United States Department of Labor
Employees' Compensation Appeals Board

LISA A. LODATO, Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, San Diego, CA, Employer**	)	**Docket No. 02-649** **Issued: June 2, 2004**

Appearances:
Sally F. LaMacchia, Esq., for the appellant
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 February 5, 2002 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated November 3, 2001, finding an overpayment in the amount of $12,757.90 and that she was not entitled to waiver of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of $12,757.90 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that the overpayment would be recovered by deducting $150.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

The Office accepted that appellant, a registered nurse, sustained a left deltoid contusion and brachial plexitis in the performance of duty on May 3, 1998 as a result of physical altercation with a patient. The record indicates that appellant briefly returned to work and then stopped working as of May 13, 1998. Her pay rate at the time of injury included a base salary of $45,616.00 per year; she also worked intermittently on weekends or holidays. Appellant began receiving compensation for temporary total disability based on a pay rate for compensation purposes of $1,096.48 per week. On June 7, 1999 she returned to part-time work at four hours per day and then stopped working on July 9, 1999.

Appellant received compensation payments through April 22, 2000.[1] By letter dated July 20, 2001, the Office advised her of a preliminary determination that an overpayment of compensation had occurred during the period June 25, 1998 to April 22, 2000. The Office noted that the correct pay rate for compensation purposes should have been $903.75 per week; instead of receiving $55,707.96 in compensation during this period appellant had received $68,465.86, creating an overpayment of $12,757.90. The Office further determined that she was not at fault in creating the overpayment and was advised to submit evidence with respect to waiver of the overpayment.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20), reporting $2,542.67 in monthly income. With respect to monthly expenses, she reported a total of $2,784.00, which included $650.00 in other expenses and $1,167.00 in minimum credit card payments. By letter dated October 2, 2001, her representative indicated that the $650.00 in other expenses included $300.00 for attorney fees, $225.00 for health insurance and $125.00 for prescription medications. With respect to the credit card payments, appellant's representative indicated that during the period she was not receiving compensation she had taken cash advances "to pay for bills, food, gas, repay a loan to her mother and other regular expenses." Appellant submitted copies of credit card statements and other monthly bills.

By decision dated November 3, 2001, the Office finalized its determination that an overpayment of $12,757.90 was created.[2] The Office denied waiver of the overpayment on the grounds that appellant had monthly living expenses $1,492.00, leaving her $1,262.00 in excess monthly income. The Office further determined that she should repay the overpayment by deducting $150.00 every four weeks from her continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(2), "'monthly pay' means the monthly pay at the time of 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 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."

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[1] Appellant remained off work and received annuity payments from the Office of Personnel Management (OPM). On July 27, 2001 the Office issued a retroactive compensation payment for the period commencing April 23, 2000.

[2] The Office noted that the balance of the overpayment was actually $10,743.90, as $2,014.00 from the retroactive compensation payment would be applied to the overpayment amount.

Section 8114(d) of the Federal Employees' Compensation Act provides:

"Average annual earnings are determined as follows:

"(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--

> (A) was fixed, the average annual earnings are the annual rate of pay; or
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> (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week."

ANALYSIS -- ISSUE 1

In the present case, appellant did not return to regular full-time employment after her May 3, 1998 injury. She returned to work in June and July, 1999, but the record indicates that this was in a part-time position. Accordingly, appellant's rate of pay is determined as of the date of injury or the date disability began, whichever is greater. The employing establishment indicated that on May 3, 1998 appellant's base salary was $45,616.00 per year and she would not receive a pay increase until November 1998. Therefore, the pay rate is the same for the date of injury and the date disability began, as appellant stopped working on May 13, 1998.

In addition to the base salary, in the year prior to the date of injury appellant did work on some weekends and holidays. Based on the evidence provided by the employing establishment, appellant earned an additional $1,378.96 in premium pay in the year prior to the injury, resulting in an annual average earnings of $46,994.96.[3] The weekly pay rate is determined by dividing the average annual earnings by 52, resulting in a weekly pay rate of $903.75. The Board, therefore, finds that the Office properly concluded that appellant should have been paid compensation based on a weekly pay rate for compensation purposes of $903.75. For the period June 25, 1998 to April 22, 2000, appellant should have received $55,707.96 in compensation for wage loss. The record indicates that she actually received $68,465.86, thereby an overpayment of $12,757.90 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act[4] provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and,

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[3] 5 U.S.C. § 8114(e) provides that premium pay is included in determining average annual earnings.

[4] 5 U.S.C. §§ 8101 *et seq*.

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."[5] Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 provides that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary "needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses" and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.[6] For waiver under the "defeat the purpose of the Act" standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.[7]

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) 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.

ANALYSIS -- ISSUE 2

In the present case, the Office determined that recovery of the overpayment would not defeat the purpose of the Act because appellant did not need substantially all of her current income to meet current ordinary and necessary living expenses. Specifically, the Office found that appellant had income of $2,754.01 per month in compensation benefits,[8] with only $1,492.00 in monthly expenses. The Board finds, however, that the Office failed to make adequate findings to support their finding with respect to monthly expenses. The Office found that the $1,167.00 minimum monthly credit card payments did not constitute ordinary and necessary living expenses: "If the claimant's consumer debt consists largely or completely of items the claimant has already accounted for in her documentation of fixed an[d] miscellaneous living expenses and may also include expenses which are not ordinary and necessary, adding the consumer debt to the claimant's ordinary and necessary living expenses, would incorrectly make the claimant appear less able to repay his or her overpayment than would actually be the case."

[5] 5 U.S.C. § 8129(b).

[6] Office procedures provide that the assets must not exceed a resource base of $3,000.00 for an individual or $5,000.00 for an individual with a spouse or dependent plus $600.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions,* Chapter 6.200 (September 1994).

[7] *See Robert E. Wenholz,* 38 ECAB 311 (1986).

[8] Appellant received $2,542.16 in compensation every four weeks, which is $33,048.08 per year, or $2,754.01 per calendar month.

The Office's procedure manual does advise claims examiners "to avoid counting an expense twice when totaling the claimant's ordinary and necessary living expenses," noting that credit card debt may consist of items already accounted for in the documentation of fixed expenses.[9]

In this case, however, the Office indicated that appellant took out cash advances in prior months to pay for living expenses while she was not receiving compensation. The Office did not explain how the minimum monthly payments on consumer debt were already accounted for in appellant's documentation of current living expenses. The current reported living expenses, such as $300.00 for food and $300.00 for rent, appear to represent currently accruing obligations, while the minimum payments on credit cards represent an additional current financial obligation based on prior purchases. While there may be situations where consumer debt represents items already documented, the Office has not established in this case that all of the minimum monthly payments listed represent duplication of expenses.

The Office further stated that the credit card debt "may also include expenses which are not ordinary and necessary." The November 3, 2001 decision does not, however, make any specific findings in this regard. The statement from appellant's representative indicated that the consumer debt was primarily for ordinary living expenses. If the Office intends to exclude the credit card payments on the grounds that the debt was not for ordinary and necessary living expenses, it must make appropriate findings based on specific evidence.[10] The statement provided by the Office that some of the debt may include expenses that are not ordinary and necessary is not sufficient to exclude the minimum monthly payments.

It is further noted that the Office excluded the claimed $125.00 per month for medical prescriptions on the grounds that it reimbursed appellant for all of her medical prescriptions. The Office did not, however, attempt to secure evidence from appellant as to whether the claimed expenses were for nonemployment-related conditions.

CONCLUSION

The Board finds that an overpayment of $12,757.90 was created in this case. With respect to waiver of the overpayment, the Office failed to make appropriate findings as to whether waiver would defeat the purpose of the Act or be against equity and good conscience. The case will be remanded to the Office for appropriate findings as to appellant's monthly expenses and an appropriate decision on the waiver issue. In view of the Board's holding, the method of repayment issue will not be addressed.

[9] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (September 1994).

[10] If certain expenses are found not to be ordinary and necessary, the claims examiner must show in writing the reasons for the finding supported by clear and complete rationale. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (September 1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2001 is affirmed, with respect to the fact and amount of overpayment; the case is set aside on the issue of waiver and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: June 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member