

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

PATTY L. WIGGINS, Appellant

and

**U.S. POSTAL SERVICE, SHARED SERVICE
CENTER, Cynthia, KY, Employer**

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**Docket No. 05-1937
Issued: December 8, 2005**

Appearances:
Patty L. Wiggins, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 19, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 16, 2005, which denied her request for a waiver of an overpayment based on an occupational injury claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$2,333.90 for the period February 23 through April 16, 2004; (2) whether the Office properly determined that appellant was not entitled to a waiver as she was found to be without fault in the creation of the overpayment; and (3) whether the Office abused its discretion in setting the rate of recovery.

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By order dated December 15, 2004, the Board noted that the Office had failed to consider all relevant evidence

submitted by appellant in response to the preliminary overpayment decision. The case was remanded to the Office for further review.¹ The facts of the claim are as follows.

On February 27, 2004 appellant, a 32-year-old postal carrier, filed an occupational disease claim (Form CA-2), alleging that, on January 30, 2004, she injured her left arm while delivering mail.

By letter dated March 22, 2004, the Office accepted appellant's claim for her diagnosed condition, lateral epicondylitis of the left elbow. The Office advised appellant that she was entitled to claim disability compensation. Appellant was paid compensation for total disability for the period February 23 through April 16, 2004, when she returned to work. In total, she received disability compensation in the amount of \$3,640.88.

By letter dated May 17, 2004, the Office made a preliminary finding that, due to no fault on her part, appellant had been overpaid benefits in the amount of \$2,333.90.² The letter indicated that the overpayment had occurred because, although she was paid compensation for total disability for the above-noted time period, she was actually entitled to compensation for only 112 hours of leave without pay in the amount of \$1,306.98.³ The Office advised appellant of actions available to her if she believed that she should receive a waiver instead of repaying the overpayment, including requesting that the district office issue a final decision based on the written evidence currently of record. The Office requested that she submit a detailed explanation of her reasons for seeking a waiver, a completed Form OWCP-20 and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips. The Office noted that "it would be against equity and good conscience to recover an overpayment when ... a claimant would suffer severe financial hardship in trying to repay the debt."

On June 18, 2004 the Office received from appellant a completed overpayment recovery questionnaire (Form OWCP-20) and a request for a waiver based on the written evidence. Appellant described her reasons for believing she was entitled to a waiver, including her allegation that the overpayment had been used to pay bills and that repayment would create a serious hardship. On June 21, 2004 the Office also received a variety of financial documents from appellant, including bills, earnings and leave statements, receipts and a personal statement of expenditures. Appellant indicated that she had total monthly income of \$4,000.00, total monthly expenses of \$3,875.92, available funds in the amount of \$450.00 and personal property and other funds valued at \$1,000.00.

By letter and accompanying memorandum dated June 23, 2004, the Office issued a final decision denying appellant's request for a waiver of recovery of the overpayment. As noted, the

¹ Order Remanding Case, Docket No. 04-1952 (issued December 15, 2004).

² In an accompanying memorandum, the Office indicated that appellant had been paid a total of \$3,640.88, but was entitled to receive only \$1,306.98 and, accordingly, had been overpaid in the amount of \$2,333.90.

³ According to her time analysis form dated April 20, 2004, appellant took leave without pay for the entire period from February 23, 2004, but began working a modified shift (four hours per day) commencing March 15, 2004 and continuing through April 16, 2004.

Board found that the Office had failed to consider all the relevant evidence submitted by appellant in response to the preliminary notice of overpayment and remanded the case for consideration of the evidence.

A report of a telephone call dated March 3, 2005 reflects that appellant telephoned the Office requesting a conference regarding the alleged overpayment, which was scheduled to take place on March 14, 2005 at 5:00 p.m.

By letter dated March 9, 2005, the Office advised appellant of its unsuccessful attempts to contact her for the purpose of scheduling a telephone conference to discuss the issue of waiver and asked her to contact the Office in that regard. The letter directed appellant to update the information previously provided on a Form OWCP-20 within 15 days.

A memorandum to the file dated June 16, 2005 reflects that appellant failed to contact the Office at the appointed time on March 14, 2005.

By decision dated June 16, 2005, the Office found that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment. The Office determined that since appellant was not receiving compensation, the debt should be recovered in full. The Office found that appellant failed to contact the Office for a telephone conference and based its denial of waiver on the Form OWCP-20 and other financial documentation previously provided by appellant.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁵ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant was paid compensation for total disability for the period February 23 through April 16, 2004 in the amount of \$3,640.88. The record further reflects that appellant should have received compensation for only 112 hours of leave without pay in the amount of \$1,306.98. Appellant does not dispute the fact or amount of overpayment. The Board finds that an overpayment was created in the amount of \$2,333.90 for this period. The Board will affirm the Office's June 16, 2005 decision on the fact and amount of overpayment.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or adjustment or recovery of the overpayment would be against equity and good conscience.⁸

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 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. A higher amount is specified for a beneficiary with one or more dependents.⁹ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹⁰ Recovery of an overpayment is also considered to be against equity and good conscience when any 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.¹¹

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.¹²

ANALYSIS -- ISSUE 2

Appellant contends that, because she was found without fault, she should not have to make repayment. However, the Act and its implementing regulations are clear that entitlement to waiver is not established solely by a finding that a claimant is without fault in creating the overpayment. Rather, such a finding entitles appellant the opportunity to establish a basis for granting waiver of the recovery of the overpayment.¹³

⁷ 20 C.F.R. § 10.433(a) (2003).

⁸ *See id.* at § 10.434. *See also* 5 U.S.C. § 8707(d).

⁹ 20 C.F.R. § 10.436.

¹⁰ *See id.* at § 10.437(a).

¹¹ *See id.* at § 10.437(b).

¹² *See id.* at § 10.438(a).

¹³ *See James Lloyd Otte*, 48 ECAB 334, 338 (1997).

Although the Office found that appellant was without fault in the matter of the overpayment, repayment is still required unless it is established that adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁴ The financial evidence indicates that appellant has total monthly income in the amount of \$4,000.00 and total monthly expenses of \$3,875.92. Therefore, appellant's monthly income exceeds monthly expenses by \$124.08, in excess of the amount specified in the Federal (FECA) Procedure Manual.¹⁵ Because her monthly income exceeds her expenses by more than \$50.00, appellant is not deemed to need substantially all of her current income to meet current ordinary and necessary living expenses and has sufficient funds available for debt repayment. Therefore, the Office properly concluded that recovery of the overpayment would not cause severe financial hardship to appellant or defeat the purpose of the Act.

Appellant argued that she would suffer financial hardship in attempting to repay the debt. However, her net disposable income exceeds by \$124.00 the amount determined by the Office procedure manual to meet ordinary living expenses. She made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, other than paying her bills. The Board finds that recovery of the overpayment is not against equity and good conscience and that the Office properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁶ However, where no further compensation benefits are due an individual, the Board does not have jurisdiction, and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.¹⁷

ANALYSIS -- ISSUE 3

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁸ As appellant returned to full-time work on April 16, 2004, she was not

¹⁴ See *Keith H. Mapes*, 56 ECAB ____ (Docket No. 03-1747, issued October 20, 2004).

¹⁵ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(1) (September 1994). (An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00)).

¹⁶ 5 U.S.C. § 8129(a).

¹⁷ *Terry A. Keister*, 56 ECAB ____ (Docket No. 04-1136; issued May 23, 2005); see also *Albert Pineiro*, 51 ECAB 310 (2000).

¹⁸ See *Terry A. Keister*, *supra* note 17.

in receipt of continuing compensation at the time the June 16, 2005 decision. Therefore, this Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that an overpayment of \$2,333.90 occurred for the period February 23 through April 16, 2004, that the Office properly denied waiver of the overpayment on the grounds that recovery would not defeat the purpose of the Act or be against equity and good conscience, and that, as appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, this Board lacks jurisdiction to review recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board