

**United States Department of Labor
Employees' Compensation Appeals Board**

MARTHA J. WOODARD, Appellant)
)
and)
)
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Lexington KY, Employer)
)
)

Docket No. 04-1044
Issued: August 30, 2004

Appearances:
Martha J. Woodward, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 10, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated January 22, 2004, which found that an overpayment occurred in the amount of \$849.42, that appellant was not at fault in the creation of the overpayment and that waiver was not warranted. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$842.42 overpayment of compensation for the period June 16, 2002 to April 17, 2003; and (2) whether the Office abused its discretion by refusing to waive recovery of the overpayment.¹

¹ The Board lacks jurisdiction over the means of recovery as there is no continuing disability. See 20 C.F.R. § 10.441.

FACTUAL HISTORY

On June 26, 2001 appellant, then 54-year-old licensed practical nurse, filed a notice of traumatic injury alleging that, while in the performance of her federal duties, a patient grabbed and bent her thumb. The claim was accepted for a dislocated thumb and surgery was authorized. Appellant underwent surgery on July 27 and October 22, 2001. Appellant stopped work on the date of injury and received benefits for total temporary disability until January 28, 2002, when she returned to a full-time light-duty job performing miscellaneous duties at no loss of pay.

On April 4, 2002 appellant requested a schedule award. In an August 14, 2002 decision, the Office determined that she had a 14 percent permanent impairment to her right upper extremity. The period of the award was June 16, 2002 to April 17, 2003. At the time of the schedule award, appellant was paid at the rate of \$646.42 per week.

Appellant returned to work in a full-time permanent position as a cardio secular technician on October 14, 2002 and retired for nonindustrial health reasons on August 18, 2003. On November 16, 2003 the Office determined appellant's wage-earning capacity and terminated appellant's wage-loss compensation finding that she had worked for more than 60 days as a cardiovascular technician and that she earned more in that position than she would have earned had she still been in her date-of-injury job.² In a November 7, 2003 letter, the Office notified appellant that it had incorrectly calculated her pay rate for the schedule award purposes. The Office stated that, in calculating her pay rate for the schedule award, it used the weekly pay rate of \$646.42, the pay rate of her nurse position on October 22, 2001 the date of her second surgery, instead of the proper rate of \$614.45, which was appellant's weekly pay rate on June 16, 2001 the date of injury and when her disability began.

In a December 1, 2003 letter, the Office stated that it preliminarily found that appellant received an \$849.02 overpayment, that she was not at fault for its creation and advised her of the opportunity to contest the overpayment or request waiver. The letter was sent to 942 Whetstone Rd., Carlisle, KY, 40311, her address of record. Appellant did not respond.

In a January 22, 2004 decision, the Office finalized the overpayment determination and denied waiver as appellant submitted no financial information. The Office further indicated that it would seek to recover the full amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Federal Employees' Compensation Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."³ Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of

² Appellant did not appeal this decision to the Board.

³ Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.

injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”⁴

Section 8129(a) of the Act⁵ provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.⁶

ANALYSIS -- ISSUE 1

Initially, the Board must determine appellant’s proper pay rate for the purpose of her schedule award. The Act provides three possibilities for determining pay rate; the rate of pay at the time of injury, at the time of disability and the time of recurrence of disability if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

The Board finds that appellant’s proper pay rate was \$614.45 as this was her pay rate at the time of her injury and when her disability began.⁷ The Board further notes that while appellant returned to work on January 28, 2002 she returned to a temporary light-duty position and not to her date-of-injury employment and therefore the third option, the date of recurrence, is not available.

In the present case, the record shows that appellant received \$18,823.78 in compensation for the period June 16, 2002 to April 17, 2003, when she was entitled to only \$17,974.36 in compensation for this period. The amount was determined by multiplying her weekly pay rate of \$614.45 by .6666 percent (no dependent rate) = \$409.63, multiplied by 258/7 (calendar days between June 16, 2002 and April 17, 2003) for a total of \$15,097.79; plus \$2,876.57 arrived at by calculating a weekly rate of \$419.50 (due to cost-of-living increase effective March 1, 2003) by 48 calendar days/7. Adding \$15,097.79 to \$2,876.57 = \$17,974.36. This amount was then subtracted from what appellant actually received in payments (\$18,823.78 minus \$17,974.36 = \$849.42. The Board finds the Office properly determined that appellant received an \$849.42 overpayment.

⁴ 5 U.S.C. § 8101(4).

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 5 U.S.C. § 8129(a).

⁷ The Board notes that, in its November 7, 2003 letter to appellant, the Office incorrectly stated that it paid appellant based on the date of disability when it actually paid her at the pay rate on the date of her second surgery. Appellant’s date of injury and disability are the same because she did not return work before she received the schedule award.

LEGAL PRECEDENT -- ISSUE 2

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.⁸ 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."⁹ 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 overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹⁰

Section 10.436 of the Office's regulation¹¹ 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 10.437¹² 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.

Section 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."

⁸ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁹ 5 U.S.C. § 8129(b).

¹⁰ Appellant argued that the overpayment should be waived because he 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.

¹¹ 20 C.F.R. § 10.436.

¹² 20 C.F.R. § 10.437.

ANALYSIS -- ISSUE 2

The Board further finds that Office properly determined that appellant was not at fault in creating the overpayment as it was not established that appellant knowingly accepted checks she was not entitled to and therefore she was entitled to consideration of a waiver.

Although appellant was provided the opportunity, she submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Her contention that she did not receive the preliminary overpayment determination is without merit because, in the absence of evidence to the contrary, there is a presumption that a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.¹³ The December 1, 2003 letter used appellant's address of record and there is no evidence to show it was not properly mailed. It is presumed it arrived in due course. Although appellant alleges that she informed the employing establishment of a change of address on July 3, 2003 appellant has not submitted evidence to establish that the Office was advised of a any change of address.

Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.¹⁴ 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.

CONCLUSION

The Board finds Office properly determined that appellant received an overpayment of \$849.42 and that the Office did not abuse its discretion in determining that she was not entitled to waiver.

¹³ *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2004 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: August 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member