

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY J. HARE and DEPARTMENT OF DEFENSE,
QUANTICO COMMISSARY, Quantico, VA

*Docket No. 02-677; Submitted on the Record;
Issued August 1, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$2,299.76 occurred; and (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; and (3) whether the Office properly found that appellant was not entitled to waiver of recovery of the overpayment under section 8129(a).

On September 28, 1998 appellant, then a 32-year-old store worker, filed a traumatic injury claim alleging that on September 8, 1998 she injured her left knee on the bottom of a cart while putting away a case of fruit. The Office accepted the claim for left knee strain and subsequently for meniscus tear to the left knee. The Office approved arthroscopic surgery performed on January 18, 1999. Appellant initially stopped work on September 9, 1998 following the incident. Thereafter, she received total disability compensation from the Office.

In a letter dated January 19, 1999, the Office outlined appellant's entitlement to weekly compensation benefits and her responsibility to return to work when she was no longer found totally disabled. The Office indicated that appellant would be paid at the rate of 75 percent for one or more dependents with an adjusted cost-of-living allowance totaling \$489.60 per week.

Appellant returned to a light-duty position for 32 hours per week on November 1, 1999. Appellant had the opportunity and medical clearance to work full time; however, she chose part-time work. On December 15, 1999 appellant filed a CA-7 claim for compensation alleging wage loss of eight hours per week for the period November 1 through December 31, 1999.¹

Upon review of the case, the Office on September 14, 2001 issued a preliminary finding of overpayment in the amount of \$2,299.76. The Office informed appellant that, if she believed

¹ The Office issued appellant a schedule award for 25 percent permanent impairment of the left lower extremity for the period March 8, 2000 to July 24, 2001. Appellant has not contested this decision on appeal, and therefore is not before the Board at this time.

she should receive a waiver instead of repaying the overpayment, that within 30 days she should either request a hearing or that the Office issue a final decision based on the written evidence of record at that time. The Office further advised appellant to submit a detailed explanation of reasons seeking waiver, a completed overpayment recovery questionnaire (Form OWCP-20) and supporting documentation and other records to support income and expenses shown on the Form OWCP-20. Appellant did not request a waiver nor did she submit the requested documentation.

By decision dated December 6, 2001, the Office finalized the September 14, 2001 preliminary determination that appellant received an overpayment of \$ 2,299.76 and was without fault in the creation of the overpayment. The Office also found that appellant was not entitled to waiver of recovery of the overpayment. Further, the Office determined that the entire amount of \$2,299.76 should be paid in full within 30 days from the date of the decision or that arrangements be made.

The Board finds that appellant received an overpayment in the amount of \$2,299.76.

The Office found in its September 14, 2001 preliminary determination that appellant was paid compensation based upon a pay rate of \$489.60 for a 40-hour workweek effective October 24, 1998 to January 2, 1999 (50 weeks) and January 3 to October 31, 1999 (302-calendar days). Appellant was further notified that she should have been paid at a pay rate of \$430.90, which was based on the total amount of average earnings for the year prior to her September 8, 1998 date of injury.

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment as the Office conceded that it erroneously paid appellant additional compensation.

Section 8129(b) of the Federal Employees' Compensation Act² 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 be against equity and good conscience.³ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁴

The implementing regulation⁵ provides that a claimant is at fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.

² 5 U.S.C. § 8129(b).

³ See *James H. Hopkins*, 8 ECAB 281, 287 (1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.433(a).

In this case, the Office informed appellant that upon review of her case following her submission of the CA-7 claim, it determined that an overpayment of \$2,299.76 had been made. The Office found that appellant was paid incorrectly for the period October 24, 1998 to October 31, 1999. The Office determined that appellant had been compensated with a weekly salary of \$489.60 based on a 40-hour workweek; however, the Office subsequently determined that appellant should have been paid a pay rate of \$431.90 which was based on the total amount of the average earnings for the year prior to the date of injury, September 8, 1998.

Although appellant is deemed without fault, the Board finds that the Office properly determined that appellant was not entitled to waiver of the overpayment.

Section 8129(a) of the Act⁶ provides that, where an overpayment of compensation has been made “because of an error of fact or law,” adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments or recovery by the United States may not be made when incorrect payments 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.”⁷

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁸ 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.

Section 10.436⁹ provides 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 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 the beneficiary’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. For waiver under the “defeat the purpose of the Act” standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.¹⁰

In determining whether appellant was entitled to waiver of the overpayment, the Office informed appellant that she had 30 days from the September 14, 2001 preliminary finding to submit additional evidence or request a hearing to prove that the finding was in error and that she

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁹ 20 C.F.R. § 10.436.

¹⁰ *James Lloyd Otte*, *supra* note 8; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

would not be able to repay the debt in full or in part, or that collection would cause her undue financial hardship. The Office found that because appellant failed to submit supporting financial documentation or evidence to support that she was financially unable to repay the debt, recovery would not defeat the purpose of the Act. It further found that repayment in this case, whether by full payment or installment, would not be against equity or good conscience; therefore the Office found that appellant was not entitled to waiver of overpayment.

As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly found that appellant was not entitled to waiver of recovery of the overpayment.

The decision of the Office of Workers’ Compensation Programs dated December 6, 2001 is hereby affirmed.

Dated, Washington, DC
August 1, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member