

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUISE PRICE and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket Nos. 03-1343 and 03-1798; Submitted on the Record;
Issued December 12, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant has established a recurrence of disability as of April 13, 2001; and (2) whether appellant received an overpayment of compensation in the amount of \$1,142.00 for the period March 24 through April 20, 2002 because the Office of Workers' Compensation Programs erroneously paid total wage-loss benefits rather than partial wage-loss benefits; and (3) whether the Office abused its discretion in denying waiver of the overpayment created from March 24 to April 20, 2002; and (4) whether the Office properly determined that \$300.00 per month should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted that, on January 10, 1989, appellant, then a 31-year-old clerk, sustained subluxations at the L5-S1 level while in the performance of her limited-duty position. She returned to restrictive part-time work in 1997 and appropriate benefits for wage loss was paid. On June 29, 2001 appellant filed a notice of recurrence of disability commencing April 14, 2001. She indicated that she had a burning sensation into the lower extremity and difficulties walking.¹ By decision dated February 15, 2002, the Office determined that appellant had not established a recurrence of disability. In a decision dated February 6, 2003, an Office hearing representative affirmed the prior decision.

The record further reflects that, in a decision dated February 21, 2002, the Office suspended appellant's entitlement to compensation benefits effective February 24, 2002 as appellant failed to submit a completed Form CA-1032. Her compensation benefits were later reinstated; however, benefits for total wage loss rather than partial wage loss were erroneously paid.

¹ The record additionally reflects that appellant filed a Form CA-2a on April 25, 2001 claiming a recurrence as of April 13, 2001 and stopped work on April 14, 2001.

On June 26, 2002 the Office informed appellant of its preliminary determination that an overpayment of compensation of \$1,142.00 had occurred for the period March 24 through April 20, 2002 as appellant had received compensation for temporary total disability benefits when she was only entitled to partial disability compensation benefits. The Office further found that appellant was with fault in creating the overpayment as she had accepted a payment which she knew or should have known was incorrect. 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 information.

By decision dated February 6, 2003, an Office hearing representative finalized the determination that an overpayment in the amount of \$1,142.00 had occurred. The hearing representative modified the preliminary finding to reflect that appellant was without fault in the creation of the overpayment and found that appellant was not entitled to waiver of recovery of overpayment. The hearing representative noted that appellant was working on a part-time basis and determined that deducting \$300.00 per 28 days from her continuing wage-loss compensation was reasonable to recover the overpayment.

The Board finds that appellant has not established a recurrence of disability commencing April 13, 2001.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.²

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.³ A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted employment injury.⁴ To meet this burden of proof, a claimant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁵

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997).

⁴ *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁵ *Helen K. Holt*, 50 ECAB 279, 282 (1999).

Causal relationship is a medical issue⁶ and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

The Office hearing representative stated that appellant, at the hearing held October 31, 2002, testified that her physical therapy was not approved.⁹ She further testified that, although she worked four hours a day, her work environment was strenuous because she was not provided with the ergonomic equipment as prescribed by her physician.¹⁰

The Board finds that, although appellant testified that her work environment was strenuous because she was not provided with the ergonomic equipment as prescribed by her physician, the evidence of record is devoid of any evidence of a change in the nature of her light-duty requirements.

The Board further finds that appellant's request for physical therapy does not qualify as a change in the nature and extent of appellant's injury-related condition to support a recurrence of disability. In an April 18, 2001 medical report, Dr. Alan M. Leff, a Board-certified anesthesiologist, set forth examination findings and diagnosed lumbar myofascial pain syndrome and dysfunctional neck and back pain. He requested physical therapy and opined, without any medical rationale, that appellant's current condition was causally related to her work injuries of January 10, 1989 and October 21, 1999. In reports dated May 14 and August 13, 2001, Dr. Leff advised that appellant had suffered a relapse of her symptoms because she could not continue physical therapy while she was working. He stated that, as a result, appellant had been totally disabled since April 14, 2001 and continued to regress. Dr. Leff reiterated that appellant needs physical therapy so that she may return to work. In his November 9, 2001 report, Dr. Leff requested that appellant undergo physical therapy three times a week and related that the physical therapy was medically indicated. He further opined, without any medical rationale, that appellant's current condition was causally related to her work injuries.

The Board finds that these reports are a request for physical therapy; they are not indicative of either an injury or a worsening of any condition as there is no objective evidence of a disabling condition with supporting medical rationale to make a determination that appellant

⁶ *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

⁷ *Duane B. Harris*, 49 ECAB 170, 173 (1997).

⁸ *Gary L. Fowler*, 45 ECAB 365 (1994).

⁹ It appears that, as the authorization took longer than expected, appellant filed a recurrence claim on April 25, 2001 and stopped work on April 14, 2001.

¹⁰ The Board notes that a copy of the hearing transcript of October 31, 2002 is not of record.

had a change in the nature and extent of the injury-related condition. Thus, a requirement for physical therapy does not qualify as a change in the nature and extent of appellant's injury-related condition to support a recurrence of disability.

The other medical evidence in this case is also not of sufficient probative value to meet appellant's burden of proof. The medical record consists of numerous treatment notes and electrodiagnostic reports which indicate that appellant had complaints of radiating pain and indicate the treatment received; however, there is no discussion of objective findings substantiating total disability or a material worsening of the accepted low back condition.

In a December 17, 2001 report, Dr. Louis A. Kessel, a chiropractor, presented his examination findings and diagnosed intervertebral disc syndrome with mild myofascitis and radiculopathy and neuritis. He indicated that appellant had low back pain with numbness in her legs and that her progress was undetermined as she was prone to "reaggravating and exacerbations." Dr. Kessel further indicated that the subluxation at L5-S1 and the increase in appellant's symptoms were caused by the work accident of January 10, 1989. However, he failed to provide a discussion regarding a worsening of the accepted condition resulting in the April 2001 recurrence or provide any medical rationale explaining how the accepted 1989 low back condition worsened without an intervening cause resulting in the current condition or disability. Moreover, as Dr. Kessel's opinion appears to be based on appellant's being "prone to reaggravations and exacerbations," this is indicative of a possibility of a future injury. The Board has held that a fear of future injury is not a compensable employment factor.¹¹

In an October 30, 2002 report, Dr. Leff stated that appellant had increased pain and muscle spasms in her neck and lower back. He stated that, as of April 14, 2001, she was unable to push, pull or bend without excruciating pain. Dr. Leff advised that muscle pain does not show up on x-ray or magnetic resonance imaging (MRI) scans. He stated that appellant was disabled from April 14, 2001 through September 9, 2002 and opined that her condition was causally related to her work injuries of January 10, 1989 and October 21, 1999. Although Dr. Leff's report indicated that appellant suffered a relapse of her symptoms, there is no detailed explanation of what those symptoms were, what caused those symptoms to worsen and how it changed appellant's ability to work. While he calls appellant's episode an exacerbation of her symptoms, there is no medical rationale to support such a statement. Moreover, Dr. Leff fails to explain how or whether appellant had experienced a worsening of the accepted condition resulting in the April 2001 recurrence and fails to provide any medical rationale supported by objective findings as to how appellant's current medical condition was causally related to the accepted 1989 low back condition.

Appellant has not submitted sufficient medical evidence to establish a worsening of the accepted condition. She, therefore, did not provide a reasoned medical opinion, based on a complete factual and medical background, establishing a recurrence of disability in this case.

The Board further finds that appellant received an overpayment of compensation in the amount of \$1,142.00 for the period March 24 through April 20, 2002.

¹¹ See *Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980).

As appellant received compensation for the period March 24 through April 20, 2002 at an incorrect pay rate which exceeded that to which she was entitled because the Office erroneously paid total wage-loss benefits rather than partial wage loss, an overpayment of compensation occurred and the total amount was calculated by the Office as equaling \$1,142.00.

Therefore, appellant received an overpayment of compensation in the amount of \$1,142.00 to which she was not entitled.

The Board further finds that the Office did not abuse its discretion in denying waiver of 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.¹² These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation 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 which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹³ Since the Office hearing representative found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulation¹⁴ 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: (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.¹⁵ 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 \$50.00.¹⁶

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

¹² See *Robert Atchison*, 41 ECAB 83 (1989).

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.436 (1999).

¹⁵ 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 (1991).

¹⁶ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

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.¹⁷

In the instant case, appellant did not establish that she was entitled to waiver of the overpayment. Although her questionnaire indicates that her workers compensation is \$1,115.00, the Office hearing representative indicated that appellant received \$1,015.00 in continuing compensation payments. The hearing representative further noted that appellant's current biweekly salary was approximately \$600.00. Thus, appellant received \$2,215.00 in monthly pay. Her questionnaire further noted that she had expenses of approximately \$1,922.00 a month. The Board finds that appellant's monthly income exceeds her monthly expenses by more than \$50.00 such that she would not qualify for waiver of the overpayment.¹⁸ Furthermore, there is no information of record with which to conclude that appellant would be under 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.¹⁹ 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.

Lastly, the Board finds that the Office properly withheld \$300.00 a month from appellant's continuing compensation to recover the overpayment.

Section 10.441²⁰ provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.

In determining that a repayment schedule of \$300.00 per 28 days was appropriate, the Office's hearing representative made a lengthy analysis of appellant's financial status and found that there was no evidence or documentation to consider appellant's income versus her liabilities or expenses. The record is devoid of any information to indicate that appellant's financial circumstances were such that recovery of the overpayment from her continuing compensation would cause her undue financial hardship. The Board finds that, in determining this repayment schedule, the Office rendered due regard to the factors set forth in section 10.441 and that the

¹⁷ 20 C.F.R. § 10.437 (1999).

¹⁸ 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 Leticia C. Taylor, supra* note 16.

¹⁹ *Carroll R. Davis*, 46 ECAB 361 (1994).

²⁰ 20 C.F.R. § 10.441 (1999).

repayment schedule was not unreasonable under the circumstances. Thus, the Board finds that the Office's requirement that appellant pay the Office \$300.00 a month until the overpayment is recovered is reasonable.²¹

Accordingly, the Office of Workers' Compensation Programs decisions dated February 6, 2003 are hereby affirmed.

Dated, Washington, DC
December 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²¹ On May 5, 2003 appellant filed her appeal with the Board which was docketed as number 03-1343. The Office subsequently issued a decision dated May 14, 2003, which appellant appealed and the Board docketed as number 03-1798. The Board notes that the May 14, 2003 decision pertains to the issue regarding the amount of continuing compensation the Office can withhold in recovering the overpayment. The Board and the Office, however, may not have concurrent jurisdiction over the same issue in the same case; *see Douglas E. Billings*, 41 ECAB 880 (1990). Following the docketing of an appeal with the Board, which in the instant case was on May 5, 2003, the Office did not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed are null and void. Thus, the May 14, 2003 decision is null and void. *Noe L. Flores*, 49 ECAB 344, 346, n.1 (1998); *Douglas E. Billings*, 41 ECAB 880, 895 (1990).