

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

Y.J., Appellant

and

**U.S. POSTAL SERVICE, BALTIMORE
CARRIER ANNEX, Baltimore, MD, Employer**

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**Docket No. 10-364
Issued: October 18, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2009 appellant filed a timely appeal of the November 5, 2009 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation, denying waiver of recovery of the overpayment and directing repayment. Pursuant to 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 appellant received an overpayment of compensation in the amount of \$2,670.70 for the period July 18 to August 14, 2008; and (2) whether the Office properly denied waiver of the overpayment.

On appeal, appellant contends that the Office did not consider her monthly expenses or her inability to pay past due bills.

FACTUAL HISTORY

The Office accepted that on June 30, 2008 appellant, then a 37-year-old letter carrier, sustained temporary exacerbation of pyriiformis syndrome (lesion of the sciatic nerve) while using a hand truck to carry tubs of mail up steps and push parcels.¹ Appellant stopped work on July 18, 2008. On January 29 and February 16, 2009 she filed Form CA-7 claims for wage-loss compensation for the period July 18, 2008 to February 13, 2009. On February 24, 2009 the Office issued a wage-loss compensation for the period July 18, 2008 to February 13, 2009.

By letter dated April 16, 2009, the Office advised the employing establishment that since appellant's new traumatic injury claim had been filed within 30 days of her injury, she was entitled to continuation of pay (COP) for 45 days from July 18 to August 14, 2008. The Office stated that it would declare an overpayment of compensation for this period.

On April 16, 2009 the Office made a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,670.79 for the period July 18 to August 14, 2008 because she received compensation for temporary total disability during the same period she received continuation of pay. It found that appellant was without fault in creating the overpayment. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents.

On April 23, 2009 appellant requested a telephonic prerecoupment hearing with an Office hearing representative. She submitted a Form OWCP-20 dated April 23, 2009. Appellant did not report any monthly income. Her monthly expenses included \$1,575.00 for rent or mortgage, \$240.00 for food, \$175.00 for clothing, \$500.00 for utilities, \$50.00 for a Visa credit card and \$592.00 for a car payment, totaling \$3,132.00. Appellant had \$1,048.00 in a checking account and \$537.00 in a savings account, totaling \$1,585.00. She stated that she never received COP from the employing establishment.

At the October 2, 2009 hearing, appellant did not contest that she received an overpayment of compensation but requested waiver. She stated that she had not returned to work and her only source of income was her workers' compensation benefits. Her parents lived with her and she paid all their expenses. Following the hearing, appellant submitted financial records which listed \$15.00 in a savings account and \$591.67 in a checking account. Her monthly expenses included \$28.00 for "Oaks at Old Court HOA," \$305.17 for wireless service for three telephones, \$1,742.36 for mortgage, \$200.00 for car insurance, \$65.51 for electricity, \$57.77 for water, and \$40.00 for Visa and \$25.00 for MasterCard credit cards.

¹ Appellant initially filed a Form CA-2a claim alleging that she sustained a recurrence of disability on June 30, 2008 due to an accepted December 13, 2006 employment-related right hip contusion injury assigned Office File No. xxxxxx871. On April 5, 2008 she returned to full-time limited-duty work. By letter dated December 31, 2008, the Office determined that appellant's claim should be treated as a new traumatic injury claim rather than as a recurrence of disability because it arose from the new June 30, 2008 employment incident.

On October 5, 2009 appellant returned to full-time full-duty work. Her gross monthly salary was \$4,210.00 based on an annual salary of \$50,525.00 with no premium pay. Premiums for health and life insurance in the amount of \$70.18 and \$6.62, respectively, were deducted from appellant's biweekly wages which totaled \$154.00 per month. Appellant's net monthly salary was \$4,056.00.

By decision dated November 5, 2009, the Office hearing representative finalized the overpayment in the amount of \$2,670.70. He denied waiver of recovery of the overpayment, finding that appellant's monthly income of \$4,056.00 exceeded her monthly expenses of \$3,210.00.² The hearing representative directed recovery of the overpayment at the rate of \$150.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides in 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.³

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.⁴ Section 8118(c) of the Act provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$2,670.70. The record reflects that appellant filed claims for wage loss for the period July 18, 2008 to February 13, 2009. During this period, she received compensation payments for temporary total disability from the Office and continuation of pay from the employing establishment. The Office determined that the amount of compensation appellant received for the period July 18 to August 14, 2008 totaled \$2,670.70 and, after deducting appellant's health benefits and life insurance of \$70.18 and \$6.62, respectively, an overpayment existed in the amount of \$2,670.70. Because appellant received regular full-time wages from the employing establishment during the period July 18 to August 14, 2008, she was not entitled to disability compensation from the Office for the same period. The Board finds that her receipt of dual payments created an overpayment of compensation.

² In the November 5, 2009 decision, the Office hearing representative disallowed \$231.00 of the \$305.00 expense for wireless telephone service as only one telephone was allowed which resulted in a monthly expense of \$74.00. He also disallowed \$28.00 for "Oaks at Old Court HOA" as no explanation was provided for this expense.

³ 5 U.S.C. § 8129(a).

⁴ *Id.* at § 8116(a).

⁵ *Id.* at § 8118(c).

There is no contrary evidence nor does appellant contest the fact and the amount of the overpayment. The Board finds that appellant received an overpayment of \$2,670.70 for the period July 18 to August 14, 2008.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁶ Section 8129(b) of the Act⁷ provides that an overpayment of 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.⁸

Section 10.436 of the implementing regulations⁹ provide that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: 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.¹⁰ 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 \$50.00.¹¹

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt; and 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.¹²

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. 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.

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ 5 U.S.C. § 8129(b).

⁸ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁹ 20 C.F.R. § 10.436.

¹⁰ An individual's assets must exceed a resource based of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (October 2004).

¹¹ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹² 20 C.F.R. § 10.437.

Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.¹³

ANALYSIS -- ISSUE 2

In denying waiver of recovery of the overpayment, the Office reviewed appellant's income, expenses and assets as listed in her April 23, 2009 OWCP-20 form and reported during the October 2, 2009 telephone conference. Appellant had monthly income of \$4,056.00, monthly expenses of \$3,210.00 and assets of \$592.00 in a checking account and \$15.00 in a savings account. The Board finds that, as appellant's monthly income of \$4,056.00 exceeds her monthly expenses of \$3,210.00 by \$846.00 which is more than the \$50.00 minimum, she does not need substantially all of her income to meet current ordinary and necessary expenses. The Board finds, therefore, that appellant is not entitled to waiver under the defeat the purpose of the Act standard.¹⁴

There is no evidence in this case and appellant did not allege that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the period July 18 to August 14, 2008. The Board finds that, pursuant to its regulations, the Office properly determined that recovery of the overpayment would not be against equity or good conscience.¹⁵

On appeal, appellant contended that the Office failed to accurately consider her monthly expenses, as she paid all expenses associated with the care of her mother who died on November 3, 2009. However, the record does not contain any financial documents supporting such expenses. Appellant contended that the Office did not consider the \$28.00 "Oaks at Old Court HOA" fee, which was for her homeowners' association. The Office hearing representative properly disallowed this expense in the November 5, 2009 decision as the financial document submitted in support of the \$28.00 expense did not indicate the purpose of the payment. Appellant contended that the Office incorrectly stated that her wireless telephone bill was \$77.00 rather than \$159.00. The Board finds that this constitutes harmless error as inclusion of the \$159.00 expense would not change the finding that appellant's monthly income exceeds her monthly expenses by more than \$50.00 and, thus, she does not need substantially all of her income to meet current ordinary and necessary expenses. Appellant contended that, although the Office correctly noted that her monthly mortgage was \$1,700.00, it did not acknowledge that she was seven months past due in her payments and was struggling to pay them. She bears the

¹³ *Id.* at § 10.438.

¹⁴ See *supra* note 7; *George A. Rodriguez*, 57 ECAB 224 (2005) (Office procedures state that 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); *Nina D. Newborn*, 47 ECAB 132 (1995).

¹⁵ With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act. As appellant is no longer receiving wage-loss compensation in this case, the Board does not have jurisdiction with respect to recovery of the overpayment. *Ricky Greenwood*, 57 ECAB 462 (2006).

responsibility to provide information about income, expenses and assets.¹⁶ The Office based its decision on the financial evidence provided by appellant.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,670.70 for the period July 18 to August 14, 2008 due to the payment of dual compensation. The Board further finds that the Office properly denied waiver of the overpayment.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2010
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁶ 20 C.F.R. § 10.438.

¹⁷ As appellant returned to work and is no longer in receipt of wage-loss compensation benefits, the Board has no jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. *See Bob R. Gilley*, 51 ECAB 377 (2000); *see also* 20 C.F.R. § 10.441(a) (regarding recovery from continuing compensation payments).