

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

JUDY L. DANIELS, Appellant)
)
and)
)
DEPARTMENT OF THE AIR FORCE,)
MALMSTROM AIR FORCE BASE, MT,)
Employer)

Docket No. 03-1286
Issued: January 22, 2004

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On April 21, 2003, appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated January 22 and January 27, 2003. The January 22, 2003 decision denied waiver of a \$1,068.72 overpayment of compensation, and directed recovery of the overpaid amount by deducting \$100.00 per month from appellant's continuing compensation benefits. The January 27, 2003 decision denied appellant's claim for a June 24, 2000 recurrence of disability related to an accepted November 1998 back strain. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment recovery and recurrence issues in this case.

ISSUES

The issues on appeal are: (1) whether the Office properly denied waiver of recovery of the \$1,068.72 overpayment of compensation; (2) whether the Office properly required appellant to repay the overpaid amount by deducting \$100.00 per month from her continuing compensation payments; and (3) whether the Office properly denied a June 24, 2000 recurrence of disability. On appeal, appellant asserts that the Office improperly denied waiver of the

overpayment based on an erroneous finding that she had more than \$50.00 per month in discretionary income. Appellant specifically alleged that the Office improperly excluded her expenses for automotive operation, maintenance and insurance.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued December 17, 2002,¹ the Board affirmed in part and remanded in part a May 16, 2002 decision of the Office finding that an overpayment of \$1,068.72 occurred in appellant's case due to an underdeduction of insurance premiums for the period May 16, 2000 to March 23, 2002.² As the underdeduction resulted from an incorrect policy code not supplied by appellant, the Office found that she was without fault in the creation of the overpayment, but found that she did not qualify for waiver.³ The Office thus required recovery of the overpaid amount by deducting \$100.00 per month from her continuing compensation payments for ten months beginning in July 2002, with an eleventh payment in April 2003 of \$88.41 in interest. The Board affirmed the Office's findings of fact, amount and fault of the overpayment. However, the Board further found that the case was not in posture on the issues of waiver and recovery as the Office failed to consider the financial information submitted by appellant. The Board remanded the case to the Office for consideration of the submitted financial documentation. The law and the facts as set forth in the Board's prior decision and order are hereby incorporated by reference.

In an April 5, 2002 overpayment recovery questionnaire, appellant listed assets of \$36.00 cash, \$400.00 in a checking account, \$30.00 in a savings account, and \$1,000.00 in other property. She submitted checking account statements showing a balance of \$2,652.98 on June 9, 2000, \$190.64 on May 9, 2001 and \$187.26 on March 11, 2002. Appellant asserted that she owed credit card balances of \$1,500.00 on AT&T Universal, with a \$200.00 to \$800.00 monthly payment, \$300.00 on a Sears card with a \$50.00 to \$100.00 monthly payment, \$110.00 per month in property tax, \$300.00 per month for food for herself and her son, \$20.00 for clothing, \$356.00 per month in utilities, and \$400.00 per month in miscellaneous expenses, including automotive expenses.

Appellant submitted a 2000 municipal tax bill regarding her address of record, showing \$243.22 in real property tax, \$5.95 in transit district assessment and \$79.06 in city assessments, for a total of \$328.23. A 2001 municipal tax bill showed \$520.05 in real property tax, \$21.87 in transit district assessments and \$81.55 in city assessments, for a total of \$614.47. Appellant also submitted water bills from April 2000 to January 2002, with monthly amounts from \$38.72 to

¹ Docket No. 02-1921.

² The record indicates that appellant was absent from work from January to September 8, 1999, and had significant work absences from September 9, 1999 through January 2000, when she stopped work. On May 9, 2000 the employing establishment removed appellant from federal employment due to excessive absences. Appellant filed an affidavit of earnings and employment dated June 18, 2002 stating that she had not worked during the previous 15 months.

³ Appellant requested waiver of recovery of the overpayment in an overpayment recovery questionnaire dated April 5, 2002.

\$43.38, with a monthly average of \$38.40.⁴ Electric utility bills from December 2000 to August 2002 averaged \$59.37.⁵ Natural gas utility bills from September 2000 to February 2002 averaged \$105.72.⁶ Bills for two telephone lines at appellant's home ranged from \$27.82 to \$112.05, with an average of \$51.49 per month.⁷ Appellant also submitted checking account statements documenting miscellaneous expenses of gasoline purchases in the amounts of \$26.51 on December 22, 2000 and \$22.00 on September 14, 2001 at Exxon, and \$26.20 on October 22, 2001 and \$18.00 on February 7, 2002 at Conoco.

On April 22, 2002 appellant claimed a recurrence of disability occurring on June 24, 2000. Appellant asserted that, while bending to pick up a horseshoe, she experienced sudden back pain, causing her to fall and break her left ankle. Appellant attributed this back pain to sequelae of the accepted November 10, 1998 back strain.⁸ A June 24, 2000 emergency room report reiterated appellant's account of events.⁹ June 24 and August 11, 2000 x-rays showed a lateral malleolar fracture.¹⁰ In a June 29, 2000 chart note, Dr. Michael A. Dube, an attending Board-certified orthopedic surgeon, noted following appellant for a left ankle fracture followed by an August 24, 2000 sprain when she tripped on a garden hose. Dr. Dube submitted treatment notes through September 22, 2000. Appellant submitted an April 16, 2002 witness statement from Jeffrey S. Golie and a May 6, 2002 witness statement from Ronald W. Koloff, confirming that, on June 24, 2000, appellant bent down to pick up a horseshoe, yelled and fell down, later complaining of ankle and low back pain.

In a June 18, 2002 letter, the Office advised appellant of the type of medical and factual evidence needed to establish her claim. The Office specifically requested that appellant submit a report from her attending physician explaining how and why the accepted back injury would cause the claimed June 24, 2000 recurrence of disability.

⁴ Monthly billing amounts for water are as follows: April 2000 \$38.72; June 2000 \$43.38; December 2000 \$36.72; and January 2002 \$38.39.

⁵ Monthly electric bills submitted were for the following amounts: December 2000 \$86.40; March 2001 \$62.40; April 2001 \$52.38; March 2002 \$50.97; and August 2002 \$44.72.

⁶ Appellant submitted natural gas bills for the following amounts: September 2000 \$19.85; December 2000 \$162.33; February 2001 \$170.94; March 2001 \$116.89; June 2001 \$43.10; and February 2002 \$121.24.

⁷ Monthly telephone bills were submitted for the following amounts: May 2000 \$111.35; June 2000 \$36.14; January 2001 \$41.72; February 2001 \$112.05; April 2001 \$81.02 and \$44.16; September 2001 \$28.20; February 2002 \$44.52; and March 2002 \$48.85 and \$27.82.

⁸ In a June 15, 2001 letter, appellant stated that she did not work with horses, but was watching her partner work with a horse on June 24, 2000.

⁹ In a July 10, 2000 report, a vocational rehabilitation counselor noted that appellant "recently fractured her leg in an accident that she described as reaching down to pick up a horseshoe at a racetrack ... lost her balance, fell and fractured her leg." The counselor did not indicate that appellant attributed this fall to the accepted back strain.

¹⁰ In an April 11, 2002 note, Dr. Donald E. Engstrom, an attending psychiatrist, stated that appellant's "work accident had more impact on her emotional status" than he had previously indicated. There is no claim of record for an emotional condition.

In a June 21, 2002 file memorandum, the Office noted that appellant's attorney telephoned on June 20, 2002 regarding the preliminary determination of overpayment. The Office noted leaving a telephone voice mail message for appellant's attorney explaining the need for supporting documentation of appellant's miscellaneous and food expenses. The Office requested that appellant submit "cancelled checks, bank statements, credit card statements, grocery receipts, mortgage statements" ... to support her claims.

By decision dated January 22, 2003, the Office denied appellant's request for waiver of recovery. The Office found that, under section 8129(a) of the Federal Employees' Compensation Act, while appellant was without fault, recovery would not defeat the purpose of the Act or be against equity and good conscience as under 20 C.F.R. § 10.322, appellant's income exceeded her monthly expenses by more than \$50.00. Appellant received \$884.52 in monthly benefits under the Act, and claimed \$1,186.00 in monthly household expenses. The Office accepted only \$546.20 in expenses, leaving appellant with \$118.32 for discretionary spending. The Office explained that, while appellant claimed \$110.00 in monthly rent or mortgage, her tax bill showed a property tax of only \$52.00 per month. The Office allowed \$300.00 per month for food for two people, \$20.00 per month for clothing expenses, \$256.00 for utilities including averages of \$71.00 for gas, \$55.00 for electricity, \$40.00 for water and \$28.20 for one telephone. The Office did not provide the mathematical calculations used to arrive at the stated averages. Also, the Office did not allow any amount for miscellaneous expenses as appellant provided no "detail [or] support." The Office directed recovery of the overpaid amount by withholding \$100.00 from appellant's continuing compensation payments beginning on July 13, 2002, with a final payment in April 2003 of \$88.41 in interest.

By decision dated January 27, 2003, the Office denied appellant's claim for a June 24, 2000 recurrence of disability on the grounds that causal relationship was not established. The Office explained that appellant had the burden of providing probative medical evidence establishing that the claimed recurrence of disability was a "spontaneous return or increase of disability due to a condition which was caused by specific factors of [her] federal employment, WITHOUT intervening cause." (Emphasis in the original.) The Office noted that appellant was advised by June 18, 2002 of the type of evidence required to establish her claim, but that appellant did not respond.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Act¹¹ provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.¹² The only exception to this requirement is found in section 8129(b) of the Act, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault, and when such adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.¹³

¹¹ 5 U.S.C. § 8129(a).

¹² 5 U.S.C. § 8129(a).

¹³ 5 U.S.C. § 8129(b).

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.¹⁴ The Office must 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,” pursuant to the guidelines provided in sections 10.434-37 of the implementing federal regulations.¹⁵

As the only limitation on the Office’s authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.¹⁶

ANALYSIS -- ISSUE 1

In this case, appellant was found to be without fault in creation of the overpayment. Thus, the Office performed a financial analysis, based on documentation submitted by appellant, as to whether she qualified for waiver of the overpayment.

Based on the Office’s calculations, the Office found in its January 22, 2003 decision that appellant did not qualify for waiver as her income exceeded her allowable household expenses by more than \$50.00.¹⁷ However, the Office did not properly consider all of the financial information submitted by appellant.

In the January 22, 2003 decision, the Office did not allow any of the \$400.00 appellant had claimed for miscellaneous expenses, on the grounds that she submitted no documentation of such expenses. The Office noted that appellant submitted numerous bank statements, but that these documents contained no details as to the nature of appellant’s expenses. However, a careful review of these bank statements reveals automotive expenses which fall under the

¹⁴ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁵ 20 C.F.R. §§ 10.434-437 (1999).

¹⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁷ Office regulations provide 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. *Frederick Arters*, 53 ECAB ____ (Docket No. 01-1237, issued February 27, 2002). The Board has found that 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. Additionally, the guidelines for recovery of an overpayment from an individual who is without fault were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base. *John Skarbek*, 53 ECAB ____ (Docket No. 01-1396, issued June 21, 2002).

category of allowable miscellaneous expenses. Appellant submitted checking account statements documenting gasoline purchases in the amounts of \$26.51 on December 22, 2000 and \$22.00 on September 14, 2001 at Exxon, and \$26.20 on October 22, 2001 and \$18.00 on February 7, 2002 at Conoco. On appeal, appellant specifically contested the Office's finding that her automotive expenses were not allowable.

As the Office has not considered these established miscellaneous expenses in calculating whether appellant qualified for waiver, the case must be remanded for further development. As the financial information of record is now more than one year old, this development shall include an opportunity for appellant to submit an updated overpayment recovery questionnaire, along with bank statements, copies of cancelled checks, credit card statements, utility bills, tax bills, store receipts and any other documentation required to substantiate the claimed expenses. The Office shall then review appellant's updated financial information, and issue a *de novo* decision adjudicating the issues of waiver and recovery of the overpayment.

ANALYSIS -- ISSUE 2

The Board finds that, as the case is not in posture for a decision regarding waiver of the overpayment, the issue of recovery of the overpayment is moot and need not be addressed.

LEGAL PRECEDENT -- ISSUE 3

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which she seeks compensation was causally related to this employment injury.¹⁸ As part of this burden, she must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and factors of her federal employment.¹⁹ The opinion on causal relationship must also be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant, and be of reasonable certainty.²⁰ An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.²¹

ANALYSIS -- ISSUE 3

In this case, appellant did not submit medical evidence explaining a causal relationship between the claimed recurrence of disability due to the June 24, 2000 fall and the accepted November 1998 back strain. Dr. Dube, an attending Board-certified orthopedic surgeon, noted appellant's progress following the June 24, 2000 left ankle fracture, but did not attribute the fall

¹⁸ *Dominic M. DeScala*, 37 ECAB 369 (1986).

¹⁹ *Steven R. Piper*, 39 ECAB 312 (1987).

²⁰ *Id.*

²¹ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

leading to the fracture to any cause. Emergency room and x-ray records contemporaneous to the June 24, 2000 fall do not contain medical rationale discussing the claimed causal relationship.

Appellant was advised by June 18, 2002 letter of the necessity of furnishing a report from her attending physician explaining how and why the accepted November 1998 back strain would cause her to fall on June 24, 2000, thereby breaking her ankle. However, appellant did not submit such evidence. For this reason, she has not met her burden of proof in establishing that she sustained a recurrence of disability as a result of her accepted employment injury.²²

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the issues of waiver and recovery of the overpayment, as further development is required to fully consider the financial evidence appellant submitted. The Board further finds that appellant has not established that she sustained a recurrence of disability as she submitted insufficient medical evidence to establish causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 22, 2003 is hereby set aside, and the case remanded for further development consistent with this decision and order. The decision of the Office dated January 27, 2003 denying appellant's claim for a recurrence of disability is hereby affirmed.

Issued: January 22, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

²² *Steven R. Piper, supra* note 19; *Alfredo Rodriguez, supra* note 21.