

FACTUAL HISTORY

On March 21, 1988 appellant, then a 59-year-old library assistant, filed a claim for a traumatic injury alleging that on February 1, 1988 she pulled a muscle in her lower back when transporting books off the elevator. On March 30, 1988 her claim was accepted for low back strain with sciatica. As appellant was married, she received compensation for wage loss at a rate equal to 3/4 of her pay rate as of March 21, 1988, with appropriate cost-of-living adjustments.

On February 28, 1997 appellant's spouse died. By letter dated September 25, 2002, the Office noted that pursuant to the Form EN1032's that appellant completed from 1997 to 2002, she is a widow and does not have any other dependents to claim and that accordingly, she should have been compensation at a 2/3 rate rather than at a 3/4 rate. The Office advised appellant that there may be an overpayment.

On April 22, 2003 the Office made a preliminary finding that appellant was overpaid benefits in the amount of \$10,452.31¹ and that she was without fault in the creation of the overpayment and requested that if she wished to apply for waiver, she submit a detailed explanation of the reasons she was seeking waiver, a completed Form OWCP-20 and supporting documents.

On June 2, 2003 appellant indicated that she wished to apply for a waiver and requested a decision based on the written evidence. In support thereof, she indicated that her monthly expenses were \$500.00 for food (she noted that she needed special food for low blood sugar); \$100.00 for clothing (she needed special garments for back support and special bras due to surgery); \$275.00 for gas, electric and water; \$65.00 for telephone bills; \$300.00 per month for home maintenance; \$546.82 for automobile loan payment; \$125.00 for gas and oil for her car; \$50.00 for maintenance of her car; \$59.00 for automobile insurance; \$200.00 for nonreimbursable medical expenses; \$300.00 for charitable contributions; \$30.80 plus \$48.58 for other insurance; \$75.00 for commuting expenses; and \$25.00 for other household expenses, including exterminators, help around house, cleaning equipment and supplies. In support thereof, appellant submitted copies of checks she wrote for insurance, special clothing, her automobile payment, maid, yard work, utilities and plumbing. She submitted a copy of her automobile loan. Appellant also submitted medical bills from the University of Washington Medical Center and the physicians who performed her surgery. She noted that she went to this hospital for treatment for breast cancer. Appellant stated that she attached the bills that she has received to date, that she does not know how much insurance will pay or what her future medical bills will be. With regard to income, appellant submitted copies of two retirement checks she received in the amounts of \$247.51 and \$435.21 for March 2003. Her income from her compensation benefits is \$1,255.00 per month.

¹ The Office calculated the amount of the overpayment by noting that, for the period of February 28, 1997 to September 7, 2002, appellant was actually paid \$93,784.43 based on a pay rate of \$303.46 on February 1, 1988 at a 3/4 rate, including all cost-of-living increases since then and that she should have been paid \$83,332.12 based on the same above information, but calculated at a 2/3 rate. The difference between these two figures was calculated to be \$10,452.31. Appellant does not contest the amount of the overpayment.

By decision dated September 24, 2003, the hearing representative determined that an overpayment occurred in the amount of \$10,452.31 and that appellant was not at fault in the creation of this overpayment. The hearing representative noted that appellant receives \$1,937.62 every 28 to 30 days from her workers' compensation plus her retirement. She noted that the \$500.00 she stated that she spent on food was excessive and that she did not provide receipts for food payments, home maintenance payments, unreimbursed medical expenses, charitable contributions or other expenses. The hearing representative then determined that appellant had monthly expenses of \$1,220.20. In reaching this conclusion, she only considered appellant's expenses for her car payment, gas and insurance of \$707.82 (\$546.82 plus \$125.00 plus \$29.00 for insurance); \$100.00 for clothing, \$79.38 for insurance and \$340.00 for utilities. The hearing representative stated that, as appellant did not provide documentation supporting her other expenses, she was unable to find that repayment of the overpayment would cause a hardship on the part of the claimant or that repayment would deprive the claimant of resources needed for ordinary and necessary living expenses. In reaching this determination, the hearing representative noted that appellant's expenses of \$1,220.20 were below her income of \$1,937.52. She then found that a repayment schedule of \$250.00 every 28 days was appropriate.

LEGAL PRECEDENT -- ISSUE 1

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 the statutory guidelines.² These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation 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 [the Act] or would be against equity and good conscience."³ 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.

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 section 10.436 and 10.437, respectively, of Title 20 of the Code of Federal Regulations.

Section 10.436 provides generally, that an overpayment would defeat the purpose of the Act if recovery would cause hardship because a beneficiary needs substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expense and the beneficiary's assets do not exceed a specified amount as set by the Bureau of Labor Statistics.⁴ Section 10.437 provides, generally, that recovery of the overpayment would be against equity and good conscience if any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt, if an individual, in reliance

² *Rudolph A. Geci*, 51 ECAB 423, 424 (2000).

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.436.

on such payments or notice that such payments would be made, gave up a valuable right or changes his or her position for the worse.⁵

ANALYSIS -- ISSUE 1

In the instant case, the evidence indicates that appellant's monthly income, including her compensation checks and her two retirement checks, equals \$1,937.62. The hearing representative determined that appellant had documented monthly expenses of \$1,220.20. In reaching this conclusion, the hearing representative allowed appellant's requested budget amounts for her automobile loan, gas for her car, insurance, household utilities and clothing. She did not allow any other expenses noted by appellant, including \$500.00 for food, \$200.00 for nonreimbursable medical expenses or \$300.00 for charity. She then determined that, as appellant's income of \$1,937.62 exceeded her expenses of \$1,220.20, she was unable to find that overpayment would deprive appellant of resources needed for ordinary and necessary expenses. The hearing representative indicated that without documentation she could not count the other expenses and accordingly, stated that she was unable to find that repayment of the overpayment would cause a hardship on the part of the claimant.

The items for which the hearing representative did not make any allowance include food, home maintenance, medical expenses and maintenance of her home and car. The hearing representative denied these expenses, finding that appellant did not submit sufficient documentation. However, the Office's procedure manual indicates that, if adequate documentation is not supplied by appellant, the hearing representative should request further evidence.⁶ Clearly, appellant is entitled to some money for these items. The hearing representative should have asked for further documentation. Therefore, this case will be remanded for the hearing representative to further consider appellant's expenses and whether recovery would defeat the purpose of the Act.

With respect to whether recovery would be against equity and good conscience, appellant has not alleged and the evidence does not demonstrate that she relinquished a valuable right or changed her position for the worse in reliance on the erroneous augmented compensation which formed the basis for her employment. Accordingly, she has not shown that she is entitled to waiver on the grounds that recovery would be against equity and good conscience.

CONCLUSION

The hearing representative did not properly develop the evidence in making her determination that recovery would not defeat the purpose of the Act and this case will be remanded for the hearing representative to further develop and consider appellant's monthly expenses. In light of the disposition of the first issue, the issue as to the amount to deduct from appellant's compensation checks is premature.

⁵ 20 C.F.R. § 10.437.

⁶ Federal (FECA) Procedure Manual, Part 6 -- Overpayment Overview, *Initial Overpayment Actions*, Chapter 6.a. (September 1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated September 24, 2003 is hereby affirmed in part, and vacated in part, and the case remanded for further consideration consistent with this opinion.

Issued: May 27, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member