

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JUANITA G. DAVIS and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Northport, NY

*Docket No. 00-2518; Submitted on the Record;  
Issued May 27, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation occurred in the amount of \$17,049.11 for the period August 31, 1988 through February 27, 1999, as appellant received augmented compensation without having any dependents; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office acted properly in withholding \$250.00 every four weeks from appellant's continuing compensation to recover the overpayment.

On April 13, 1982 appellant, then a 44-year-old licensed practical nurse, filed a notice of occupational disease alleging that she developed an emotional condition due to factors of her federal employment. On January 11, 1983 the Office accepted appellant's claim for temporary aggravation of bipolar disorder and began paying compensation benefits.

In an April 1, 1983 CA-1049 form letter, the Office advised appellant of the terms under which she would receive compensation. The letter specifically indicated that her compensation was being paid at the augmented rate or three-fourths of her weekly pay, as she claimed a dependent.

In a CA-1032 form letter dated June 12, 1988, appellant advised the Office that her dependent son, born August 31, 1970, had graduated from high school and would be starting college in the fall. In a CA-1032 form letter dated November 3, 1988, she advised the Office that her son began college in September 1988. By letter dated February 22, 1989, the Office requested that appellant submit verification of her son's full-time attendance in college. She did not respond, but in a CA-1032 form letter dated December 26, 1990, appellant advised the Office that her son entered the Army on October 1, 1990. In subsequent CA-1032 letters, appellant no longer claimed any dependents. The Office continued to pay disability compensation at the augmented rate through February 27, 1999.

In a March 9, 1999 letter, the Office advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$3,234.41 for

the period August 31, 1988, the day her son turned 18, to December 26, 1990, the day she reported that her son had joined the Army, because she received compensation at the augmented three-fourths rate instead of the two-thirds rate to which she was entitled as a person with no dependents. The Office also determined that appellant was at fault in creating this portion of the overpayment because she failed to respond to the Office's request for verification that her son was a full-time college student, as she had previously indicated on her CA-1032 forms. Appellant was informed that she might request a prerecoupment hearing and was further advised to submit a completed financial questionnaire to assist the Office in deciding how to recover the overpayment.

In a separate March 9, 1999 letter, the Office advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$13,814.70 for the period December 26, 1990, when she informed the Office that her son entered the Army, until February 27, 1999, when the Office reduced her compensation benefits, because she received compensation at the augmented three-fourths rate instead of the two-thirds rate to which she was entitled. The Office also determined that appellant was without fault in creating this portion of the overpayment. Appellant was informed that she might request a prerecoupment hearing and that she might request waiver of recovery. The Office advised appellant to submit a completed financial questionnaire to assist the Office in deciding whether or not to waive the overpayment or in the event that waiver is not granted, to assist the Office in deciding how to recover the overpayment.

In a response received April 7, 1999, appellant returned her completed overpayment questionnaire and requested a waiver of the overpayment on the grounds that she was mentally incompetent to handle her affairs and, therefore, was not at fault in the creation of the overpayment.

By decision dated June 4, 1999, the Office finalized its preliminary determination that an overpayment in the total amount of \$17,049.11 had been created. The Office further found that appellant was not eligible for waiver of either portion of the overpayment and that the overpayment would be recovered by withholding \$250.00 from her continuing compensation checks every four weeks.

By letter dated May 25, 2000, appellant, through counsel, requested reconsideration of the Office's decision and provided additional financial and medical evidence in support of her request. In a letter dated July 28, 2000, the Office properly informed appellant that the only right of review following a final overpayment determination is an appeal.<sup>1</sup>

The Board finds that appellant received an overpayment of compensation in the total amount of \$17,049.11 due to her receipt of augmented compensation benefits when she had no eligible dependents.

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<sup>1</sup> Section 10.440(b) of the Office's regulations provides that "[t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such a decision." 20 C.F.R. § 10.440(b).

Appellant received augmented compensation based on her dependent son through February 27, 1999. Her son, born August 31, 1970, turned 18 on August 31, 1988, however, there is no evidence in the record that he was a full-time student or otherwise qualified as a dependent pursuant to 20 C.F.R. § 10.405. Because appellant had no eligible dependents for the period August 31, 1988 through February 27, 1999, the Board finds that appellant received an overpayment of compensation due to receipt of augmented benefits for this period.

The Board further finds that the Office properly determined the amount of the overpayment.

The record reflects that, for the period August 31, 1988 through December 26, 1990, appellant received monthly compensation at the augmented rate of 75 percent in the amount of \$29,701.72.<sup>2</sup> As appellant had no eligible dependents for that period, she was entitled to monthly compensation at the basic two-thirds rate, or \$26,461.31. The difference between the augmented compensation and the basic rate, \$3,234.41, represents the overpayment of compensation to appellant for this period. The record further reflects that, for the period December 26, 1990 through February 27, 1999, appellant received monthly compensation at the augmented rate of 75 percent in the amount of \$126,386.32. As she had no eligible dependents for that period, she was entitled to monthly compensation at the basic two-thirds rate or \$112,571.62. The difference between the augmented compensation and the basic rate, \$13,814.70, represents the overpayment of compensation to appellant for this period.

In addition, the Board finds that, with respect to the overpayment in the amount of \$3,234.41, for the period August 31, 1988 through December 26, 1990, the Office properly found that appellant was at fault in the creation of this portion of the total overpayment and that appellant is not entitled to waiver of this overpaid amount.<sup>3</sup>

Section 8129 of the Federal Employees' Compensation Act provides, however, that the Office may not adjust later compensation or recover an overpayment unless an "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."<sup>4</sup> Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

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<sup>2</sup> The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay; *see William G. Dimick*, 38 ECAB 751 (1987).

<sup>3</sup> *See Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

<sup>4</sup> 5 U.S.C. § 8129(b).

Section 10.433 of the implementing federal regulations provides that a recipient who has done any of the following will be found to be at fault with respect to creating the overpayment:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment, which he or she knew or should have known, was incorrect. (This provision applies only to the overpaid individual.)”<sup>5</sup>

The regulations further provide that whether or not the Office determines that an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care to be expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>6</sup>

On October 20, 1999 the Office made a preliminary determination that appellant was at fault in the matter of the overpayment under the second criterion above because she failed to respond to the Office’s February 22, 1989 request for verification of her son’s student status and further failed to notify the Office until December 26, 1990 that her son had joined the Army on October 1, 1990 and ceased to be a full-time student.

The Board finds that this evidence supports that appellant failed to provide information to the Office which she knew or should have known to be material.

Both before the Office and on appeal to the Board, appellant contends that she is mentally incompetent and thus was unable to respond sufficiently to the Office’s requests for information. In support of her argument, appellant submitted a medical report from Dr. Lajpat Gandhi, her treating Board-certified psychiatrist since 1984, who stated:

“[Appellant] has a long history of Bipolar Disorder Mixed Type. The symptoms of this disorder still persist. She continues to remain unstable, fragile with periods of Hypomania and Depression. [Appellant’s] moods remain very labile and her judgment is still very poor. [She] has persistently gotten into serious financial and interpersonal problems. [Appellant] has not been able to care for herself and often has to depend on others to help her with daily needs. [She] continues to be disabled and is in no shape to handle any vocational situation.”

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“Appellant’s mental status reveals presence of delusional thinking with delusions of grandeur. Her speech remains pressured with looseness [of] associations. Appellant’s mood is labile and her affect is inappropriate. Her concentration and

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<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> 20 C.F.R. § 10.433(b).

attention span are impaired. Insight and Judgment is very poor. Appellant periodically shows features of Hypomania with psychosis.

In my clinical opinion [appellant] is permanently disabled and cannot hold any meaningful job. Her prognosis remains poor.”

However, Dr. Gandhi did not provide the medical reasoning behind this conclusion, explaining how and why the accepted psychiatric disorder would render appellant incompetent such that she could not respond to the Office’s February 22, 1989 request for verification of whether her son remained a full-time college student following his enrollment in September 1998. The Board has held that medical opinions unsupported by medical rationale are of little probative value.<sup>8</sup>

The record indicates that appellant regularly corresponded with the Office, through the mail and on the telephone, both in response to specific queries and to raise her own concerns about such matters as whether her monthly compensations checks had been correctly deposited into her checking account. Such actions are not in comport with appellant’s contention that she was unable to properly respond to the Office’s request for verification of her son’s college enrollment, nor does it establish that she could not discern that she was still receiving compensation at the augmented 75 percent rate after her son left school and joined the Army and ceased to be her legal dependents. Therefore, appellant’s contention that she was incompetent to maintain correspondence with the Office or to manage her financial affairs during the period August 31, 1988 through December 26, 1990 is not supported by either the factual or medical record.<sup>7</sup>

Therefore, the Board finds that appellant failed to provide information to the Office which she knew or should have known to be material.

In addition, while the Office may have been remiss in continuing to issue appellant checks for disability after the Office was notified that appellant’s son was no longer a dependent, this did not excuse appellant’s acceptance of the checks which she knew or should have known should have been returned to the Office.<sup>8</sup>

With respect to the overpayment in the amount of \$13,814.70 for the period December 26, 1990 through February 27, 1999 of this portion of the total overpayment, which the Office found appellant to be without fault, the Board finds that the Office properly denied waiver of recovery

Section 8129 of the Act<sup>9</sup> provides that an overpayment of compensation must be recovered unless “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

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<sup>7</sup> See *George A. Hirsch*, 47 ECAB 520 (1996) (finding that appellant’s claim of mental incompetence in handling his financial affairs was unsupported by the factual and medical record).

<sup>8</sup> *Larry D. Strickland*, 48 ECAB 669 (1997).

<sup>9</sup> 5 U.S.C. § 8129.

good conscience.” Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.<sup>10</sup>

Section 10.436 of the implementing regulations<sup>11</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 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>12</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>13</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>14</sup>

In the instant case, appellant did not establish that she was entitled to waiver of the overpayment. She contends that she is unable to repay the overpayment because she requires all of her compensation benefits, in the net amount of \$1,114.36 every 28 days and her social security income in the amount of \$391.00 a month, to pay basic living expenses. On her overpayment questionnaire, appellant listed her expenses including rent in a senior citizens’ home or complex at \$500.00 a month, food costs of \$250.00 a month, clothing at \$50.00 a month, a monthly utility bill of \$300.00, transportation costs of \$100.00 a month and credit card payments of \$200.00 a month. This totals \$1,400.00 in monthly expenses. By letter dated April 22, 1999, the Office asked appellant to provide additional information regarding her living expenses. The Office noted that as appellant stated that she lived in a senior citizens’ housing complex, yet claimed that she spent \$250.00 on food and \$300.00 for utilities each month. Therefore, the Office requested that appellant submit copies of any utility bills that she paid, including telephone and advised her that failure to provide such information would lead the Office to assume that she was not required to pay these separate utilities. In addition, the Office asked appellant to provide justification for her monthly food bill of \$250.00, which the Office

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<sup>10</sup> See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>11</sup> 20 C.F.R. § 10.436 (1999).

<sup>12</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>13</sup> See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

<sup>14</sup> 20 C.F.R. § 10.437 (1999).

stated seemed excessive for one person and to provide copies of her credit card statements. The Office again warned appellant that failure to provide the requested information could result in the disallowance of reduction of certain claimed expenses. She did not respond to the Office's request for additional financial documentation and clarification. In its final decision dated June 6, 1999, the Office allowed appellant the full claimed amounts for her rent, food, clothing, transportation and credit card bills, but reduced her utilities to \$100.00 to account for telephone service. The Board notes that, even if the Office had allowed appellant the full claimed amount for her utility bills, appellant's total monthly income of \$1,505.36 would still exceed her claimed monthly expenses of \$1,400.00 by more than \$50.00 such that she would not qualify for waiver of the overpayment.<sup>15</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 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>16</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.

The Board also finds that the Office properly required repayment by withholding \$250.00 from appellant's monthly continuing compensation.

Section 10.441(a) states in relevant part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If 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 factors, so as to minimize any hardship.”<sup>17</sup>

In this case, the Office could not precisely determine a repayment rate that would minimize financial hardship because appellant failed to provide the supplemental documentation to substantiate her claimed expenses. The Office noted that appellant was receiving an average of \$1,207.22<sup>18</sup> every four weeks in wage-loss benefits and that she had social security benefits in the amount of \$391.00. Taking into account her claimed, although unsubstantiated, expenses, the Office set a repayment rate of \$250.00 a month.

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<sup>15</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 13.

<sup>16</sup> *Carroll R. Davis*, 46 ECAB 361 (1994).

<sup>17</sup> 20 C.F.R. § 10.441(a).

<sup>18</sup> Appellant receives 13 payments of \$1,114.36 a year.

The record demonstrates that the Office gave due regard to the factors enumerated in section 10.441(a)<sup>19</sup> and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal.<sup>20</sup> Therefore, the Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment at the rate of \$250.00 every four weeks from her continuing compensation.

The decision of the Office of Workers' Compensation Programs dated June 4, 1999 is affirmed.<sup>21</sup>

Dated, Washington, DC  
May 27, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>19</sup> *Id.*

<sup>20</sup> See *Donzel R. Yarbour*, 50 ECAB 179, 185 (1998) (finding that the Office's decision to withhold 10 percent or \$200.00 a month from appellant's continuing compensation was appropriate under the circumstances of the case).

<sup>21</sup> The Board notes that subsequent to the Office's June 4, 1999 decision, appellant submitted additional financial documentation. The Board is precluded from reviewing this evidence, however, as it was not before the Office at the time of the final decision on appeal; see 20 C.F.R. § 501.2(c).