

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY HERNANDEZ-GALLEGOS and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Jacksonville, FL

*Docket No. 03-704; Submitted on the Record;
Issued July 3, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant received a \$5,812.67 overpayment of compensation for the period of November 30, 2000 through February 13, 2001; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$286.71 from appellant's compensation payments every four weeks.

On February 16, 1999 appellant, then a 48-year-old tools and parts attendant, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she injured her left shoulder while opening a drawer. The claim was accepted for left shoulder strain, C5-6 radiculopathy, cervical discectomy and anterior fusion that was performed at the C5-6 level.¹ Appellant stopped work on May 19, 2000 to recover from surgery.

On February 26, 2001 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she suffered a left shoulder condition and depression as a result of the work-related injury. In a June 1, 2001 decision, the claim was accepted for left shoulder impingement. Appellant received total temporary compensation. On February 26, 2001 appellant also submitted a claim for compensation on account of traumatic injury, or occupational disease (Form CA-7) for the period October 27, 2000 through February 13, 2001, that was paid by the Office.²

On March 5, 2001 appellant received a schedule award for a permanent impairment of her left upper extremity. The award was paid for the period November 30, 2000 through May 23, 2001.

¹ Claim No. 06-722732.

² Claim No. 06-2028950.

In a September 26, 2001 preliminary decision, the Office found that appellant received an overpayment in the amount of \$5,812.67 for the period covering November 30, 2000 through February 13, 2001 because appellant received compensation under two claims for the same body part. Appellant was found to be without fault for creating the overpayment and was provided her procedural rights, including the right to request a waiver. Appellant requested a hearing which was held on June 28, 2002. At the hearing appellant's representative argued that appellant received payment for two separate injuries, under different claim numbers and that the schedule award was for an injury to appellant's left shoulder while her wage-loss compensation was for her neck. Appellant's representative indicated that financial information would be forthcoming, but none was received.

In a January 7, 2003 decision, the hearing representative found that appellant received dual payments for an injury to her left shoulder and therefore received an overpayment; appellant was without fault but waiver was denied because no financial information was received.

The Board finds that appellant received a \$5,812.67 overpayment of compensation for the period November 30, 2000 through February 13, 2001.

In the present case, appellant received wage-loss compensation and a schedule award for an injury to her left shoulder for the period in question despite the fact that the Federal Employees' Compensation Act prohibits dual benefits for injuries to the same body part.³ The record contains evidence which establishes that appellant received wage-loss compensation totaling \$5,812.67 for an injury to her left shoulder and a schedule award for partial impairment to the same shoulder during the same period. This constituted a dual payment of benefits. Therefore, the Office properly determined that appellant received a \$5,812.67 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive 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.⁴ These statutory guidelines are found in section 8129(b) of the 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 this subchapter or would be against equity and good conscience."⁵ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the

³ *Michael Biggs*, Docket No. 03-751 (issued May 28, 2003); FECA Manual, No. 2.808.5(a)(4)1500-8(d)

⁴ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

⁵ 5 U.S.C. § 8129(b).

overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁶

Section 10.436 of the Office's regulations⁷ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) [t]he 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) [t]he beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. Section 10.437⁸ states that recovery of an overpayment is also considered to be against good conscience if the 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.

20 C.F.R. § 10.438 states:

“(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 [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.”

Although appellant was provided with the opportunity, she submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.⁹ Further, appellant has not shown that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received while working. Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

Section 10.441¹⁰ provides 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

⁶ Appellant argued that the overpayment should be waived because she was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁷ 20 C.F.R. § 10.436.

⁸ 20 C.F.R. § 10.437.

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.441.

of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.

Since appellant did not submit any financial data, there is insufficient information for the Board to perform an analysis of the reasonableness of the monthly recovery rate of \$286.71.¹¹ Appellant has therefore not shown that the Office abused its discretion in withholding \$286.71 from appellant's monthly compensation payments.

The decision of the Office of Workers' Compensation Programs dated January 7, 2003 is affirmed.

Dated, Washington, DC
July 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ The Board notes that appellant submitted new medical evidence subsequent to the Office's decision. However, the Board cannot consider that evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).