

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

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LILLER MARK, Appellant)	
)	
and)	
)	Docket No. 05-598
)	Issued: June 7, 2005
U.S. POSTAL SERVICE, SECTIONAL)	
CENTER FACILITY ANNEX, Camden, NJ,)	
Employer)	
<hr/>)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Liller Mark, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

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

JURISDICTION

On January 12, 2005 appellant filed a timely appeal of the August 27, 2004 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation in the amount of \$15,018.15. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$15,018.15, for the period June 27, 1975 to April 21, 1982; (2) whether the Office properly denied waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$300.00 every four weeks from appellant's continuing compensation.

FACTUAL HISTORY

On March 15, 1968 appellant, then a 42-year-old distribution clerk, sustained a traumatic injury to her neck and right upper extremity when she lifted a tray of mail in the performance of duty. The Office accepted her claim for right cervical and brachial strains. Appellant received appropriate wage-loss compensation and returned to work March 11, 1969. She sustained recurrence of disability on June 27, 1974 and the Office placed her on the periodic compensation rolls effective November 14, 1974. The Office twice attempted to terminate wage-loss compensation effective April 21, 1982. However, both decisions were later set aside and appellant's compensation was reinstated retroactive to April 22, 1982. The Office placed her back on the periodic compensation rolls effective July 12, 1984 and appellant continues to receive wage-loss compensation for total disability.

In June 2002, with the assistance of her U.S. Representative, appellant inquired as to whether her benefits had been properly augmented because of her dependent spouse, Louis Mark, who died on April 26, 1991. She provided copies of their December 28, 1941 marriage license, her husband's April 26, 1991 death certificate and additional evidence that the two resided together prior to her husband's death. In subsequent correspondence appellant explained that she did not initially claim her husband as a dependent because he had been employed and she was unaware that she could claim him as a dependent.

In a letter dated March 26, 2003, the Office advised appellant that in light of her husband's previous dependent status she was entitled to additional compensation of \$26,474.52 for the period April 22, 1982 to April 26, 1991. The Office further indicated that it would require more time to manually calculate her entitlement to augmented compensation for the prior period, June 24, 1974 to April 21, 1982.

On November 28, 2003 the Office paid appellant \$15,018.15 for the period June 27, 1974 to April 21, 1982. On December 12, 2003 the Office again paid appellant \$10,007.70 for the period June 27, 1974 to April 21, 1982. The Office calculated that appellant should have been compensated a total of \$90,467.43 for the period June 27, 1974 to April 21, 1982 instead of the actual payments she received in the amount of \$80,459.73.

By letter dated June 28, 2004, the Office notified appellant of its preliminary determination that she received an overpayment of benefits in the amount of \$15,018.15. The Office conducted a telephone conference with her on August 27, 2004 and advised that she was not at fault in creating the overpayment. However, upon reviewing the financial information submitted, the Office indicated that a waiver of recovery could not be granted. The memorandum of conference also indicated that appellant agreed that she could repay \$300.00 every four weeks, but that withholding any more would create a financial hardship.

That same day the Office issued its decision finalizing the \$15,018.15 overpayment of benefits. The August 27, 2004 decision found that appellant was not at fault. The Office also

denied waiver of recovery of the overpayment because appellant's monthly income exceeded her allowable monthly expenses. Additionally, the Office determined that \$300.00 would be withheld from appellant's continuing compensation every four weeks. The Office began withholding \$300.00 effective September 5, 2004.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act authorizes the payment of monies for a variety of reasons including compensation for lost wages, reimbursement for various medical expenses and payment for the loss of use of a schedule member.¹ When the Office pays benefits to an individual either because of an error of fact or law, the Office is generally obligated to recover the overpayment of benefits.²

ANALYSIS -- ISSUE 1

On November 28, 2003 the Office paid appellant \$15,018.15. While the payment was noted to be for the period June 24, 1974 to April 21, 1982, there is nothing in the record to justify payment in this amount for the period noted. The Office claims to have dispersed these funds in error. Appellant did not deny receiving the November 28, 2003 payment, nor does she claim entitlement to the monies dispersed. The record establishes that she was entitled to \$10,007.70, for the period June 27, 1974 to April 21, 1982 as additional compensation for having a dependent. As appellant is not entitled to the November 28, 2003 payment of \$15,018.15, the Office properly found that appellant received an overpayment of benefits.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless 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 Waiver of recovery of an overpayment is not possible if the individual is at fault in creating the overpayment.⁴ However, a finding that appellant is without fault is insufficient, of itself, for the Office to waive recovery of the overpayment.⁵ The Office must determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁶

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 the beneficiary from whom

¹ 5 U.S.C. §§ 8102, 8103, 8107.

² 5 U.S.C. § 8129.

³ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

⁴ 20 C.F.R. § 10.433(a) (1999).

⁵ *Jorge O. Diaz*, 51 ECAB 124 (1999).

⁶ 20 C.F.R. § 10.434 (1999).

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 the beneficiary's assets do not exceed a specified amount as determined by the Office.⁷ Additionally, 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 or when any individual in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁸

Section 10.438 of the regulations provide that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]."⁹ As the regulation indicates, this information is necessary to determine whether or not recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁰ Appellant's financial information is also used to determine any necessary repayment schedule.¹¹

ANALYSIS -- ISSUE 2

Appellant did not claim financial hardship. Her sole contention was that she should not be found at fault in accepting the overpayment. Although the Office made a preliminary finding of fault, in its August 27, 2004 final decision the Office determined that appellant was not at fault in accepting the overpayment. However, the fact that appellant was not at fault in the creation or acceptance of the overpayment does not, of itself, establish a basis for waiver of recover of the overpayment.¹²

The record does not establish that recovery of the overpayment will defeat the purpose of the Act. The financial documentation appellant provided on July 22, 2004 indicated that she had a money market account balance of \$16,372.33 and total bank deposits of \$19,037.25 as of July 14, 2004. Additionally, she reported monthly income of \$3,264.00 and monthly expenses of \$2,466.54, which leaves a monthly surplus of \$797.46. The Office found allowable monthly expenses of \$1,977.97, with a monthly surplus of \$1,286.03. While it is unclear which of appellant's expenses the Office disallowed, even when credited with all of her claimed monthly expenses her income sufficiently exceeds her expenses such that recovery of the overpayment would not defeat the purpose of the Act. Appellant has not alleged, nor does the record establish that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received. Accordingly, she failed to establish that recovery of the

⁷ 20 C.F.R. § 10.436 (1999).

⁸ 20 C.F.R. § 10.437 (1999).

⁹ 20 C.F.R. § 10.438(a) (1999).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Jorge O. Diaz*, 51 ECAB 124 (1999).

overpayment would be against equity and good conscience.¹³ The Board finds that the Office properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of the regulations authorizes the Office to recover an overpayment by decreasing later payments of compensation.¹⁴ 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.”¹⁵

ANALYSIS -- ISSUE 3

With respect to the Office’s decision to deduct \$300.00 every four weeks from appellant’s continuing compensation, the Board finds that such a repayment schedule is in accordance with 20 C.F.R. § 10.441(a). Her gross monthly compensation from the Office is \$2,043.00. Taking into account appellant’s assets, her additional monthly income and her claimed expenses, the Board finds that the Office reasonably imposed a repayment schedule of \$300.00 every four weeks. Additionally, she agreed that withholding \$300.00 per month would not represent a financial hardship.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$15,018.15. The Board further finds that the Office properly denied waiver of recovery of the overpayment and properly required repayment of the overpayment by deducting \$300.00 every four weeks from appellant’s continuing compensation payments.

¹³ 20 C.F.R. § 10.437 (1999).

¹⁴ 20 C.F.R. § 10.441(a) (1999).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member