

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATRINA A. SHEPARD and U.S. POSTAL SERVICE,
POST OFFICE, White River Junction, VT

*Docket No. 02-1924; Submitted on the Record;
Issued August 14, 2003*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$2,348.06 overpayment of compensation; (2) whether the Office properly refused to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every 4 weeks.

In August 1991, the Office accepted that appellant, then a 29-year-old postal window clerk, sustained mild bilateral carpal tunnel syndrome due to employment factors.¹ She first stopped work due to this condition on July 8, 1994 and returned to limited-duty work for six hours a day in October 1994. At the time she was injured, appellant was earning night differential and Sunday premium pay; after September 1994, appellant was not entitled to earn night differential pay as she worked a day shift.

By decision dated September 17, 1999, the Office adjusted appellant's compensation based on her actual wages as a modified clerk for the employing establishment. In calculating appellant's wage-earning capacity, the Office used a figure of \$683.33 for her pay a week at the time of injury. Effective November 6, 1999 appellant was reassigned as a modified transportation clerk for the employing establishment. She did not receive night differential or Sunday premium pay after that date.

By decision dated and finalized August 17, 2000, an Office hearing representative set aside the Office's September 17, 1999 decision and remanded the case to the Office for further factual development of the evidence concerning appellant's wage-earning capacity. The representative determined that the Office made various errors in its calculation of appellant's wage-earning capacity, including the fact that it used improper figures for her night differential and Sunday premium pay. She directed the Office to obtain additional information from the

¹ The Office later authorized the performance of bilateral carpal tunnel release surgery.

employing establishment, including the total night differential and Sunday premium pay for the year prior to July 8, 1994, the date disability began; the current salary for the position appellant worked on July 8, 1994; and her current salary.²

On remand the Office obtained the information requested by the Office hearing representative in her August 17, 2000 decision. It was determined that appellant received \$2,745.17 in night differential and Sunday premium pay during the year prior to July 8, 1994. Appellant was at a pay grade of Level 4, Step H on July 8, 1994 and was at Level 6, Step O by late 2000. The employing establishment provided a detailed accounting of the actual wages appellant received for various periods since 1994. She earned \$32,315.00 a year or \$621.44 a week in base pay on July 8, 1994 and was earning \$37,615.00 a year in base pay by late 2000. The evidence reveals that appellant's compensation was based on wage-earning calculations, which erroneously assumed that, from a date prior to July 8, 1994 onwards, she was receiving \$61.89 a week in night differential and Sunday premium pay in addition to \$621.44 a week in base pay for a total of \$683.33 a week. The employing establishment indicated that, after September 30, 1994, appellant was entitled to Sunday premium pay but was not entitled to night differential pay because she was working the day shift and the Office determined that further errors in her wage-earning capacity occurred as a result of this fact.³ The Office also performed calculations to correct an error that was made when appellant's pay grade of Level 6, Step O, rather than her pay grade of Level 4, Step H on July 8, 1994 was used to calculate her wage-earning capacity.

By decision dated September 28, 2001, the Office adjusted appellant's compensation effective December 3, 2000, based on her actual wages as a modified transportation clerk for the employing establishment. In reaching its determination regarding her wage-earning capacity, the Office incorporated the information requested by the Office hearing representative. On September 28, 2001 the Office also made a preliminary determination that appellant received an overpayment of \$2,348.06, but that she was not at fault in the creation of the overpayment.⁴ The Office determined that the overpayment occurred because errors were made in calculating appellant's wage-earning capacity, because the Office made erroneous assumptions about her entitlement to night differential and Sunday premium pay and improperly used her pay grade of Level 6, Step O, rather than her pay grade of Level 4, Step H, in its calculations. The Office indicated that appellant's wage-earning calculations were based on a pay of \$683.33 a week but that she was actually entitled to lesser amounts for various periods.

² It should be noted that section 8101(4) of the Federal Employees' Compensation Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he 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...." 5 U.S.C. § 8101(4).

³ The employing establishment indicated that on July 8, 1994 appellant actually should have received night differential and Sunday premium pay averaging \$52.79 a week.

⁴ The Office determined that appellant received \$77,399.35 for the period July 8, 1994 to December 2, 2000, but was only entitled to receive \$75,051.29 for this period.

Appellant requested an oral hearing in connection with the Office's preliminary overpayment determination. She testified at the hearing that she did not fully understand the Office's calculation of the overpayment of compensation. Appellant also provided details about her monthly income and expenses. By decision dated and finalized June 26, 2002, an Office hearing representative finalized the Office's preliminary overpayment determination of September 28, 2001. The representative determined that appellant received a \$2,348.06 overpayment of compensation and that she was not entitled to waiver of recovery of the overpayment. He further found that recovery of the overpayment should be made by deducting \$50.00 from appellant's compensation payments every 4 weeks.

The Board finds that appellant received a \$2,348.06 overpayment of compensation for the period.

In the present case, the evidence of record, which shows that appellant received \$77,399.35 for the period July 8, 1994 to December 2, 2000, but was only entitled to receive \$75,051.29 for this period. The record contains documents, which show that appellant's compensation for this period was based on wage-earning calculations, which erroneously assumed that, from a date prior to July 8, 1994 onward, she was receiving \$61.89 a week in night differential and Sunday premium pay in addition to \$621.44 a week in base pay for a total of \$683.33 a week. Appellant was entitled to lesser amounts of night differential and Sunday premium pay for various periods and the Office's failure to account for this fact created errors in her compensation.⁵ Further, errors were made in appellant's compensation because her pay grade of Level 6, Step O, rather than her pay grade of Level 4, Step H on July 8, 1994 was used to calculate her wage-earning capacity. The Office performed detailed calculations, which highlighted how these errors created an overpayment of \$2,348.06. Therefore, the Office properly determined that appellant received a \$2,348.06 overpayment.

The Board further finds that the Office properly refused to waive recovery of the overpayment.

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.⁶ These statutory guidelines are found in section 8129(b) of the 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 who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁷ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the

⁵ For example, after September 30, 1994 appellant was entitled to Sunday premium pay but was not entitled to night differential pay, because she was working the day shift.

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ 5 U.S.C. § 8129(b).

overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁸

Section 10.436 of the Office's regulations⁹ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) [t]he 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 furnished by the Bureau of Labor Statistics.¹⁰ 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 expenses by more than \$50.00.¹¹

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.¹²

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. The record reflects that appellant has \$1,916.00 in monthly income¹³ and \$1,782.00 in monthly expenses.¹⁴ Therefore, her monthly income exceeds her monthly ordinary

⁸ Appellant argued that the overpayment should be waived because she was not found to be at fault in its creation but she would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁹ 20 C.F.R. § 10.436 (1999).

¹⁰ 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, 301 (1991).

¹¹ *See Leticia C. Taylor*, 47 ECAB 198, 203 (1995).

¹² 20 C.F.R. § 10.437. The standard for determining whether an individual would experience severe financial hardship attempting to repay the debt is the same for determining whether recovery would defeat the purpose of the Act.

¹³ According to her testimony at the oral hearing, appellant received \$1,200.00 in pay from the employment establishment; \$616.42, in Office compensation (prorated from \$569.00 per 28 days); and \$100.00 in child support.

¹⁴ At the oral hearing, appellant testified regarding her monthly expenses which consisted of the following: food (\$800.00), automobile payments (\$356.00) and insurance (\$50.00), debt consolidation (\$176.00), sporting fees for her children (\$50.00), haircuts (\$50.00); telephone charges (\$60.00); gasoline (\$120.00); and lunches for her children and other miscellaneous expenses (\$120.00).

and necessary expenses by \$134.00.¹⁵ As appellant's current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁶ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment, which created the overpayment.¹⁷ Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, she has failed to show that the Office improperly refused to waive the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every 4 weeks.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent 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 the 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 relevant factors, so as to minimize any hardship.”¹⁸

The record supports that, in requiring repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every 4 weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every 4 weeks.

¹⁵ In his June 26, 2002 decision, the Office hearing representative stated that appellant's current income exceeded her current ordinary and necessary living expenses by \$92.00. This would be harmless error as appellant's current income exceeded her current ordinary and necessary living expenses by an even greater amount.

¹⁶ On appeal appellant presented evidence concerning her current financial condition, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

¹⁷ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹⁸ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

The June 26, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 14, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member