

period December 18, 2000 to March 1, 2002, the Office paid appellant compensation based on a \$956.40 weekly pay rate. This pay rate was calculated by multiplying a \$23.91 hourly date of injury pay rate, as provided by the employing establishment on August 31, 2001, by 40 hours a week. On March 2, 2002 the Office increased the weekly pay rate by \$3.22 to \$959.62 retroactive to December 18, 2000. The record does not indicate the reason for this increase. However, employing establishment personnel action forms (Form SF 50-B) showed that for the period July 19 to December 31, 2000 the correct pay rate was \$852.00 a week, increasing to \$852.88 a week or \$21.32 an hour from January 1, 2001 to March 1, 2002. The Office determined that appellant received \$44,103.52 in compensation but was entitled to only \$39,251.38, a difference of \$4,852.14.

By notice dated May 23, 2002, the Office advised appellant of its preliminary determination that a \$4,852.14 overpayment of compensation had occurred as she was paid compensation at an incorrect pay rate from December 18, 2000 to March 1, 2002. Appellant received compensation for that period based on a weekly pay rate of \$959.62 whereas the correct pay rate was \$852.88. The Office found that appellant was not at fault in creation of the overpayment. Appellant requested a waiver of the overpayment and a preresoupment hearing, which was held on June 16, 2003.

At the hearing, appellant submitted bills listing approximately \$3,325.00 in monthly expenses and a 2001 federal tax return showing \$33,303.00 adjusted gross income for herself and her husband. She noted residing with her husband and six-year-old daughter. Appellant submitted bills dated from March 2002 to June 2003 showing the following monthly expenses: \$1,765.00 for mortgage; \$72.90 to \$81.50 for electricity; \$31.07 to \$35.05 for water, \$50.00 for heating gas; \$93.41 for telephone; \$285.00 for annual sewer tax; \$500.00 for food; \$12.00 to \$40.00 for church or charity expenses; \$169.00 for automotive insurance; \$10.00 for dry cleaning; \$25.00 for child care; variable medical expenses of up to \$100.00; and \$57.50 for cable television. Appellant also submitted documents regarding \$501.77 in minimum monthly consumer debt and student loan payments. She listed an \$8,950.00 loan from her mother and a \$6,500.00 loan from her father but did not provide information regarding any monthly payments. Appellant noted earning \$936.56 working part time from January to July 2001. She also worked as a substitute teacher on December 13, 14 and 18, 2001 earning a total of \$285.00. After the hearing, she submitted a July 18, 2003 overpayment recovery questionnaire (Form OWCP-20) listing \$500.00 in a checking account and \$5.00 in a savings account.

By decision dated August 27, 2003, the Office hearing representative finalized the overpayment in the amount of \$4,852.14 and determined that appellant was not entitled to waiver. The hearing representative found that appellant had \$3,724.61 in allowable monthly living expenses. The hearing representative found that appellant had the following ordinary and necessary monthly living expenses: \$1,765.00 for mortgage and property tax; \$23.00 for sewer fees; \$450.00 for food; \$125.00 for clothing; \$81.00 for electricity; \$46.00 for heating gas; \$93.00 for telephone; \$34.00 in medical expenses; \$26.00 in charitable contributions; \$152.00 for car insurance; \$175.00 for automotive gas and maintenance; \$10.00 for dry cleaning; \$25.00 for child care; \$161.00 in minimum credit card payments; and \$558.61 in loan repayments. The hearing representative did not allow \$58.48 a month for cable television or repayment on \$7,000.00 in loans from family members as she did not provide a monthly payment amount or

information on any interest. The hearing representative calculated a monthly income of \$4,422.00,¹ leaving a difference of \$697.39. The hearing representative found that there was no basis for waiver of the overpayment due to financial hardship as her monthly income exceeded her ordinary and necessary living expenses by more than \$50.00 and recovery at the rate of \$250.00 a month from appellant's continuing compensation payments would not create a financial hardship. The hearing representative found no evidence that appellant relinquished a valuable right or changed her position for the worse in reliance on payment of compensation.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of her duty.² Under the Act, an employee's compensation is based on her monthly pay as determined under sections 8101(4)³ and 8114.⁴ In cases where compensation payments were based erroneously on a pay rate greater than that to which the employee was entitled, the difference between the compensation the employee should have received and did receive constitutes an overpayment of compensation.⁵

ANALYSIS -- ISSUE 1

Appellant was receiving compensation for disability resulting from an emotional condition sustained in the performance of duty. For the period December 18, 2000 to March 1, 2002, appellant received compensation based on a weekly pay rate of \$959.62. This pay rate was calculated by multiplying a \$23.91 hourly date-of-injury pay rate, as provided by the employing establishment on August 31, 2001, by 40 hours a week. The Office increased the weekly pay rate by \$3.22 to \$959.62 retroactive to December 18, 2000. However, employing establishment personnel forms demonstrate that the correct weekly pay rate was \$852.00 from December 18 to 31, 2000 and \$852.88 for the period January 1, 2001 to March 1, 2002. The Board finds that these forms are sufficient evidence to establish the correct pay rate for the periods at issue. Thus, as the record demonstrates that appellant was paid compensation at an incorrect pay rate, the difference between the pay rate to which she was entitled and the

¹ A family business had an adjusted gross income of \$22,333.00 a year. Appellant received \$2,561.00 per month in compensation, plus an adjusted monthly gross of \$1,861.00 for a total monthly income of \$4,442.00.

² 5 U.S.C. §§ 8101-8193, 8102(a).

³ 5 U.S.C. 8101(4) provides that "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, except when otherwise determined under section 8113 of this title with respect to any period."

⁴ 5 U.S.C. § 8114; *see Daniel Shaw*, 50 ECAB 339 (1999) (discussion of how 5 U.S.C. § 8114 is applied to an employee's earnings to determine the appropriate monthly pay rate).

⁵ *See generally Monte Fuller*, 51 ECAB 571 (2000) (discussion of proper determination of pay rate); *see Donzel R. Yarbour*, 50 ECAB 179 (1998).

compensation she received resulted in an overpayment of compensation in the amount of \$4,852.14.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act 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 The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments or recovery by the United States may not be made when incorrect payments have 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.”⁷ Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁸ 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 guidelines provided in section 10.434 to 10.437 of the implementing federal regulation.

Section 10.436 of the Act’s implementing regulation 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) the 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) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.⁹ 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 \$50.00.¹⁰ Further, 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.¹¹

Section 10.437 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.¹²

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ *James Lloyd Otte*, 48 ECAB 334 (1997); *see William J. Murphy*, 40 ECAB 569 (1989).

⁹ 20 C.F.R. § 10.436 (1999).

¹⁰ *Frederick Arters*, 53 ECAB __ (Docket No. 01-1237, issued February 27, 2002); *see Howard R. Nahikian*, 53 ECAB __ (Docket No. 01-138, issued March 4, 2002).

¹¹ *Id.*

¹² 20 C.F.R. § 10.437 (1999).

Section 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. The information will all be used to determine the repayment schedule, if necessary.”¹³

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in creation of the overpayment and, therefore, considered waiver. Appellant submitted financial information establishing that she had \$4,852.14 in monthly income and \$3,724.61 in allowable monthly living expenses. As previously discussed, recovery of the overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses. The Office recognizes 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. The difference between appellant’s allowable monthly income and expenses is \$697.39, substantially in excess of the \$50.00 margin. Also, appellant does not allege and the evidence does not support that she relinquished a valuable right or changed her position for the worse in reliance on her compensation payments. Accordingly, the Office properly found that recovery would not defeat the purposes of the Act or be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 provides if an overpayment of compensation has been made to an individual entitled to further payments and 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 relevant factors, so as to minimize any hardship.¹⁴

ANALYSIS -- ISSUE 3

With respect to the Office’s decision to deduct \$250.00 every four weeks from appellant’s continuing compensation payments, the Board finds that such a repayment schedule is in accordance with section 10.441(a). In exercising its authority under section 10.441(a), the Office must take into account the “probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.” It may be impossible to eliminate all financial hardship given appellant’s reported income and monthly expenses. However, section 10.441(a) does not require the

¹³ 20 C.F.R. § 10.438.

¹⁴ 20 C.F.R. § 10.441 (1999).

elimination of financial hardship. The Office is required to take into account certain factors “so as to minimize any hardship.”

The Office carefully considered the numerous financial records appellant submitted in determining the repayment schedule, differentiating between ordinary and necessary living expenses and discretionary expenses. Based on the information appellant provided, the Office allowed the amounts she requested for mortgage, property tax, utilities, telephone, clothing, child care and automotive expenses. The Office also allowed \$26.00 a month for charitable contributions, which is the average of the \$12.00 to \$40.00 monthly contributions appellant noted on her overpayment recovery questionnaire. The Office allowed \$450.00 a month for food, \$50.00 less than appellant requested for her family of three. The Board finds that this 10 percent deduction is reasonable under the facts and circumstances of the case. Although appellant claimed variable medical expenses of up to \$100.00 a month, she did not provide sufficient documentation to justify these expenses. Thus, it was reasonable for the Office to deny this expense.¹⁵ Also, the Office denied appellant’s request to allow \$58.48 a month for cable television as this was not an ordinary and necessary living expense. The Board finds that this exclusion was reasonable.¹⁶

The Office also made a detailed review of appellant’s various consumer debts and determined which payments could be considered as ordinary and necessary living expenses. The Office allowed the amounts appellant requested regarding minimum payments on consumer debt and documented student loan repayments. The Office did not allow debt repayments pertaining to a \$8,950.00 loan from appellant’s mother or to a \$6,500.00 loan from her father. The Office found that appellant did not provide information regarding any monthly repayment amounts. As appellant did not submit documentation substantiating her obligation to repay these loans or the amount of monthly payments, the Board finds that the Office was reasonable in denying these expenses.¹⁷

Thus, the Office gave careful consideration to each expense appellant submitted pursuant to her request for waiver of the overpayment of compensation. Following this review, the Office determined that appellant’s monthly income exceeded her ordinary and necessary living expenses by \$697.39. Therefore, the Board finds that the Office reasonably concluded that a repayment schedule of \$250.00 every four weeks, deducted from appellant’s continuing compensation payments, would minimize any resulting hardship while effecting recovery of the overpayment.

¹⁵ See generally *Robert D. Clark*, 48 ECAB 422 (1997) (discussing the importance of an employee submitting accurate financial information regarding income and expenses to determine eligibility for waiver of an overpayment of compensation).

¹⁶ See *Jorge O. Diaz*, 51 ECAB 124 (1999) (the Board affirmed the Office’s exclusion of cable television expenses in calculating appellant’s monthly income and expenses in determining whether the Office properly denied waiver of recovery of an overpayment of compensation).

¹⁷ See generally *Robert D. Clark*, *supra* note 15.

CONCLUSION

The Board finds that an overpayment occurred in this case in the amount of \$4,852.14. The Board also finds that, while appellant was not at fault in the creation of the overpayment, she is not entitled to waiver. The Board further finds that the Office properly directed recovery of the overpayment by deducting \$250.00 every four weeks from appellant's continuing compensation until such time as the amount of \$4,852.14 is paid.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2003 is affirmed.

Issued: October 25, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member