U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MACIE WARDEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Beckley, WV

Docket No. 03-23; Submitted on the Record;
Issued December 12, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs used the correct rate of pay in calculating appellant's compensation; (2) whether the Office properly determined that appellant received an overpayment in the amount of $6,335.57 for the period October 15, 1998 through July 15, 2000; (3) whether the Office abused its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment; and (4) whether the Office properly requested repayment in the amount of $100.00 per month.

On October 15, 1998 appellant, a 45-year-old volunteer hospital worker, injured her right leg when she tripped over a patient's legs. She filed a claim for benefits, which the Office accepted for fractured right patella.

In determining appellant's pay rate for purposes of disability compensation, the Office was required to calculate a constructive pay rate because appellant was employed as a part-time, unpaid volunteer. By letter dated December 24, 1998, the employing establishment advised the Office that, according to its daily review records, appellant had worked as a volunteer at the employing establishment since April 1973 and had normally worked on Tuesdays and Thursdays from approximately 8:00 a.m. until 1:00 p.m. Appellant's supervisor completed a Form CA-7 on February 18, 1999 wherein he noted that on the date of injury appellant had a base pay of $5.15 per hour and confirmed that appellant had volunteered 2 days per week for approximately 10 hours per week. In a March 1, 1999 memorandum, the Office, in order to establish a pay rate for appellant, equated her volunteer employment to that of a paid nurse's aid. The Office then stated that it would base her pay on the current national minimum wage, $5.75, and utilize the "150" rule. Pursuant to this rule, the Office multiplied a minimum wage of $5.75 times 150, which when divided by 52 amounts to a pay rate of $132.69 per week.

By decision dated June 12, 2000, the Office granted appellant a schedule award for a 16 percent permanent impairment of her right knee for the period from November 18, 1999 to October 5, 2000, for a total of 322.56 days of compensation. Appellant's compensation was to

be based on a weekly rate of $284.80, which when multiplied by the 2/3 rate amounted to weekly compensation of $189.87.[1]

By letter dated July 27, 2000, the Office informed appellant that it had been using an incorrect rate of pay in her compensation payments and had, therefore, computed her compensation incorrectly. The Office stated that, although appellant was an unpaid volunteer worker at the time of her injury, there were provisions under the Federal Employees' Compensation Act, which allowed an unpaid volunteer's pay rate to be set at the rate of an employing establishment employee who performs duties similar duties to those of the volunteer worker. The Office then noted that when it made its first compensation payment to appellant it did not have sufficient information to compute a rate of pay in accordance with the above provisions, so pending this information it utilized a formula based on the minimum wage and paid her compensation using a rate of pay of $132.69 per week. This computation, however, did not take into account that appellant only worked 10 hours per week.

The Office further stated that this rate of pay was also utilized in determining schedule award payments that began November 18, 1999. The employing establishment had provided information that a comparable rate of pay for her duties would be that of a nurse's aide, a GS-1, of the general schedule pay scale. At the time of appellant's injury in October 1998, that rate of pay was $13,662.00 per year, or $6.55 per hour. The Office stated that based on this information it should have adjusted appellant's rate of pay to accurately reflect appellant's actual workweek of 10 hours per week as follows: $6.55 per hour times 10 hours, which amounts to a weekly compensation rate of $65.50 per week. Instead, the Office used the wrong yearly pay rate of $14,810.00 (the rate of GS-1 step 1 for the year 2000) and incorrectly computed the rate of pay based on a full-time workweek as follows: $14,810.00 per year, divided by 52 weeks, which equaled a pay rate based on $284.80 per week, or $189.87 at the 2/3 rate. The Office then retroactively adjusted appellant's compensation to reflect the higher rate of pay and adjusted her continuing schedule award payment as well, in accordance with this corrected rate. The Office, therefore, adjusted its continuing schedule award payments to reflect the correct rate of pay of $65.50 per week.

By letter dated August 2, 2000, the Office advised appellant that she was entitled to schedule award payments at the weekly rate of $179.00.

On July 10, 2002 the Office issued a preliminary determination that an overpayment had occurred in the amount of $6,335.57 for the period October 15, 1998 through July 15, 2000, because she received compensation based on an incorrectly computed pay rate. The Office noted that, at the time of her injury, appellant was working as a volunteer's aid for 10 hours a week and should have been compensated at the rate of $65.50 a week for 10 hours a week. Instead, the Office stated that she was compensated at the rate of $132.69 per week for a 40-hour workweek. The Office stated that it had also made a similar error in computing appellant's schedule award payments by paying her at the rate of $189.87 from November 18, 1999 through February 29, 2000, when it should have paid her at the rate of $43.67; and by paying her at the rate of $195.00 from March 1 through July 15, 2000, when it should have paid her at the rate of $44.75 during

[1] By decision dated August 17, 2001, an Office hearing representative affirmed the June 12, 2000 Office decision.

this period, reflecting a 10-hour workweek. The Office found that appellant was without fault in the matter, stating that she could not have been reasonably aware that the payments she had been receiving were incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised appellant that, when she was found without fault in the creation of the overpayment, recovery might not be made if it can be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that she had the right to request a prerecoupment hearing on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the July 10, 2002 letter.

Appellant completed the questionnaire, requested waiver and submitted documentation pertaining to her financial situation.

In a decision finalized on August 8, 2002, the Office found that appellant was not entitled to waiver. The Office considered the financial information appellant submitted and determined that, based on her income, assets and resources, recovery of the $6,335.57 overpayment would not result in undue hardship and would, therefore, not defeat the purpose of the Act. The Office also determined that appellant could repay the overpayment through monthly installments of $100.00.

The Board finds that the Office used the correct rate of pay in calculating appellant's compensation.

Pursuant to section 8114,[2] the Board must initially determine from the evidence of record the rate of compensation appellant should have received during the period in question and thus if an overpayment has occurred. The Act[3] provides for computation of monetary compensation for disability on the basis of monthly pay, which is deemed 1/12 of the average annual earnings of the employee at the time of injury.[4] When compensation is paid on a weekly basis, the weekly equivalent of the monthly pay is deemed 1/52 second of the average annual earnings.[5]

The Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment, in which she was injured

[2] 5 U.S.C. § 8114.

[3] 5 U.S.C. § 8114(b)(c)(d).

[4] 5 U.S.C. § 8114(b).

[5] 5 U.S.C. § 8114(c).

substantially for the entire year immediately preceding the injury[6] and would have been afforded employment for substantially a whole year, except for the injury.[7] The Act provides:

> "Average annual earnings are determined as follows:
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> (1) If the employee worked in the employment, in which she 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 workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.
>
> (2) If the employee did not work in the employment, in which she was employed at the time of her injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection."[8]

The Office is required by its own guidelines to review the information provided in the Form CA-7 to determine whether appellant was employed in the position during substantially the whole year or whether the position would have afforded employment for substantially a whole year had it not been for the injury.[9] The employing establishment informed the Office in its December 24, 1998 letter that appellant had been employed as a volunteer worker at the employing establishment since April 1973, typically on Tuesdays and Thursdays from approximately 8:00 a.m. until 1:00 p.m. The employing establishment also submitted the February 18, 1999 Form CA-7, which indicated that on the date of injury appellant had a base pay of $5.15 per hour and had worked as a volunteer for 2 days per week, approximately

[6] *See John D. Williamson*, 40 ECAB 1179 (1989), wherein appellant had worked in a part-time position for a period of over one year, appellant had not demonstrated the capacity to earn wages concurrently as a full-time employee for one year prior to the employment injury.

[7] 5 U.S.C. § 8114(d)(1), (2).

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9(a)(b) (September 1990).

10 hours per week. The record also indicates that on June 12, 2000 appellant was granted a schedule award, which indicated that her weekly pay was $284.80 and that her weekly compensation was $189.87.

The Board has long recognized in interpreting the statute for pay rate purposes that the objective is to arrive at as fair an estimate as possible of the claimant's future earning capacity and that this can best be accomplished by considering appellant's employment activities during the year preceding the injury.[10] This position is supported by Larson's *The Law of Workers' Compensation*,[11] which notes that if appellant's employment during the past year is inherently intermittent, discontinuous, or part time, the mere multiplication of the date-of-injury wage would not accurately reflect annual earning capacity.

In this regard, if sections 8114(d)(1) and (2) of the Act are not applicable, 5 U.S.C. § 8114(d)(3) provides as follows:

> "If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment, in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors."

In the instant case, the Office initially based appellant's compensation rate on the current national minimum wage $5.75, which, utilizing the "150" rule, it multiplied times 150, which when divided by 52 amounted to a pay rate of $132.69 per week. The Office, however, subsequently recognized that this pay rate computation was incorrect because it failed to reflect that fact that she only worked 10 hours per week. The Office further stated that this formula was also utilized in determining her schedule award payments beginning in November 18, 1999. The Office, therefore, adjusted appellant's pay rate and computed a new rate based on that of a nurse's aide, a GS-1, of the general schedule pay scale. However, the Office erred again by using the yearly pay rate, $14,810.00, for the wrong year, 2000, instead of $13,662.00 per year, or $6.55 per hour, the prevailing rate as of October 1998, the date of injury. This led the Office to pay appellant at the weekly rate of $284.80, reflecting an annual salary of $14,810.00 per year, divided by 52 weeks. The Office then retroactively adjusted appellant's compensation to reflect the higher rate of pay and adjusted her continuing schedule award payment as well, in accordance with the corrected rate of $65.50, which represented a pay rate of $6.55 per hour times 10 hours. The Office also adjusted its continuing schedule award payments to reflect the adjusted, correct rate of pay of $65.50 per week.

[10] *See Billy Douglas McClellan*, 46 ECAB 208 (1994); *John D. Williamson* 40 ECAB 1179 (1989); *Wendell Alan Jackson*, 37 ECAB 118 (1985*); Irwin E. Goldman*, 23 ECAB 6 (1971).

[11] A. Larson, *The Law of Workers' Compensation*, § 60.11(a)(2) (1992).

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of $6,335.57, for the period October 15, 1998 through July 15, 2000. The record shows that the Office incorrectly paid appellant $9,052.31, representing varying rates of compensation covering three periods; this overpayment was reflected in an Office worksheet dated July 9, 2002. The Office indicated that: (a) from October 15, 1998 through February 18, 1999, appellant received $2,414.96 in temporary total disability compensation, reflecting 91 workdays, or slightly more than 18 weeks of pay at the incorrect rate of $132.69, when she should have received $1,192.10, reflecting slightly more than 18 weeks of pay at the correct rate of $65.50; (b) from November 18, 1999 through February 29, 2000, appellant received $2,820.92 in schedule award payments, reflecting 104-calendar days, or nearly 15 weeks of pay at the incorrect rate of $189.87, when she should have received $648.82, nearly 15 weeks of pay at the correct rate of $43.67; and (c) from March 1 through July 15, 2000, appellant received $3,816.43 in schedule award payments, reflecting 137-calendar days, or nearly 20 weeks of pay at the incorrect rate of $195.00, when she should have received $875.82, reflecting nearly 20 weeks of pay at the correct rate of $44.75. Thus, as the Office incorrectly paid appellant at incorrect compensation rates from October 15, 1998 through February 18, 1999, November 18, 1999 through February 29, 2000 and from March 1 through July 15, 2000, the Office properly found that she received an overpayment of compensation in the amount of $6,335.57 during that period.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

Section 8129 of the Act[12] 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." Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive 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," pursuant to the guidelines provided in sections 10.436[13] and 10.437[14] of the implementing federal regulation.

[12] 5 U.S.C. § 8129(a)(b).

[13] 20 C.F.R. §§ 10.436.

[14] 20 C.F.R. § 10.437.

With regard to the "defeat the purpose of the Act" standard, section 10.436 of the regulation provides:

> "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:
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> > (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."

With regard to the "against equity and good conscience" standard, section 10.437 of the regulation provides:

> "(a) 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.
>
> "(b) 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. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.
>
> > (1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.
> >
> > (2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."

Finally, Section 10.438 of the Office's regulation[15] provides:

> "(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This

[15] 20 C.F.R. § 10.438.

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

Thus, a finding that appellant was without fault is insufficient in and of itself, for the Office to waive the overpayment.[16] The Office must 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" pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.[17]

Office regulations provide 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.[18] The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary expenses by more than $50.00.[19] Additionally, the guidelines for recovery of an overpayment from an individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.[20]

Office procedures provide that recovery will defeat the purpose of the Act if the individual's assets do not exceed the resource base of $3,000.00 for an individual or $5,000.00 for an individual with a spouse or one dependent, plus $6,000.00 for each additional dependent.

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[16] *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

[17] 20 C.F.R. § 10.434-437 (1999).

[18] *Frederick Arters*, 53 ECAB ____ (Docket No. 01-1237, issued February 27, 2002).

[19] *Id.*

[20] *John Skarbek*, 53 ECAB ____ (Docket No. 01-1396, issued June 21, 2002).

This base includes all of the claimant's assets that are not exempted from recoupment.[21] The first $3,000.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.[22]

In the instant case, in determining that appellant was not entitled to waiver of the overpayment, the Office reviewed the overpayment questionnaire and financial information submitted by appellant. The Office considered appellant's income, expenses, assets and general financial circumstances and found that, as appellant's total monthly income is $1,193.00 and her monthly expenses are $656.96, recovery of the overpayment would not cause undue hardship. Since appellant's monthly income exceeded her monthly expenses by $536.04, she did not need essentially all of her monthly income to meet her expenses. In addition, the Office noted that appellant's total personal assets, which included the combined amount of her savings and checking accounts, amounted to $3,130.00; this figure exceeded the statutory minimum of $3,000.00.

The financial information submitted by appellant, therefore, showed that she did not meet the financial criteria under which the Office would consider waiver of recovery of the overpayment on the grounds that recovery would defeat the purpose of the Act. Thus, as appellant's monthly assets substantially exceeds her monthly income as outlined above, the Office properly found that she was not entitled to waiver on grounds that recovery would defeat the purpose of the Act.[23]

Further, there is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received from October 15, 1998 through July 15, 2000.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory and regulatory guidelines. The issue on appeal, therefore, is whether the Office's denial of waiver constituted an abuse of discretion.[24] 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

[21] The Office Procedure Manual provides that an individual's assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, etc. Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

[22] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (September 1994).

[23] *See Robert D.* Clark, 48 ECAB 422 (1997); *Nina D. Newborn,* 47 ECAB 132 (1995).

[24] *James M. Albers, Jr.,* 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

not abuse its discretion by issuing its August 8, 2002 final decision denying waiver of recovery of the overpayment in the amount of $6,335.57.

Lastly, the Board finds that the Office properly required monthly repayment in the amount of $100.00.

The method determined by the Office to recover an overpayment lies within the Office's discretion. The analysis that determines the method of repayment is substantially the same as that used to determine waiver.[25]

With regard to the method determined by the Office to recover the amount of the overpayment, section 10.441(b) of Office regulations provides:

> "When an overpayment has been made to an individual who is not 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 the individual fails to make such refund, [the Office] may recover the same through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral to the debt to a collection agency or to the Department of Justice."[26]

In the instant case, the Office recommended that appellant either repay the overpayment in full or repay the debt in the amount of $100.00 each month. The Office noted that this amount would be less than 10 percent of her monthly income, which would lessen the amount of her interest payments. The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case and found that appellant's assets were sufficient to require repayment in monthly installments of $100.00. The Office thus did not abuse its discretion under the standard outlined above in determining that repayment of the overpayment could by accomplished by monthly payments of $100.00 and that the repayment schedule was not unreasonable under the circumstances.

[25] *See Howard R. Nahikian*, 53 ECAB _____ (Docket No. 01-138, issued March 4, 2002).

[26] 20 C.F.R. § 10.441(b) (1999).

The decision of the Office of Workers' Compensation Programs dated August 8, 2002 is hereby affirmed.

Dated, Washington, DC
December 12, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member