

FACTUAL HISTORY

On July 12, 1989 appellant, then a 34-year-old letter carrier, sustained an employment-related right rotator cuff strain. She stopped work that day and received compensation based on a weekly pay rate of \$546.21. Appellant returned to four hours of modified duty on November 27, 1989, and began working eight hours of modified duty on January 29, 1990. On June 1, 1990 she underwent surgical repair of the right shoulder, and again received compensation based on a weekly pay rate of \$546.21. Appellant returned to eight hours of modified duty daily on September 17, 1990. Right shoulder impingement syndrome was accepted and she continued to work modified duty. Appellant again stopped work on May 31, 2007 and had right shoulder surgery on June 4, 2007. She thereafter filed CA-7, claims for compensation beginning May 31, 2007. The employing establishment informed the Office that appellant's pay rate on June 4, 2005, the date of recurrence, was \$946.52 per week,² and she was paid disability compensation at that rate. Appellant returned to full-time modified duty on April 16, 2008 and on April 25, 2008 began working four hours daily.

The Office determined that an incorrect pay rate for compensation was used from May 31, 2007 to April 15, 2008 and, beginning April 25, 2008, paid appellant compensation based on a weekly pay rate of \$546.21. Computer print-outs and an overpayment worksheet show that appellant received \$27,469.95 in compensation for the period May 31, 2007 through April 15, 2008, when she should have received \$21,738.27, yielding a \$5,731.68 overpayment in compensation. By letter dated July 23, 2008, the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$5,731.68 for the period May 31, 2007 through April 15, 2008 because she was paid at an incorrect pay rate. It found appellant without fault and explained that as she had never returned to full duty, she should have been paid using the date-of-injury pay rate of \$546.21.

Appellant was given 30 days to respond and was provided an overpayment action request form and an overpayment questionnaire. On August 22, 2008 she requested a prerecoupment hearing, stating that she disagreed that the overpayment occurred and requested waiver. Appellant submitted a statement reporting rent of \$1,164.00 a month and that she had a Thrift Savings loan, and financial information including Quincy Credit Union receipts dated October 2 and November 23, 2007 and August 12, 2008, with the latter showing a \$1,270.26 balance, and credit card payment receipts and earnings and leave statements for pay periods 10, 12 and 13 in 2008.

At the hearing, held on December 16, 2008, appellant's union representative argued that appellant was entitled to the recurrent pay rate because she was a "regular" employee since she had returned to full-time duties. Appellant testified that she had returned to full-time modified employment in 1990 and described her modified job duties, stating that she still had restrictions. The hearing representative advised her to provide an overpayment questionnaire. Appellant submitted limited-duty job assignments dated 1989, 1994 and 1999, medical evidence, employing establishment correspondence, and additional financial information including

² It is unclear why this date was chosen as there is no evidence of record that appellant had a recurrence of disability on that date.

Citizens Bank statements dated December 21 and 22, 2008 showing balances of \$15,844.80 and \$13,980.80 respectively. She also submitted grocery receipts and receipts showing credit card, insurance, department store, utility and motor vehicle tax payments.

By decision dated March 10, 2009, an Office hearing representative found that an overpayment in compensation in the amount of \$5,731.68 had been created because appellant had been paid at an incorrect pay rate for the period May 31, 2007 through April 15, 2008. He further found that she was not at fault but was not entitled to waiver because her asset base exceeded the allowable amount of \$4,800.00. The Office hearing representative noted that appellant had not provided an overpayment questionnaire and that, based on the financial information she provided, it was difficult to assess her monthly expenses. He determined that her monthly part-time earnings and compensation payments totaled \$2,135.60 and her necessary living expenses totaled \$2,005.10, yielding \$130.50 in discretionary income each month. The hearing representative then determined that \$100.00 would be deducted from appellant's continuing compensation each payment period to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act³ 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 duty.⁴ 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.⁵ The Act provides that monthly pay means the monthly pay at the time of injury, or the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment, whichever is greater.⁶

The Board has defined "regular" employment as established and not fictitious, odd-lot or sheltered, and that the duties of "regular" employment are covered by a specific job classification that would have been performed by another employee if appellant did not perform them.⁷

ANALYSIS -- ISSUE 1

Following her July 12, 1989 employment injury when she stopped work, appellant initially returned to part-time modified duty, and then to full-time modified duty on November 27, 1989. She continued to work modified duty until she stopped work on May 31,

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at 8102(a).

⁵ *Id.* at 8129(a).

⁶ *Id.* at § 8101(4); see *Janet A. Condon*, 55 ECAB 591 (2004).

⁷ *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

2007 to undergo a surgery. Appellant again returned to modified duty on April 16, 2008 and testified at the hearing that she still worked restricted duty.

The Board finds that, contrary to appellant's argument on appeal, it is apparent that she did not return to "regular" employment. By her own testimony, when she returned to full-time employment in 1990, she returned to modified duties and has continued to work restricted duty since that time, never returning to full duties. The test is not whether the tasks that appellant performed during her modified duty would have been done by someone else, but instead whether she occupied a regular position that would have been performed by another employee. The record supports that appellant did not perform all the duties of the position of letter carrier or any other regular classified position at any time after her return to work following the July 12, 1989 employment injury. Appellant did not resume "regular" employment within the meaning of section 8101(4) of the Act and, as such, the correct pay rate for compensation purposes should have been \$546.21, the weekly pay rate in effect on the date of injury. She was thus not entitled to the recurrent weekly pay rate of \$946.52 on which her compensation was based for the period May 31, 2007 through April 15, 2008.⁸

The record supports that appellant's monetary compensation for the period May 31, 2007 through April 15, 2008 was based on a recurrent pay rate of \$946.52 per week, when she should have received compensation based on the date-of-injury pay rate of \$546.21. Computer print-outs and an overpayment worksheet show that she received compensation of \$27,469.95 for this period, when she should have received compensation of \$21,738.27. Thus, an overpayment in compensation in the amount of \$5,731.68 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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."⁹ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.¹⁰ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.¹¹

Section 10.436 provides that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses, and, also, if the beneficiary's assets do not exceed a specified amount as determined by

⁸ *Janet A. Condon, supra* note 6.

⁹ 5 U.S.C. § 8129.

¹⁰ *Steven R. Cofrancesco, 57 ECAB 662 (2006).*

¹¹ 5 U.S.C. §§ 10.434-10.437.

the Office from data provided by the Bureau of Labor Statistics.¹² For waiver under the defeat the purpose of the Act standard, a claimant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹³ Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent.¹⁴

An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits. Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies.¹⁵

ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁶

In evaluating whether recovery of the overpayment from appellant would defeat the purpose of the Act, the Office noted that it was difficult to assess her monthly expenses because she had not provided an overpayment questionnaire. It also correctly noted that, as appellant reported assets in excess of \$13,000.00 which exceeded the resource base of \$4,800.00, appellant had not established that she was entitled to a waiver on the basis of defeating the purpose of the Act. Although appellant did not submit an overpayment questionnaire, she furnished a Citizens Bank statement dated December 22, 2008 showing a balance of \$13,980.80. As this amount is greater than the resource base of \$4,800.00,¹⁷ the Office acted properly in refusing appellant's request for waiver under the standard of defeating the purpose of the Act as she did not meet both criteria to qualify for waiver of the recovery of the overpayment. It therefore properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of the Act.¹⁸ Furthermore, as appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, the Office properly determined that recovery would not be against equity and good conscience. The Board thus finds that the Office properly denied waiver of the

¹² *Id.* at § 10.436.

¹³ *Id.*

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁵ *Id.*

¹⁶ *Supra* note 9.

¹⁷ *Supra* note 14.

¹⁸ *See K.K.*, 61 ECAB ____ (Docket No. 09-207, issued October 2, 2009).

overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.¹⁹

LEGAL PRECEDENT -- ISSUE 3

The Office's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, it 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.²⁰

ANALYSIS -- ISSUE 3

Appellant did not provide an overpayment questionnaire or sufficient detailed information regarding her current financial circumstances. It is her responsibility to provide information about income, expenses and assets.²¹ The hearing representative noted that the available evidence indicated that appellant had \$130.50 in discretionary income each month and set the recovery of the overpayment at \$100.00 from continuing compensation payments. Based on the evidence, the hearing representative did take relevant evidence into account so as to minimize hardship in recovering the overpayment. The Office therefore did not abuse its discretion in finding that appellant should repay her overpayment at the rate of \$100.00 per compensation period.

¹⁹ *Supra* note 5.

²⁰ 20 C.F.R. § 10.441(a); *see Steven R. Cofrancesco, supra* note 10.

²¹ 20 C.F.R. § 10.438.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in compensation in the amount of \$5,731.68, that the Office properly denied waiver and required recovery of the overpayment by deducting \$100.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 26, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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