

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

SHERLYN M. JONES, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 05-1813
Issued: June 5, 2006**

Appearances:
Sherlyn M. Jones, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On August 25, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' overpayment decision dated August 17, 2005. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$4,331.25, for the period October 7 through November 30, 2002 because she received concurrent compensation for a schedule award and for wage loss during that period; (2) whether the Office abused its discretion in denying waiver of the overpayment; and (3) whether the Office properly requested a lump-sum repayment in the amount of \$4,431.25.

FACTUAL HISTORY

Appellant, a 50-year-old window clerk, filed a claim for bilateral carpal tunnel syndrome causally related to factors of her employment. The Office accepted the claim for bilateral carpal tunnel syndrome. On May 26, 1998 appellant filed a claim based on a tendinopathy of the distal

supraspinatus tendon on the left shoulder and tear of the right rotator cuff. On November 24, 1998 the Office accepted bilateral rotator cuff tears and authorized rotator cuff surgeries for both shoulders. Appellant stopped work on December 5, 1998. The Office paid appropriate compensation for temporary total disability and placed her on the periodic rolls beginning January 31, 1999. The Office consolidated appellant's cases on September 22, 2000.

On May 12, 2003 the Office granted appellant a schedule award for a 22 percent impairment of the left upper extremity and a 22 percent impairment of the right upper extremity. The Office noted that 151 days of compensation for this schedule award had already been paid during the period July 3 to November 30, 2002 and that appellant would receive schedule award compensation effective May 12, 2003 for the remaining 809.96 days of compensation.¹

On June 7, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$4,331.25, for the period October 7 through November 30, 2002. It found that appellant received concurrent compensation for a schedule award and for wage loss during that period. The Office found that she was without fault in the matter because appellant was not aware that the payments she received were incorrect. The Office advised appellant that, if she disagreed with the fact or amount of the overpayment, she could submit new evidence in support of her contention. The Office further advised her that, when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. Appellant had the right to request a preresoupment hearing on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the June 7, 2005 letter.

On June 21, 2005 appellant requested a waiver of recovery of overpayment, claiming that it would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. She submitted copies of the following monthly expenses: a \$54.33 monthly payment for All State Homeowners' Insurance, on a total premium of \$610.00; a \$46.99 monthly payment for a Fingerhut credit account, on a total premium of \$653.42; a utility bill from ComEd (ComEd Convenience & Move Center) in the amount of \$117.42; and a monthly payment for a telephone bill in the amount of \$40.25. In addition, appellant submitted a Bank One monthly statement from May 18 through June 16, 2005 showing total deposits of \$2,281.94, which included a \$2,181.94 compensation check from the Department of Labor. The bank statement also reflected \$505.40 in total checks -- one in the amount of \$300.00 (presumably for rent), one in the amount of \$78.97 and in the amount of \$126.43 -- in addition to electronic withdrawals totaling \$1,277.94. The withdrawals included a \$349.66 loan payment; an \$86.10 telephone payment, a \$61.00 payment to Comcast; and a \$40.00 automobile payment. Appellant also indicated Automatic Teller Machine (ATM) and debit card withdrawals totaling \$1,394.38, plus \$29.50 in ATM teller fees. She also submitted statements from her brother, her daughter and her sister who claimed that they were dependent upon financial assistance they received on a monthly basis from appellant.

¹ The Office interrupted payment for this award as of December 1, 2002 and resumed payment on May 12, 2003. Payment was authorized through February 17, 2005 and the Office issued a lump-sum payment to appellant for the portion of the award covering September 17, 2003 through February 17, 2005.

In a decision dated August 17, 2005, the Office hearing representative finalized the overpayment of \$4,331.25 for the period October 7 through November 30, 2002. It was found that she improperly received concurrent compensation under a schedule award and for wage loss during that period. The Office stated that, “[a]fter carefully studying your case and fully considering any additional evidence or arguments submitted, we have decided not to waive the overpayment.” The Office determined that appellant was not entitled to waiver and found that she should repay the overpayment \$4,331.25 in one monthly installment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees’ Compensation Act provides that an employee who receives continuing compensation or has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, may not receive salary, pay or remuneration of any type from the United States.²

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,331.90, for the period October 7 through November 30, 2002, as she received a schedule award and wage-loss compensation the same period. Under Federal (FECA) Procedure Manual, Part 2 -- Claims, *Waiver of Recovery*, Chapter 2.808.5.a(4) (September 1994), a schedule award for one injury may be paid concurrently with wage loss for another injury only if those injuries are not to the same part of the body. The hearing representative correctly calculated that appellant was improperly paid a schedule award by taking her weekly wage of \$790.40, multiplied by the 2/3 compensation rate, multiplied by the 55-day overpayment period, divided by 7 days plus cost-of-living adjustments. This created an overpayment in the amount of \$4,331.25 for the period October 7 through November 30, 2002.

Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act³ provides that 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.” (Emphasis added.) Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would

² 20 C.F.R. § 10.400(b).

³ 5 U.S.C. § 8129(a)-(b).

be against equity and good conscience,” pursuant to the guidelines provided in sections 10.436⁴ and 10.437⁵ of the implementing federal regulations.

With regard to the “defeat the purpose of the Act” standard, section 10.436 of the regulation provides:

“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.”

With regard to the “against equity and good conscience” standard, section 10.437 of the regulation provides:

“(a) 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.

“(b) 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”

⁴ 20 C.F.R. § 10.436.

⁵ 20 C.F.R. § 10.437.

A finding that appellant was without fault is insufficient, in and of itself, for the Office to waive the overpayment.⁶ 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 the guidelines provided in sections 10.434-437 of the implementing federal regulations.⁷

Office regulations provide that 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 or 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.⁸ The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary expenses by more than \$50.00.⁹ Additionally, the guidelines for recovery of an overpayment from an individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.¹⁰

Office procedures provide that recovery will defeat the purpose of the Act if the individual’s assets do not exceed the 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 claimant’s assets that are not exempted from recoupment.¹¹ The first \$3,000.00 or more, depending on the number of the individual’s dependents, is also exempted from recoupment as a necessary emergency resource.¹²

⁶ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁷ 20 C.F.R. §§ 10.434-437 (1999).

⁸ *Frederick Arters*, 53 ECAB 397 (2002).

⁹ *Id.*

¹⁰ *John Skarbek*, 53 ECAB 630 (2002).

¹¹ The Office procedure manual provides that an individual’s assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, *etc.* Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (September 1994).

Section 20 C.F.R. § 10.438¹³ 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. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

ANALYSIS -- ISSUE 2

In the instant case, the Office determined that, while appellant was not at fault in the creation of the overpayment, the overpayment should not be waived. To sustain this finding the Office was required to determine that repayment would not defeat the purpose of the Act or be against equity and good conscience. These findings require that the Office evaluate appellant's financial documentation. She submitted information indicating that she had monthly income of \$2,181.94, the amount of her compensation check from the Department of Labor and submitted a number of documents to substantiate her monthly expenses. The Office erred by failing to make a detailed determination of income, expenses and assets. Pursuant to its regulations, the Office, therefore, did abuse its discretion by issuing its August 17, 2005 final decision denying waiver of recovery of the overpayment in the amount of \$4,331.25, without evaluation of appellant's financial documentation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,331.25, for the period October 7 through November 30, 2002 because she received concurrent compensation for a schedule award and for wage loss during that period. The Board finds that the Office did abuse its discretion in denying waiver of the overpayment. The Board sets aside the Office's repayment schedule for further evaluation of waiver.

¹³ 20 C.F.R. § 10.438.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2005 decision of the Office of Workers' Compensation Programs be affirmed in part and remanded in part, consistent with this decision of the Board.

Issued: June 5, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board