

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

L.C., Appellant)	
)	
and)	Docket No. 09-2274
)	Issued: July 7, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Houston, TX, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 14, 2009 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 15, 2009 regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly found a \$50,745.61 overpayment of compensation from August 7, 2005 to April 14, 2007 due to payment of a duplicate schedule award; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly set the rate of recovery from her continuing compensation payments.

On appeal, appellant contends that the Office denied waiver without fully considering her financial information, including her monthly car payment.

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By order issued June 10, 2008,¹ the Board set aside an October 12, 2007 overpayment decision and remanded the case to the Office to hold a precoupment hearing. The law and facts of the case as set forth in the Board's order are incorporated by reference. The relevant facts are set forth below.

On May 24, 2000 the Office issued appellant a schedule award for a 16 percent permanent impairment of each upper extremity due to accepted bilateral carpal tunnel syndrome and multiple trigger fingers.² Appellant again claimed a schedule award on August 17, 2004. The Office ascertained that she had a 5 percent impairment of each upper extremity, less than the 16 percent previously awarded. However, on August 11, 2005, it issued a schedule award based on a five percent impairment rating of each upper extremity, to be paid for a 31.2-week period beginning on August 7, 2005. The Office made \$50,745.60 in periodic roll payments from August 7, 2005 to April 14, 2007, a period of approximately 80 weeks.³

By notice dated August 29, 2007, the Office found a \$50,745.60 overpayment of compensation for schedule award payments made from August 7, 2005 to April 14, 2007. It found appellant at fault in creation of the overpayment. In a September 16, 2007 letter, appellant requested a precoupment hearing. By decision dated October 12, 2007, the Office finalized the August 29, 2007 notice. It did not hold the precoupment hearing.⁴

By decision dated May 13, 2008, the Office rescinded the August 11, 2005 schedule award as duplicative and erroneous.

Pursuant to the Board's June 10, 2008 order, the Office conducted an August 9, 2008 conference call advising appellant that it would not issue a final overpayment until it held a precoupment hearing.

By decision dated and finalized November 4, 2008, an Office hearing representative set aside the August 29 and October 12, 2007 decisions and remanded the case for additional development.

¹ Docket No. 08-167 (issued June 10, 2008).

² The Office accepted that appellant sustained these injuries in the performance of duty on or before July 10, 1995. At that time, appellant was a 44-year-old window clerk. She underwent left median nerve release on December 2, 1996 and right median nerve releases on March 5, 1997 and September 24, 1999.

³ The Office issued overpayment decisions in April and May 2007, set aside by an August 23, 2007 decision of the Office's Branch of Hearings and Review.

⁴ Appellant filed her prior appeal with the Board on October 24, 2007. During the pendency of the appeal, the Office issued a December 5, 2007 decision vacating the October 12, 2007 decision. As the Board still retained jurisdiction over the overpayment issue, the Office may not issue a decision regarding the same issue on appeal before the Board. See *Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990). The December 5, 2007 decision is therefore moot. The Office also issued two preliminary notices of overpayment on May 13, 2008, which were not finalized.

By notice dated November 10, 2008, the Office advised appellant of its preliminary determination of a \$17,998.72 overpayment of compensation for the period August 7, 2005 to March 18, 2006 due to duplicative schedule award payments. It found her not at fault in creation of the overpayment as the August 11, 2005 decision specified this period of entitlement. By a second notice dated November 10, 2008, the Office advised appellant of its preliminary finding of a \$32,746.89 overpayment of compensation from March 19, 2006 to April 14, 2007. It found her at fault in creation of the overpayment as she accepted payments after the period specified in the August 11, 2005 decision.

In November 27, 2008 letters, appellant requested a precoupment hearing and waiver of the overpayments. She contended that she did not realize she was not entitled to the August 11, 2005 schedule award. During the hearing, held April 9, 2009, appellant did not contest the fact or amount of the overpayment. She asserted that the August 11, 2005 decision did not clearly specify the period of the schedule award.

Appellant submitted financial documentation of her monthly utility, insurance and revolving debt repayment expenses. On an overpayment recovery questionnaire, she listed \$2,723.00 in monthly income. Appellant documented the following monthly expenses: \$200.00 food; \$598.00 mortgage; \$197.00 in combined insurance payments; \$585.00 utilities; \$44.00 telephone; \$38.00 home security system; \$228.00 in credit card payments; and \$98.00 for cable television. She also listed undocumented monthly expenses of \$436.73 in car payments, \$220.00 for a credit union loan, \$200.00 for clothing and \$800.00 in unspecified miscellaneous expenses. Appellant also listed \$2,515.00 in bank accounts, stocks and bonds.

By decision dated July 15, 2009, the Office hearing representative found that appellant received a combined overpayment of \$50,745.61 and that she was not at fault for the entire period of the overpayment as the August 11, 2005 schedule award decision did not clearly set forth the duration of the award. The hearing representative reviewed her financial information. He allowed the monthly utility, insurance and credit card payments appellant listed on her questionnaire, \$100.00 of the claimed \$200.00 in clothing expenses and \$200.00 of the claimed \$800.00 in miscellaneous expenses. The hearing representative disallowed \$98.00 for cable television, as it was not a necessity. Also, there was no documentation to support the \$436.73 car payment or \$220.00 loan payment. The hearing representative denied waiver of the overpayment as appellant did not require substantially all of her \$2,723.00 monthly income to meet \$2,152.00 in ordinary and necessary living expenses, leaving discretionary income of \$571.00 each month. He noted that she did not allege or establish detrimental reliance on the notice or fact of the overpaid compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁵ 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.⁶ Section 8129(a) of the Act provides, in

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

pertinent part, that when “an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”⁷ The Office’s procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$50,745.61. The record reflects that from August 7, 2005 to April 14, 2007 she received schedule award compensation pursuant to an August 11, 2005 decision that duplicated a May 24, 2000 schedule award. The Office rescinded the August 11, 2005 schedule award as duplicative and erroneous. Therefore, the benefits paid constitute an overpayment of compensation.

There is no contrary evidence regarding the fact and the amount of the overpayment. Also, appellant does not contest the fact or amount of the overpayment. The Board finds that she received an overpayment of \$50,745.61 for the period August 7, 2005 to April 14, 2007.

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.⁹ If it finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹⁰

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.¹¹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹² Recovery of an overpayment is considered to be

⁷ *Id.* at § 8129(a).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

⁹ 20 C.F.R. § 10.433(a) (1999).

¹⁰ *Id.* at § 10.434.

¹¹ *Id.* at § 10.436.

¹² *Sherry A. Hunt*, 49 ECAB 467 (1998).

against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹³ 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.¹⁴

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.¹⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the matter of the \$50,741.61 overpayment, so she was eligible for consideration of waiver. Appellant's overpayment recovery questionnaire showed a monthly income of \$2,723.00 and ordinary and necessary living expenses of \$2,152.00, a difference of \$571.00. This means that she does not need substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses.¹⁶ The Office properly concluded that recovery of the overpayment would not cause hardship to appellant or defeat the purpose of the Act.

Appellant does not argue and the record does not establish that recovery of the debt would be against equity and good conscience. She did not show that she gave up a valuable right or changed her position for the worse in reliance on the overpayment. Because recovery of the overpayment would not defeat the purpose of the Act and would not be against equity and good conscience, the Office properly denied waiver. Appellant must repay the debt. The Board will affirm the Office's July 15, 2009 decision on the denial of waiver.¹⁷

On appeal, appellant contended that the Office did not properly consider her financial information, including her monthly car payment. However, the Board finds that the Office hearing representative thoroughly reviewed her supporting documentation and gave due regard to all appropriate factors in determining that the overpayment was not eligible for waiver. The Board notes that appellant did not submit documentation of the monthly car payment.

¹³ 20 C.F.R. § 10.437(a).

¹⁴ *Id.* at § 10.437(b).

¹⁵ *Id.* at § 10.438(a).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 6.0200.6(a)(1) and .6(a)(4) (September 1994).

¹⁷ The Board notes that it does not have jurisdiction to review the Office's finding regarding how the overpayment should be recovered. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

LEGAL PRECEDENT -- ISSUE 3

Office regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment, as soon as the error is discovered or her attention is called to same. If 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.¹⁸

ANALYSIS -- ISSUE 3

In the July 15, 2009 decision, the hearing representative found that appellant's financial information showed \$571.00 in discretionary income each month and set the recovery of the overpayment at \$275.00 from continuing compensation payments. Based on the evidence, the hearing representative took into consideration the financial information submitted by appellant, as well as the factors set forth in 20 C.F.R. § 10.441, so as to minimize hardship in recovering the overpayment. The Office therefore did not abuse its discretion in finding that she should repay the overpayment at the rate of \$275.00 every 28 days.

CONCLUSION

The Board finds that the Office properly found a \$50,745.61 overpayment of compensation for the period August 7, 2005 to April 14, 2007 due to payment of a duplicate schedule award. The Office properly denied waiver of the overpayment as recovery would not defeat the purpose of the Act or be against equity and good conscience. Also, it did not abuse its discretion in setting the rate of recovery from continuing compensation.

¹⁸ 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 15, 2009 is affirmed.

Issued: July 7, 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