

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. SIZEMORE and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION NO ISLAND, San Diego, CA

*Docket No. 02-1879; Submitted on the Record;
Issued February 3, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,225.98; (2) whether she was at fault in the creation of the overpayment, such that a waiver of recovery of the overpayment could be considered; and (3) whether the Office of Workers' Compensation Programs properly denied waiver of recovery of the overpayment.

On December 4, 1987 appellant, then a 35-year-old clerk-typist, sustained a dislocated left shoulder, a fractured right femur for which she underwent surgery, thrombophlebitis of the right leg and a major depressive disorder when she was involved in a motor vehicle accident. She was placed on the periodic rolls for receipt of compensation through March 23, 1989. Appellant returned to work full time effective March 24, 1989 and filed a claim for recurrence of disability beginning on August 11, 1989. She returned to light duty full time on January 11, 1990. On March 1, 1990 appellant work hours were reduced to six hours per day and she was subsequently found to be totally disabled after March 26, 1990. She, therefore, had a new pay rate as of March 1, 1990, the date her hours were reduced.

Appellant was paid temporary total disability at an erroneous pay rate of August 8, 1989 instead of March 1, 1990 when her work hours were reduced. The Office found that appellant was not at fault in the creation of the overpayment, in the amount \$8,225.98, as it was an Office error that appellant would not have known to be incorrect.

Appellant was paid a schedule award beginning on December 30, 2001.¹ She complained that implementation of her schedule award resulted in a reduction of her monetary benefits, which resulted in a complete review of her record. The Office found that for the period March 26, 1990 to February 23, 2002 she received \$179,998.27 gross compensation when she

¹ By decision dated January 9, 2002, appellant was granted a schedule award for a 20 percent permanent impairment of her right leg and a 3 percent permanent impairment of her left arm for the period December 30, 2001 to April 12, 2003 for a total of 66.96 weeks of compensation. Appellant did not appeal the schedule award decisions and they are not before the Board on the present appeal. *See* 20 C.F.R. § 501.2(c).

was actually entitled to \$170,239.67. The Office found that appellant received an overpayment of \$8,225.98 after crediting \$1,192.60 in health benefits premium, \$158.52 in optional life insurance premiums and \$181.50 in wage-loss compensation for 30 hours from March 1 to March 15, 1990.

On March 18, 2002 the Office issued a preliminary determination that an overpayment of compensation had occurred in the amount of \$8,225.98 due to the pay rate error and found that appellant was without fault in its creation such that waiver of recovery of the overpayment could be considered. The Office advised appellant that if she wanted waiver of the overpayment to be considered, she had 30 days to request waiver and to provide financial information necessary to support waiver. An overpayment recovery questionnaire was included for completion.

By letter also dated March 18, 2002, the Office advised appellant that it was correcting the pay rate it used to calculate her schedule award and that, effective March 23, 1990, her schedule award payments would be based upon a pay rate of \$322.85 instead of \$296.40.

Appellant did not respond to the March 18, 2002 preliminary overpayment determination nor did she request a waiver or complete the overpayment recovery questionnaire.

By decision dated May 2, 2002, the Office finalized the overpayment decision, finding that appellant had received an overpayment of compensation in the amount of \$8,225.98; that she was not at fault in the creation of the overpayment; but that she was not entitled to waiver.

The Board finds that appellant received an overpayment of compensation in the amount of \$8,225.98.

In this case appellant was paid temporary total disability at an erroneous pay rate when her work hours were reduced. For the period March 26, 1990 to February 23, 2002, she received \$179,998.27 when she was actually entitled to \$170,239.67. Therefore, she received an overpayment of \$8,225.98, after crediting \$1,192.60 in health benefits premium, \$158.52 in optional life insurance premiums and \$181.50 in wage-loss compensation for 30 hours from March 1 to March 15, 1990.

The Board further finds that appellant was not with fault in the creation of the overpayment, such that waiver of recovery of the overpayment could be considered.

Section 8129(a) of the Federal Employees' Compensation Act² provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) describes the only exception to the Office's right to adjust later payments:

“Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when

² 5 U.S.C. §§ 8101-8193.

adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”³

In order to qualify for this exemption, the individual must be without fault. In considering the issue of fault, *i.e.*, whether an individual is without fault, what constitutes fault depends on whether the facts show that the incorrect payment resulted from: (a) an incorrect statement as to a material fact which the payee knew or should have known to be incorrect; (b) failure of the payee to provide information which he or she knew or should have known to be material; or (c) acceptance of a payment which the payee knew or should have known to be incorrect.⁴

In this case the Office found appellant to be without fault as she would not know or should have known her pay rate calculation was incorrect.

Because appellant was without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b), adjust later payments only if adjustment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.434 of Title 20 of the Code of Federal Regulations provides that if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the [the Act], or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”

Section 10.436 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 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.”

The Office’s procedure manual explains that both conditions in (a) and (b) above must be met to defeat the purpose of the Act. When an individual exceeds the limits for either disposable

³ *Id.* at § 8129(b).

⁴ *See* 20 C.F.R. § 10.433(a)(1)-(3).

current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.⁵

Section 10.437 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 the 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.”

The Form OWCP-20 overpayment recovery questionnaire is designed to obtain the financial information necessary to determine whether adjustment or recovery would defeat the purpose of the Act.⁶ Appellant did not submit the Form OWCP-20 the Office provided with its preliminary determination dated March 18, 2002 and she did not otherwise submit financial evidence or supporting documentation to establish income, assets, expenses or that recovery of the overpayment would defeat the purpose of the Act. Neither has she argued or submitted evidence to establish that recovery of the overpayment would be against equity or good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse. Although appellant is without fault in the matter of the overpayment, she nonetheless bears responsibility for providing the financial information necessary to support her request to waive recovery of the overpayment. Section 10.438 of Title 20 of the Code of Federal Regulations states in this regard:

“(a) 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 [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 waiver and no further request for waiver shall be considered until the requested information is furnished.”

⁵ Federal (FEC A) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(September 1994). The procedure manual specifies that the individual’s assets must 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 \$600.00 for each additional dependent. An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.

⁶ See Federal (FECA) Procedure Manual, Part -- 6, Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (September 1994).

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁷ Generally, an abuse of discretion can be shown only through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probably deductions from established facts.⁸ The Board has long held that when a claimant submits no financial evidence to support her request to waive recovery of an overpayment, the Office commits no abuse of discretion in denying that request.⁹ As appellant did not submit evidence in this case to establish 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 in refusing to waive recovery of the overpayment.

The evidence in this case does not establish 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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 2, 2002 is hereby affirmed.

Dated, Washington, DC
February 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁷ See *William J. Murphy*, 40 ECAB 569 (1989).

⁸ See *Loretta R. Celi*, 51 ECAB 560 (2000); *Bonnie Goodman*, 50 ECAB 139 (1998); *Lecil E. Stevens*, 49 ECAB 673 (1998).

⁹ E.g., *William J. Murphy*, 40 ECAB 569 (1989); *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); *Joseph H. Light*, 13 ECAB 358 (1962).