

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN W. ALLEN and U.S. POSTAL SERVICE,  
POST OFFICE, Biloxi, MS

*Docket No. 02-1948; Submitted on the Record;  
Issued February 14, 2003*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant received an overpayment of compensation in the amount of \$975.22; (2) whether the Office properly refused to waive recovery of the overpayment, given that appellant was without fault; and (3) whether the Office properly decided to deduct \$100.00 every four weeks from appellant's continuing compensation.

The Office accepted that on January 10, 1997, appellant sustained left-sided tendinitis. The claim was later expanded to include elbow tendinitis and left carpal tunnel syndrome, right carpal tunnel syndrome, left and right carpal tunnel release, left flexor tenolysis, neuroplasty and transposition of the ulnar nerve at the left elbow with medial epicondylectomy.

In a report dated July 22, 1998, Dr. Robert K. Hillier, appellant's treating physician and a Board-certified orthopedic surgeon, stated that appellant was released to return to full time, limited duty effective that date.

In a duty status report dated January 31, 2000, Dr. Hillier stated that appellant could work Tuesday to Saturday from 6:30 a.m. to 3:00 p.m. with 30 minutes lunch, off work on Sunday and Monday to rest.

On March 31, 2000 the Office advised appellant that she had 30 days to accept a job offer which was consistent with the limitations required by Dr. Hillier. On April 19, 2000 Dr. Hillier placed appellant on total disability. On May 5, 2000 Dr. Hillier performed a left carpal tunnel release. Appellant received total disability benefits from that date.

On June 30, 2000 the Office placed appellant on the periodic rolls and she received compensation for total disability based on her weekly 40-hour rate of \$797.20. Compensation payment would begin on May 5, 2000. In a worksheet dated July 7, 2000, the Office noted that appellant's weekly pay rate on May 5, 2000, the date of recurrence of disability (left carpal tunnel release surgery) was \$733.20.

On September 15, 2000 Dr. Hillier performed right carpal tunnel release. On December 5, 2000 he performed a neuroplasty and transposition ulnar nerve at elbow with medial epicondylectomy. In a report dated January 25, 2001, Dr. Hillier stated that appellant was totally disabled "from any gainful employment until she recovers from her surgery to her left elbow." In a report dated April 4, 2001, he stated that appellant was released to restricted duty that day.

In a statement of accepted facts dated March 15, 2001, the Office stated that Dr. Hillier released appellant to light duty on January 25, 2001.

In a report dated May 3, 2001, Dr. Raymond R. Fletcher, a Board-certified orthopedic surgeon and an Office consultant, stated that appellant was able to work a 40-hour work week with restrictions and that she reached maximum medical improvement on April 3, 2001.

On the same date, appellant accepted a 40 hour a week job as a modified distribution clerk (part-time flexible clerk) and returned to work. In a report dated May 9, 2001, Dr. Hillier stated that appellant was released to restricted duty on that day.

In a report dated July 7, 2001, the employing establishment stated that appellant's current wages of \$40,472.00 annually or \$20.24 an hour, were equal to the current annual payrate for a carrier position, which was the job she had when she was initially injured. The employing establishment noted that the hourly wage for a carrier was \$36.55.

By letter dated July 19, 2001, the Office advised appellant that her compensation was terminated on that date because her "actual wages meet or exceed the wages of the job held when injured and no loss of wages has occurred."

In an internal memorandum dated July 18, 2001, an Office claims examiner indicated that appellant was overpaid compensation because she received total disability compensation at the time of her left carpal tunnel release as if she were a full-time employee and thus was entitled to 2,080 hours of wage earning a year. However, appellant returned to work as a part-time flexible employee and would be compensated at a rate of 2000 hours a year, because part-time flexible employees' are not entitled to holiday pay. The difference is 80 hours of wages a year. Thus, appellant was paid \$19.93 an hour for 2,080 hours when she was entitled to be paid \$19.93 an hour for only 2,000 hours of work. Her payrate was erroneously determined to be \$797.20 a week, the correct weekly pay was \$766.54 a week,

In a worksheet dated September 8, 2001, the Office determined that appellant was overpaid \$975.22 because the Office incorrectly paid her total disability compensation from May 5, 2000 to April 2, 2001 in the amount of \$25,282.79 when appellant's compensation should have been calculated on a partial disability total of \$24,307.57.

On September 18, 2001 appellant submitted an overpayment questionnaire and requested a waiver and hearing of the overpayment. She listed her monthly income of \$3,197.92 including social security benefits of \$239.84. Appellant noted total expenses of \$2,545.00 including \$384.67 for rent, \$56.00 for food, \$140.00 for clothing and utilities at \$165.00 per month. She listed other expenses including transportation, dental needs, etc. at \$1,800.00. Appellant listed other assets totaling \$2,030.00.

In a memorandum to the file dated September 25, 2001, the Office stated that appellant's work-related injury began on January 1, 1997, when she was partially disabled from work as a result of her left-hand tenosynovitis, carpal tunnel syndrome and enthesopathy, all of which are work related. The Office noted that, since appellant has worked for two consecutive months without a formal job suitability finding, her job as a modified distribution clerk "fairly and reasonably" represent her wage-earning capacity.

In a decision dated September 28, 2001, the Office terminated appellant's compensation benefits on the grounds that her job fairly and reasonably represented her wage-earning capacity.

In a report dated October 15, 2001, Dr. Hillier stated that "from May 5, 2000 through April 2, 2001, [appellant]was totally disabled from any significant gainful employment."

On May 9, 2002 the Office advised appellant that she had abandoned her request for an oral hearing scheduled for April 25, 2002.

In a decision dated June 4, 2002, the Office finalized the preliminary determination finding that the overpayment had occurred as alleged, that appellant was without fault in its creation, and that appellant was required to repay the debt in installments of \$100.00 per month.

As appellant received compensation for the period May 5, 2000 to April 4, 2001 at an incorrect pay rate which exceeded that to which she was entitled, an overpayment of compensation occurred and the total amount was calculated by the Office as equaling \$975.22.

Therefore, appellant received an overpayment of compensation in the amount of \$975.22 to which she was not entitled.

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.<sup>1</sup> 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 Unites 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."<sup>2</sup> 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.

Section 10.436 of the implementing regulation<sup>3</sup> 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

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<sup>1</sup> See *Robert Atchison*, 41 ECAB 83 (1989).

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.436 (1999).

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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

In the instant case, appellant did not establish that she was entitled to waiver of the overpayment. Her questionnaire notes her income of over \$3,400.00 a month and expenses of \$2,545.00 a month. In addition, appellant has over \$2,000.00 in assets. 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.<sup>7</sup> Furthermore, there is no information of record from which to conclude that appellant would be under severe financial hardship if recovery was sought because she had relinquished a valuable right or changed his 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.<sup>8</sup> 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.

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<sup>4</sup> 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).

<sup>5</sup> *See Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

<sup>6</sup> 20 C.F.R. § 10.437 (1999).

<sup>7</sup> 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 5.

<sup>8</sup> *Carroll R. Davis*, 46 ECAB 361 (1994).

The June 4, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 14, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member