

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARLENE A. LUCK and U.S. POSTAL SERVICE,
POST OFFICE, Cambridge, NY

*Docket No. 03-1215; Submitted on the Record;
Issued August 5, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether an overpayment of \$2,046.91 occurred in appellant's case from August 2 to November 2, 2002; (2) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment; and (3) whether the Office properly set the rate of recovery from future compensation payments so as to minimize any hardship.

On July 3, 2002 appellant, then a 39-year-old rural mail carrier, filed an occupational disease claim alleging that she sustained an injury in the performance of duty: "[r]ight shoulder was hurting from putting mail in [a] box. I tried to rest right arm by using [the] left [one] to put mail in [a] box. By doing so I pulled something in my neck and back." Appellant indicated that she first became aware of the disease or illness on June 21, 2002. She reported the condition to her supervisor and first received medical care on July 1, 2002. On July 2, 2002 appellant stopped work. The postmaster indicated that appellant was last exposed on July 2, 2002 to conditions alleged to have caused the disease or illness.¹

On August 14, 2002 the Office notified appellant that it had accepted her claim for left trapezium strain.

Appellant filed claims for wage loss using a Form CA-7. On this form the employing establishment reported that appellant earned \$30,873.00 per year at the time of injury and at the time she stopped work on July 2, 2002. On August 23, 2002 the employing establishment reported that appellant had an auxiliary route and worked only 26 hours a week.

On October 24, 2002 the Office notified appellant that she would be receiving regular compensation payments of \$1,781.16 every four weeks on the periodic rolls based on a weekly rate of pay of \$593.72.

¹ The postmaster also indicated that appellant worked five hours a day Monday through Saturday.

On November 6, 2002 the Office made a preliminary determination that an overpayment of \$2,046.91 occurred in appellant's case for the following reason:

“Upon receipt of your initial [Form] CA-7, your employer reported your annual salary of \$30,873.[00], but did not inform [the Office] that as a [r]ural [m]ail [c]arrier, you work an average of 26 hours per week.

“[The Office] therefore, paid you on the basis of 40 hours per week. Your pay rate was calculated to be \$593.71, whereas, it should have been \$385.84. This resulted in an overpayment of \$2[,]046.91 occurring between August 2, 2002 to November 2, 2002.”

The Office advised appellant that she was without fault in creating the overpayment and could request a waiver. Stating that it was providing her with an overpayment recovery questionnaire, the Office informed appellant that she should submit documents, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips and other records to support income and expenses shown on the questionnaire. The Office explained:

“This information will help us decide whether or not to waive the overpayment. If waiver is not granted, the information will be used to decide how to collect the overpayment. We will not try to collect the overpayment until we reach a final decision on your request for waiver.

“Also please note that under 20 C[.]F[.]R[.] [§] 10.438, we will deny waiver if you fail to furnish the information requested on the enclosed Form OWCP-20 (or other information we need to address a request for waiver) within 30 days. We will not consider any further request for waiver until the requested information is furnished.”

Appellant requested waiver and submitted copies of her earnings statements, income tax returns and bills. The earnings statements showed an hourly pay rate of \$14.84 in the pay period prior to July 2, 2002. Appellant informed the Office that at the time of injury her average work week was 32 hours per week and that her route was subsequently cut. She stated that her bills well exceeded her monthly income and that it would be a hardship to return the overpayment.

Appellant submitted information on her monthly expenses. She submitted statements supporting \$378.13 in minimum monthly installment debt and a balance of \$367.13 due on a credit account. She also submitted documents to support a monthly car payment of \$337.54, a minimum monthly payment of \$73.14 for car insurance and a monthly rent of \$550.00. To support this last item, appellant submitted a November 15, 2002 letter from John Petteys, who identified himself as a landlord and stated that he received from appellant \$550.00 per month for rent.

On January 9, 2003 the employing establishment reported that appellant's salary on the date she stopped work was \$14.84 per hour.

On January 16, 2003 the Office informed appellant that it could find no indication that she was provided the necessary overpayment recovery questionnaire. The Office attached such a

questionnaire and asked her to submit it, together with supporting financial documents, within 30 days.

On January 22, 2003 appellant completed the questionnaire. She listed workers' compensation as her only source of income. Appellant reported \$1,887.54 in total monthly expenses: \$550.00 for rent, \$400.00 for food, \$200.00 for clothing, \$300.00 for utilities and \$437.54 for "other expenses," including monthly installment debts of \$387.54. She reported that she owned no valuable property or real estate and that she had \$169.00 in her bank accounts and cash on hand.

On January 27, 2003 the Office advised appellant that she would be receiving regular compensation payments of \$1,157.52 every four weeks on the periodic rolls based on a weekly pay rate of \$385.84.

On February 22, 2003 appellant stated that she worked as a mail carrier from September 1998 to July 1, 2002, that her rate of pay was \$14.84 per hour and that she worked anywhere from 32 to 38 hours per week.

In a letter dated March 24, 2003, the Office stated that the employing establishment had confirmed, in a telephone call, that on that date appellant's correct pay rate was \$14.84 per hour for only 26 hours of work each week or a weekly pay rate of \$385.84. The employing establishment indicated to the Office that appellant was a rural carrier associate and that this pay rate and salary was commensurate with that position.

In a decision dated March 26, 2003, the Office finalized its preliminary determination that an overpayment occurred in the amount of \$2,046.91 because the Office used an incorrect pay rate to award compensation benefits. Although the Office indicated that appellant was aware that she was receiving improper compensation, it made no finding that she was at fault in the creation of the overpayment. Instead, the Office addressed appellant's monthly income and expenses and denied waiver. The Office noted that appellant failed to document expenses listed for food, clothing and "other expenses." She documented only \$131.80 of the \$300.00 claimed for utilities and the letter she submitted from her landlord documenting rent was of limited probative value because the identity of her landlord was not verified. Consulting the most recent statistics from the Bureau of Labor Statistics, the Office noted that the amounts claimed for food and clothing appeared to be overstated: Appellant claimed \$4,800.00 per year to feed her family of three, while statistics indicated that a family of three spent an average of \$3,512.00 per year for food at home.² Appellant claimed \$2,400.00 per year to clothe her family of three, while statistics indicated that a family of three spent an average of \$2,024.00 for clothing. The Office also observed that appellant appeared to have resources in addition to those identified because her listed monthly expenses exceeded monthly income by over \$700.00.

The Office made the following finding:

"From the analysis presented above relative to the [overpayment recovery questionnaire] furnished by the claimant, it is concluded that there is no basis to

² The Office ignored statistics for "[f]ood away from home," which is listed as an additional \$2,424.00 per year.

approve waiver of the overpayment. Since [appellant] is receiving periodic compensation payments, it cannot be concluded that waiver is appropriate under the ‘defeat the purpose of the act’ provision. Specifically, in the case of *William Phillips, [Jr.]*, 39 ECAB ___ [330] (1987), the Employees’ Compensation [Appeals] Board noted that consideration of financial hardship was inapplicable as that appellant was entitled to compensation under the Federal Employees’ Compensation Act. Also, as with *William Phillips, supra*, the detrimental reliance provision is not applicable because [the] claimant did not allege that she changed her position for the worse or relinquished a valuable right in reliance on payment of compensation benefits.”³

The Office also found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$173.63 per payment.

The Board finds that this case is not in posture for decision.

Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of monthly pay.⁴ Section 8101(4) of the Act provides that “monthly pay” means 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.⁵ When compensation is paid on a weekly basis, the weekly equivalent of the monthly pay is deemed one-fifty-second of the average annual earnings.⁶

In an occupational disease claim, the date of injury for the purposes of computing compensation is the date the employee was last exposed to employment factors alleged to have caused her condition.⁷ In this case, the date of appellant’s last exposure and the date disability began are effectively the same date. Appellant’s pay rate on July 2, 2002 is crucial to the determination of not only how much compensation she is entitled to receive, it is crucial in determining the amount of any overpayment, whether her monthly income exceeds monthly expenses and whether the repayment schedule minimizes any hardship.

The employing establishment reported that appellant earned \$30,873.00 per year on the date of injury and at the time she stopped work on July 2, 2002. Evidence establishes that

³ The Office’s reading of *William Phillips, Jr.*, 39 ECAB 330 (1987) is in error. In that case, the Board held: “[s]ince the evidence clearly establishes that appellant does not need substantially all of his monthly income to meet his ordinary and necessary living expenses, waiver of the overpayment is not warranted under the ‘defeat the purpose of the Act’ clause.” *Id.* at 334. Waiver was not precluded because the claimant was receiving compensation payments. Rather, the claimant’s monthly income exceeded his monthly expenses by \$1,034.65, leaving him sufficient disposable resources to repay the debt at a rate that minimized hardship.

⁴ See 5 U.S.C. §§ 8105, 8106.

⁵ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

⁶ 5 U.S.C. § 8114(c).

⁷ *Hugh A. Feeley*, 45 ECAB 255 (1993).

appellant's pay rate on July 2, 2002 was \$14.84 per hour. This is consistent with annual earnings of \$30,873.00 if appellant worked 40 hours a week. The employing establishment also reported, however, that appellant worked an auxiliary route at only 26 hours a week. Appellant advised that at the time of injury she worked an average of 32 hours per week and that her route was subsequently cut. She later asserted that she worked anywhere from 32 to 38 hours a week. Appellant submitted earnings statements supporting that she averaged over 32 hours a week for the eight weeks prior to July 2, 2002. This evidence tends to contradict the employing establishment's report that appellant worked only 26 hours a week. The record contains no further documentation of appellant's average annual earnings.

Because the evidence is insufficient to establish how many hours appellant worked per week or what her monthly pay was on July 2, 2002, the amount of the overpayment cannot be determined. The Board finds that an overpayment did, in fact, occur because the Office paid compensation based on a 40-hour work week, while the evidence establishes that appellant worked something less than 40 hours a week. Further development of the evidence is necessary to establish appellant's monthly pay. The Board will affirm the Office's March 26, 2003 decision on the issue of fact of overpayment but will set aside that decision on the issue of the amount. On remand, the Office shall obtain sufficient documentation from the employing establishment to establish appellant's average annual earnings under 5 U.S.C. § 8114(d) and shall then recalculate the amount of the overpayment.

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁰

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ *Id.* at § 10.434. 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 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. *Id.* at § 10.436. 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. *Id.* at § 10.437(a). 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. *Id.* at § 10.437(b).

¹⁰ *Id.* at § 10.438(a).

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹¹

The Office found that appellant was without fault in the matter of the overpayment. She requested waiver and reported expenses of \$400.00 a month for food and \$200.00 a month for clothing, but she submitted no specific documentation to support these figures.¹² Using the most recent statistics from the Bureau of Labor Statistics, the Office found that appellant's figures appeared to be overstated. The Board disagrees. The Consumer Expenditure Survey indicates that for a family of three, at appellant's age, the average annual expenditure for food is \$5,935.00. The survey also indicates that the average annual expenditure for apparel and services is \$2,024.00. Together, then, annual expenditures for food and clothing can be expected to approximate \$7,959.00 or \$663.25 per month. Appellant's claimed expenditure of \$600.00 a month for food and clothing therefore, appears reasonable.

Appellant also claimed monthly rent of \$550.00. She submitted a letter from her landlord to confirm this figure, but the Office discounted the evidence for lack of verification of the landlord's identity. The letter could be incorrect, of course, but the Office should not presume so. On its face the evidence supports the monthly expense claimed. If there is a presumption at work here, it should be that the evidence is what it purports to be: a letter from appellant's landlord confirming a monthly rent of \$550.00. If the Office had concerns about the letter's authenticity, it should have exercised its power to develop the evidence further.

Appellant's claimed expenditure of \$600.00 a month for food and clothing, indirectly supported by the Consumer Expenditure Survey and her claimed expenditure of \$550.00 a month for rent, supported by the November 15, 2002 letter from Mr. Petteys, together bring her monthly expenses to \$1,150.00. The Office accepted as documented another \$131.80 a month for utilities, bringing monthly expenses to \$1,281.80, which is more than the \$1,253.98 in monthly income appellant received in workers' compensation benefits beginning January 2003.¹³

From this evidence alone, without regard to other documented expenses, it appears that appellant needs substantially all of her current income to meet current ordinary and necessary living expenses and that, given her minimal assets, recovery of an overpayment would cause hardship and defeat the purpose of the Act. The issue of waiver remains unresolved, however, because of appellant's pay rate on July 2, 2002 and, therefore, her monthly income from workers' compensation, is not established. That a claimant receives continuing compensation is no basis for denying waiver.¹⁴

¹¹ *Id.* at § 10.438(b).

¹² Appellant submitted credit card balances with no itemization of charges for food, clothing or other expenses.

¹³ There is no evidence in this case that appellant has income outside her workers' compensation payments. No presumption to the contrary arises from the mere fact that her claimed monthly expenses exceed her claimed monthly income.

¹⁴ *See supra* note 3.

Office regulations provide:

“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 relevant factors, so as to minimize any hardship.”¹⁵

In this case, the Office found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$173.63 per payment. The Office gave no indication as to how it arrived at this figure or whether it gave due regard to the factors noted above. As with the issues of amount and waiver, the issue of recovery remains unresolved because appellant’s average annual earnings and the rate of her compensation, are not established.

The Board will set aside the Office’s March 26, 2003 decision on the issues of amount of overpayment, waiver and recovery. After further developing the evidence on appellant’s average annual earnings, the Office shall afford appellant due process and readjudicate the overpayment that occurred in this case.

¹⁵ 20 C.F.R. § 10.441(a) (1999).

The March 26, 2003 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment and is otherwise set aside. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
August 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member