthly expenses by more than \$50.00, she did not qualify for waiver of the overpayment.⁷ Furthermore, there is no information of record with which to conclude that appellant would be under severe financial hardship if recovery were sought because she had relinquished a valuable right or changed her position for the worse.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁸ 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 Board further finds that appellant received an overpayment for the period January 4 through February 27, 1999 because she received compensation for temporary total disability after she returned to work part time. The Board finds, however, that the case is not in posture for decision on the amount of the overpayment.

As appellant received compensation for total disability after she returned to work part time, she received an overpayment of compensation. The Office calculated the amount of the overpayment, however, based on its erroneous calculation of appellant's pay rate for compensation purposes, as discussed above. On remand, therefore, the Office should recalculate the amount of the overpayment of compensation.

The Board finds that appellant was at fault in the creation of the overpayment.

Section 8129(b) of the Act⁹ provides that "[a]djustment 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." Section 10.433 of the Office's implementing regulations¹⁰ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

"(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

⁶ 20 C.F.R. § 10.436.

⁷ 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 Letitia C. Taylor*, 47 ECAB 198 (1995).

⁸ *Carroll R. Davis*, 46 ECAB 361 (1994).

⁹ 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.433.

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.¹¹ In this case, the record contains a computer printout indicating that appellant received compensation from January 4 to February 27, 1999 by check dated March 26, 1999. As appellant returned to work on January 4, 1999, she should have known that she was not eligible to receive compensation for total wage-loss disability for those dates.

The case will be remanded for the Office to redetermine appellant’s loss of wage-earning capacity and the amount of overpayments. It is, therefore, premature for the Board to address the issue of repayment of the overpayment for appellant’s continuing compensation payments.

The decisions of the Office of Workers’ Compensation Programs dated August 10 and May 31, 2000 are affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
April 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *Robin O. Porter*, 40 ECAB 421 (1989).