

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN BLACKNELL and U.S. POSTAL SERVICE,
GEORGIA SALES CENTER, Roswell, GA

*Docket No. 03-1912; Submitted on the Record;
Issued December 22, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to waive recovery of an overpayment of compensation in the amount of \$1,918.01.

The Office accepted that appellant, a 49-year-old sales specialist, sustained a cervical strain, contusion, blunt trauma to both knees and rotator cuff tears during an automobile accident on October 25, 2001. Appellant returned to work four hours per day on January 17, 2002, but was sent home by the employing establishment on February 5, 2002 due to a lack of available work for her. Appellant then filed a claim for compensation (Form CA-7) for the period February 5 through 18, 2002. Appellant subsequently returned to work four hours per day on February 19, 2002 which was increased to six hours on September 16, 2002. During this period appellant filed requests for compensation (Form CA-7) indicating the hours she was requesting compensation.

In a preliminary determination dated March 28, 2003, the Office made a finding that appellant had received a \$1,918.01 overpayment of wage-loss compensation. The Office found that the overpayment occurred during the period June 17 to September 27, 2002 due to an incorrect hourly rate that appellant was paid for her intermittent wage loss. The Office found that appellant was paid at an hourly rate of \$54.81 for the period June 17 through September 20, 2002 and an hourly rate of \$36.54 for the period September 23 through 27, 2002. Appellant's correct hourly pay rate was \$27.41, which the Office found by dividing her weekly salary of \$1,096.21 by 40 hours. Appellant was paid compensation based upon a 20-hour workweek for the period June 17 to September 20, 2002 and a 30-hour workweek for the period September 23 to 27, 2002. The Office found that appellant was paid \$3,973.77 during the period June 17 through September 27, 2002 when her correct payment, computed at the correct pay rate of \$27.41 per hour, should have been \$2,055.76 which resulted in an overpayment of \$1,918.01. Lastly, 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 claim for overpayment waiver.

Appellant was further notified in a May 12, 2003 letter that she had 15 days from the date of the letter to request a prerecoupment hearing before a representative of the Branch of Hearings and Review. The Office received no response from appellant.

By decision dated May 28, 2003, 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 noted that as of the date of the decision that it had not received any information from appellant regarding any claim for waiver. The Office, in the May 28, 2003 decision, determined that for the period June 17 through September 27, 2002 appellant was received an overpayment in the amount of \$1,921.20 based upon an incorrect pay rate.

The Board finds that appellant received an overpayment of compensation in the amount of \$1,918.01.

The Office incorrectly paid appellant intermittent wage loss at the wrong hourly rate of \$54.81 for the period June 17 through September 20, 2002 and an hourly rate of \$36.54 for the period September 23 through 27, 2002. These incorrect hourly pay rates were computed by dividing appellant's weekly pay of \$1,096.21 by the 20, and later 30, hours she performed light duty rather than dividing her weekly pay by the 40 hours per week she worked when she sustained her injury. Thus, using the correct compensation rate of $\frac{3}{4}$, hourly pay rate of \$27.41, and number of hours of compensation and comparing this to the amount appellant was actually paid, appellant was overpaid by \$1,918.01. Appellant received the above overpayment of compensation. The Board notes that appellant has not challenged the amount of the overpayment on appeal.

The Board further finds that the Office did not abuse its discretion in denying waiver 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.¹ 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 who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."² Since the Office 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.

¹ See *James A. Gray*, 54 ECAB ____ (Docket No. 02-195, issued December 27, 2002); *Robert Atchison*, 41 ECAB 83, 87 (1989).

² 5 U.S.C. § 8129(b); *Miguel A. Muniz*, 54 ECAB ____ (Docket No. 02-58, issued December 9, 2002); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

Section 10.436 of the implementing regulation³ provides that recovery of an overpayment will defeat the purpose of the Act if 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.⁴ 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 \$50.00.⁵

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.⁶

In this case, appellant was advised by the Office on March 28 to provide the necessary financial information by completing the overpayment recovery questionnaire if she wanted to request waiver. On May 12, 2003 the Office advised appellant that she had 15 days from the date of the letter to request a precoupment hearing. However, she failed to submit a completed OWCP-20 form or otherwise submit financial information supporting a request for waiver. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.⁷ Appellant did not submit any financial information to show that she would experience severe financial hardship; that she relinquished a valuable right; or that her position changed for the worse. As appellant has not shown that recovery 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.

³ 20 C.F.R. § 10.436.

⁴ 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 Wayne G. Rogers*, 54 ECAB ____ (Docket No. 01-116, issued March 7, 2003); *Robert F. Kenney*, 42 ECAB 297 (1991).

⁵ *See Wade Baker*, 54 ECAB ____ (Docket No. 01-123, issued November 21, 2002); *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁶ 20 C.F.R. § 10.437; *see Wade Baker*, *supra* note 5.

⁷ 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information); *see James A. Gray*, *supra* note 1; *Wade Baker*, *supra* note 5.

The decision of the Office of Workers' Compensation Programs dated May 28, 2003 is hereby affirmed.

Dated, Washington, DC
December 22, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member