U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE FLETCHER and DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, SEYMOUR JOHNSON AIR FORCE BACE, NC

Docket No. 03-600; Submitted on the Record;
Issued August 18, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation under 5 U.S.C. § 8113(b) because of her failure to participate in vocational rehabilitation; (2) whether the Office properly determined that appellant received an overpayment of $290.89; (3) whether the Office properly denied waiver of recovery of the overpayment; and (4) whether the Office properly required repayment of the overpayment by deducting $50.00 every four weeks from appellant's continuing compensation.

The Office accepted that appellant, a sales store checker born January 9, 1948, developed right carpal tunnel syndrome in the performance of her duties on or about November 5, 1997. The record reflects that appellant stopped work and was terminated from the employing establishment on March 7, 1998. The record further reflects that the Office accepted the subsequent condition of left carpal tunnel syndrome and approved surgical releases of appellant's bilateral carpal tunnel syndrome. Appellant was placed on the periodic compensation rolls following the Office's acceptance of the subsequent condition of left carpal tunnel syndrome.

By decision dated February 11, 2002, the Office reduced appellant's compensation. The Office determined that appellant had, without good cause, failed to undergo vocational rehabilitation as directed. Her compensation was reduced to reflect what would have been her wage-earning capacity in the absence of such failure. According to the Office, appellant would have had the capacity to earn wages as a medical admitting clerk had she continued vocational rehabilitation.

In a preliminary determination dated August 27, 2002, the Office made a finding that appellant received a $290.89 overpayment of wage-loss compensation. The Office found that the overpayment occurred during the period February 23 to March 23, 2002, because appellant was paid at the wage-earning capacity of $131.99 when she should have been paid at the

wage-earning capacity of $224.72. The Office determined that appellant was not at fault in the creation of the overpayment and requested that she submit financial information in support of any request for a waiver of recovery of overpayment.

By decision dated October 10, 2002, the Office finalized the preliminary overpayment determination regarding the fact and amount of the overpayment and appellant's lack of fault in its creation. The Office further noted that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment. The Office also determined that the overpayment would be repaid by deducting $50.00 every four weeks from appellant's continuing compensation payments.

The Board finds that the Office met its burden of proof to reduce appellant's compensation in this case.

Section 8113(b) of the Federal Employees' Compensation Act provides:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed …, the [Office] … after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies…."[1]

The regulations implementing the Act also provide in pertinent part:

> "If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, [the Office] will act as follows--
>
> > (a) Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation…."[2]

In this case, Dr. Daniel T. Poole, a neurologist, indicated in a June 25, 2001 Form OWCP-5c report, that appellant could work full time in a position with no more than 1 to 2 hours of repetitive wrist movement and a 10-pound restriction on pushing, pulling and lifting. As appellant's former employer could not accommodate appellant's work restrictions, the Office referred appellant for vocational rehabilitation services on August 21, 2001. In a subsequent report of August 28, 2001 report, Dr. Poole advised that appellant should avoid any prolonged repetitive tasks with her hands and not engage in any heavy lifting. On December 13, 2001 a rehabilitation plan was developed for short-term training in computers, which included training

[1] 5 U.S.C. § 8113(b).

[2] 20 C.F.R. § 10.519 (1999).

for a position as a hospital admitting clerk and receptionist. Appellant was scheduled to begin training in January 2002 and continue through late April 2002. On December 13, 2001 appellant reportedly refused to sign the rehabilitation plan, citing noncompensable medical problems as her reason for not being able to participate in the rehabilitation plan.[3] In a December 17, 2001 letter, the rehabilitation counselor encouraged appellant to participate in the training and placement program unless she provided medical documentation indicating her inability to the Office. Appellant was informed of specific instructions on enrollment and registration information pertaining to the Typing for Computers and Introduction to Computers classes. In a December 17, 2001 letter to the Office, the rehabilitation counselor noted that, if appellant did not take the recommended courses commencing in January 2002, she would have to wait until the summer to receive her training.

Office procedures require that prior to reduction of compensation a claimant be notified of the provisions of section 8113(b) and provided an opportunity to either resume participation in vocational rehabilitation or provide reasons for not continuing participation.[4] By letter dated January 7, 2002, the Office informed appellant that she had the ability to successfully complete the approved training program in computer training necessary for a placement effort in the field of admitting clerk and directed appellant to undergo the training program by contacting the claims examiner so that necessary arrangements could be made to enter the program. The Office further advised appellant of the provisions of section 8113(b) and informed her that she had 30 days to provide documentation regarding the failure to attend the training program.

In a January 11, 2002 report, Dr. Poole advised that appellant's carpal tunnel syndrome was mild in severity and she should try to restrict any type of repetitive hand movement. He stated, however, that appellant may type on a computer and write, but she should not do this for a prolonged period of time. He further indicated that neurologically appellant was intact. Dr. Poole also noted that appellant's main complaint at the time was right lower extremity pain, for which she was scheduled to see a back specialist.

A February 4, 2002 report from the rehabilitation specialist advised that appellant had not begun training, nor had she been in communication with the rehabilitation specialist or vocational rehabilitation counselor to express her desire to participate in training or cooperate in the vocational rehabilitation process.

The Board finds that the Office's January 7, 2002 letter properly advised appellant of the provisions of section 8113(b) and provided her an opportunity to comply with the Office's directive to continue participation in vocational rehabilitation or provide reasons for her failure to continue participation. Appellant originally declined to sign the plan on December 13, 2001 because she was concerned about her fluctuating blood sugar level and high blood pressure and wanted to talk to her physician. In a December 17, 2001 letter to appellant, the rehabilitation

[3] Appellant reportedly did not want to sign the vocational rehabilitation plan until she spoke with her doctor regarding her fluctuating blood sugar level and her high blood pressure. Her next physician's appointment was scheduled for December 21, 2001.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Vocational Rehabilitation Services*, Chapter 2.813.11(b) (December 1993).

counselor noted that those conditions were nonwork-related medical conditions and appellant would need to provide medical documentation regarding her inability to participate in the training/placement program. In a letter dated January 24, 2002, appellant explained that she had still had problems with her bilateral carpal tunnel syndrome and had nonwork-related problems such as back arthritis, diabetes, anxiety and leg pain.

Appellant has failed to submit the medical evidence necessary to support her disability from the bilateral carpal tunnel syndrome, which appears to be a preexisting medical condition. Thus, there is no information available for the Office to make a determination on whether appellant's bilateral carpal tunnel syndrome affects her performance in the selected position. Although appellant had indicated that her nonwork-related conditions had prevented her from participating in the training program, she also failed to submit any medical evidence to substantiate the extent of such conditions and whether the conditions were preexisting or subsequently acquired after the work injury. The Office properly determined that appellant had, without good cause, failed to undergo vocational rehabilitation when directed by the Office. According to the rehabilitation counselor, appellant would have been capable of performing the position of hospital/medical admission clerk or receptionist at $8.00 per hour or $320.00 per week on completion of the training program. Under the provisions of section 8113(b), the Office may reduce appellant's compensation prospectively to reflect her wage-earning capacity as a hospital/medical admission clerk.

The Board finds that the Office properly determined that appellant received an overpayment of $290.89.

Appellant was entitled to wage-loss compensation totaling $425.11 for the period February 24 through March 23, 2002. Based on the selected position of hospital/medical admission clerk and application of the principles set forth in *Albert C. Shadrick*, the Office determined that appellant's loss of wage-earning capacity was $224.72 per week starting February 24, 2002.[5] The Office found, however, that it erroneously paid appellant at the rate of $131.99[6] per week for the period February 24 to March 23, 2002, which amounted to $716.00. Consequently, appellant actually received $716.00 during the period February 24 to March 23, 2002, based on the weekly rate of $131.99 when she should have received $425.11 based on her loss of wage-earning capacity weekly rate of $224.72. Utilizing the correct compensation rate of three-fourths, weekly pay rate of $224.72 and pay rate date of February 23 to March 23, 2002, appellant was overpaid by $290.89. Appellant received the above overpayment of compensation. The Board notes that appellant has not challenged the amount of the overpayment on appeal. Accordingly, the Board finds that the Office's finding regarding the amount of overpayment is supported by the record.

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

[5] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.403 (1999).

[6] This represented the loss in earning capacity per week.

Under section 8129 of the Act, 5 U.S.C. § 8129(b) and the implementing regulations, 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.[7] Waiver of recovery of an overpayment is not possible if the individual is at fault in creating the overpayment.[8] In this instance, the Office determined that appellant was without fault in creating the overpayment. However, a finding that appellant is without fault is insufficient, of itself, for the Office to waive recovery of the overpayment.[9] The Office must determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.[10]

The applicable regulations 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 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 the beneficiary's assets do not exceed a specified amount as determined by the Office.[11] Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.[12]

Section 10.438 of the regulations provides that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office] and failure to furnish the information within 30 days of the request shall result in denial of waiver."[13]

The record in the instant case does not support a finding that recovery of the overpayment would either defeat the purpose of the Act or be against equity and good conscience. The Office advised appellant that if she wanted to request waiver she had to provide the necessary financial information by completing the overpayment recovery questionnaire issued on August 27, 2002. On September 15, 2002 appellant submitted an overpayment recovery questionnaire noting monthly expenses of $1,025.00, creditor expenses of $270.00 and her monthly income from workers' compensation being $205.00. However, appellant failed to provide any supporting data to substantiate her expenses. As a result, the Office did not have the

[7] 20 C.F.R. §§ 10.430, 10.433, 10.434, 10.436, 10.437, 10.441(a) (1999).

[8] 20 C.F.R. § 10.433(a) (1999).

[9] *Jorge O. Diaz,* 51 ECAB 124 (1999).

[10] 20 C.F.R. § 10.434 (1999).

[11] 20 C.F.R. § 10.436 (1999).

[12] 20 C.F.R. § 10.437 (1999).

[13] 20 C.F.R. § 10.438 (1999) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act. Furthermore, the evidence of record does not demonstrate that appellant 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 overpayment. As appellant has not shown that recovery of the overpayment would "defeat the purpose of the Act" or would "be against equity and good conscience," the Board finds that the Office properly denied waiver of recovery of the overpayment.

With respect to the Office's decision to deduct $50.00 every four weeks from appellant's continuing compensation, the Board finds that such a repayment schedule is in accordance with 20 C.F.R § 10.441(a). This section authorizes the Office to recover an overpayment by decreasing later payments of compensation. In exercising its authority under section 10.441(a), the Office must take 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."[14] Given the limited financial information available, the Board finds that the Office reasonably imposed a repayment schedule of $50.00 every four weeks.

The decisions of the Office of Workers' Compensation Programs dated October 10 and February 11, 2002 are hereby affirmed.

Dated, Washington, DC
August 18, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] 20 C.F.R § 10.441(a) (1999).