

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

G.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Liberty, KY, Employer**

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**Docket No. 08-2118
Issued: May 19, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2008 appellant timely appealed the June 5, 2008 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of wage-loss compensation. 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 of \$10,685.20 for the period June 2, 2001 through August 9, 2003 because the Office relied on an incorrect pay rate; and (2) whether appellant is entitled to waiver of recovery of the overpayment.

FACTUAL HISTORY

Appellant, a 60-year-old retired part-time flexible (PTF) clerk, has an accepted occupational disease claim for right lateral epicondylitis, which arose on or about August 1, 2000. She stopped work on February 19, 2001. On June 8, 2001 appellant filed a

claim (Form CA-7) for wage-loss compensation for total disability beginning June 2, 2001.¹ The Office paid the claim and she continued to receive wage-loss compensation for temporary total disability through August 9, 2003. Appellant returned to work on August 18, 2003 in a part-time, limited-duty capacity. She voluntarily retired effective December 31, 2003.²

During the period June 2, 2001 through August 9, 2003, the Office paid wage-loss compensation based on a weekly pay rate of \$809.60. This pay rate was calculated based on an hourly wage of \$20.24 and a presumed 40-hour workweek. But as a part-time flexible clerk, appellant did not regularly work 40 hours per week.

In March 2007 the employing establishment provided updated information regarding appellant's earnings over the 12-month period preceding her February 2001 work stoppage. During this time frame appellant worked a total of 1,728.50 hours and earned \$34,569.29. She worked approximately 33 hours per week with an average weekly wage of \$664.79.

On May 18, 2007 the Office issued a preliminary determination that appellant received an overpayment of \$10,658.20 for the period June 2, 2001 through August 9, 2003. It indicated that appellant's wage-loss compensation should have been computed based on a weekly pay rate of \$664.79 rather than \$809.60. Additionally, the Office advised that appellant was without fault in creating the overpayment.

On June 3, 2007 appellant requested a prerecoumpment hearing. She did not submit an overpayment recovery questionnaire. The Office did, however, receive a partial copy of appellant's 2005 federal income tax return, which reported a combined income of \$154,847.00.³ Appellant also submitted a May 15, 2007 handwritten letter outlining \$18,930.00 in expenses associated with her 25-year-old daughter Andrea's education.⁴ Appellant's other expenses included \$400.00 to \$500.00 per month for electricity, telephone, insurance and health aid. She also reported automobile expenses of approximately \$1,600.00 per year and \$3,058.27 for health insurance.

A telephonic hearing was held on March 17, 2008 and the hearing representative issued a final overpayment decision on June 5, 2008. She concurred with the Office's preliminary findings regarding fact of overpayment, amount of overpayment and fault. With respect to recovery of the overpayment, the hearing representative found that waiver was unwarranted. She noted, among other things, that appellant had an annual income in excess of \$150,000.00 and few known expenses. With a reported monthly income in excess of \$12,000.00, the hearing representative believed that a monthly repayment schedule of \$1,200.00 would not be "overly burdensome."

¹ From February 19 until June 1, 2001, appellant used sick leave to cover her absence from work.

² Appellant currently receives a nondisability annuity from the Office of Personnel Management (OPM).

³ Appellant filed a joint return with her husband. The taxable amount of her OPM annuity was \$21,791.64.

⁴ Appellant's May 15, 2007 letter was in response to a May 8, 2007 memorandum of conference regarding, among other things, her pay rate effective February 20, 2001, the date her disability began.

LEGAL PRECEDENT -- ISSUE 1

The amount of compensation paid is a function of the injured employee's pay rate.⁵ If the employee worked in the employment in which she was employed at the time of her injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay was not fixed, the average annual earnings are the product obtained by multiplying her daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if she was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.⁶ The rate of pay to be used in calculating compensation is based on the greatest of either the monthly pay at the time of injury or at the time disability begins or at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the Federal Government.⁷

ANALYSIS -- ISSUE 1

As a part-time employee without a fixed rate of pay, appellant's average annual earnings are to be determined in accordance with 5 U.S.C. § 8114(d)(1)(B). She worked the entire 12-month period that preceded her February 2001 work stoppage. During this time frame, appellant earned \$34,569.29, which corresponds to an average weekly wage of \$664.79. The Office, however, paid wage-loss compensation based on an erroneous weekly pay rate of \$809.60. From June 2, 2001 until August 9, 2003, it paid appellant net wage-loss benefits in the amount of \$64,237.59 based on an incorrect pay rate. Applying the appropriate weekly pay rate of \$664.79, she was entitled to net wage-loss benefits of \$53,579.38. As such, appellant received an overpayment of \$10,685.20. Both the senior claims examiner and the hearing representative found appellant not at fault in creating this overpayment.

LEGAL PRECEDEN -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or 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

⁵ 5 U.S.C. §§ 8105, 8106, 8107 (2006); 20 C.F.R. §§ 10.401(b), 10.404(b) (2008).

⁶ 5 U.S.C. § 8114(d)(1)(B). The above-noted phrase "substantially the whole year" is interpreted as meaning at least eleven months. *Robert A. Flint*, 57 ECAB 369, 375n.18 (2006).

⁷ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Jon L. Hoagland*, 57 ECAB 635, 639 n.14 (2006).

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

beneficiary's assets do not exceed a specified amount as determined by it.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. When an 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.¹⁰

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office.¹¹ 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.¹² This information will also be used to determine the repayment schedule, if necessary.¹³

ANALYSIS -- ISSUE 2

Appellant argued that the hearing representative's request for \$1,200.00 per month plus interest was quite expensive given that her monthly income was only \$1,631.98 per month. She did not submit a recovery questionnaire in response to the Office's May 18, 2007 preliminary finding of overpayment. The only documentation of appellant's income was the first page from her joint federal tax return for 2005 and a Form 1099-R (Statement of Annuity Paid) for 2005. OPM paid appellant a gross annuity of \$22,872.00 in 2005. Appellant's 2005 joint tax return indicated total income of \$154,847.00, which included the taxable portion (\$21,792.00) of her OPM annuity. Total income also included approximately \$51,000.00 in interest and dividends, \$13,212.00 in capital gains, \$75,060.00 from "Rental real estate, royalties ..." and \$7,649.00 in "other income." The hearing representative's finding of \$12,000.00 in monthly income is roughly one-twelfth of the total annual income reported on appellant's 2005 joint tax return. Appellant's claim that her income was only \$1,631.98 per month is not supported by the record.

An individual is deemed to need substantially all of her income to meet current ordinary and necessary living expenses if her monthly income does not exceed monthly expenses by more than \$50.00.¹⁴ Based on the above-noted tax records, appellant has a monthly income of approximately \$12,000.00. In a May 15, 2007 letter, she identified \$18,930.00 in annual expenses associated with her then 25-year-old daughter Andrea's graduate studies. Appellant also reported monthly expenses of \$400.00 to \$500.00 for electricity, telephone, insurance and health aid. Additionally, she claimed automobile expenses of approximately \$1,600.00 per year

⁹ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

¹⁰ 20 C.F.R. § 10.437(a), (b).

¹¹ 20 C.F.R. § 10.438(a).

¹² *Id.*

¹³ *Id.*

¹⁴ *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

and \$3,058.27 for health insurance. If appellant received credit for all of the reported items, her monthly expenses would be approximately \$2,500.00. The lion's share of this amount is attributable to her daughter's educational expenses (\$1,577.50).¹⁵

An individual's ordinary and necessary living expenses include: fixed living expenses such as food and clothing, furniture, household and personal hygiene supplies, rent, mortgage payments, utilities, maintenance, insurance (automobile, life and health), taxes, automobile expenses and commuting expenses.¹⁶ Additional allowable expenses include nonreimbursed medical and hospitalization expenses, church and charitable contributions made on a regular basis and miscellaneous expenses, such as newspapers and haircuts, not to exceed \$50.00 per month.¹⁷ An individual may also claim expenses for the support of others for whom the individual is responsible, such as dependent child day care, child support or alimony.¹⁸

Appellant and her husband did not claim their adult daughter as a dependent for tax purposes and the daughter's status as a graduate student does not qualify her as a dependent under the Act.¹⁹ Under the current circumstances, her contributions to her daughter's education would not be considered ordinary and necessary living expenses. But even if the daughter's educational expenses were taken into account, appellant's \$12,000.00 monthly income far exceeds her reported monthly expenses of approximately \$2,500.00. Based on the available information, she clearly does not need substantially all of her income to meet current ordinary and necessary living expenses.

As to her assets, appellant did not provide any specific information in this regard.²⁰ Her May 15, 2007 letter identified a car of "unknown value." However, the various types of passive income reported on appellant's 2005 federal tax return suggests that she and her husband have assets that likely exceed the applicable asset base of \$8,000.00. Accordingly, the Board finds that recovery of the overpayment would not defeat the purpose of the Act. The record also does not support a finding that recovery would be against equity and good conscience. Appellant has not alleged detrimental reliance nor does the record support such a finding. Consequently, the Office properly found that appellant was not entitled to waiver of recovery of the overpayment.

Appellant took exception to the hearing representative's \$1,200.00 per month repayment schedule. She stated that it was "quite expensive" given her claimed monthly income of only

¹⁵ Appellant did not claim her daughter as a dependent on her 2005 tax return. However, on numerous CA-7 forms she listed both her husband and her daughter, born August 15, 1981, as dependents.

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(3) (May 2004).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Dependents include "a student, until he or she reaches 23 years of age or completes 4 years of school beyond the high school level." 20 C.F.R. § 10.405(a).

²⁰ As previously indicated, the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. *Supra* note 11.

\$1,631.98. Because appellant is no longer receiving compensation under the Act, the hearing representative's decision to impose a repayment schedule is beyond the scope of the Board's current jurisdiction.²¹

CONCLUSION

The Board finds that appellant received an overpayment of \$10,685.20 for the period June 2, 2001 through August 9, 2003. The Board further finds that appellant is not entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²¹ *Joan Ross*, 57 ECAB 694, 703-04 (2006).