

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY C. CHAPEL and U.S. POSTAL SERVICE,
POST OFFICE, Leesburg, FL

*Docket No. 02-1524; Submitted on the Record;
Issued September 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$7,256.06 for the period April 24, 1998 to February 27, 1999; (2) whether the Office of Workers' Compensation Programs abused its discretion by denying waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment in full.

The Office accepted that on January 4, 1997 appellant, then a 51-year-old rural carrier associate, sustained aggravation of right elbow arthritis from loading mail trays into a vehicle, for which he underwent arthroscopic surgery on June 11, 1997. His hourly wage as of June 17, 1997 was noted to be \$14.86 an hour and he worked an average of 33.61 hours per week for the preceding year. Compensation was paid on that basis through June 20, 1997 and, thereafter, appellant was advised to submit CA-8 forms for further compensation claims.

In July 1997, appellant returned to modified limited duty for a period of approximately six weeks, four hours per day, six days per week. In August 1997, he increased his modified duty hours to six hours per day, six days per week. Appellant was released to full duty on December 29, 1997.

Appellant thereafter claimed that he sustained a recurrence of disability on April 6, 1998. It was prophylactically recommended that he limit his working hours to four from six hours per day to avoid aggravation caused by increased activity. Appellant claimed that he took a pay cut working limited duty and that, when he returned to full duty, he was paid less than before the original incident. The Office responded that, since rural carrier associates are employed irregularly and paid only when actually employed, their weekly pay rate for compensation purposes was determined under 5 U.S.C. § 8114 by taking the total earnings for the year prior and dividing by 52.

On May 22, 1998 appellant filed an occupational disease claim which, on June 17, 1998, the Office accepted for an aggravation of post-traumatic arthritic right elbow commencing April 24, 1998. In calculating appellant's wage-loss compensation, the Office determined that

appellant's hourly wage, at that time, was \$15.05, that he received \$65.10 for subsistence and \$54.32 for working express mail, for a total weekly pay rate of \$661.22. This resulted in appellant being paid \$20,191.03 in compensation benefits. In making this determination, however, the Office assumed that appellant had been working a schedule of 36 hours per week.

On April 5, 1999 an employing establishment injury compensation specialist determined that during 1997 and 1998 appellant had worked only 27 hours per week as a yearly average.

The Office advised appellant that he had been overpaid for the period April 24, 1998 through February 27, 1999 because he had been paid as if he had worked a set schedule of 36 hours per week instead of the 27 hours per week average he had actually worked. The Office determined that from April 23 to November 22, 1997 appellant had worked 745.64 hours and was paid \$14.86 per hour and that from November 22, 1997 to April 23, 1998 he had worked 609.33 hours and was paid \$15.05 per hour. The Office calculated that appellant earned \$20,250.62 per year for compensation purposes, for a pay rate of \$389.44 per week.¹ This would result in appellant being owed \$12,934.97 for the period April 24, 1998 to February 27, 1999. However, the Office previously paid appellant \$20,191.03, calculated at an hourly wage of \$15.05, with \$65.10 for subsistence and \$54.32 for working express mail, for a total weekly pay rate of \$661.22 working 36 hours per week.

Appellant requested an oral hearing before an Office hearing representative, which was held on September 25, 2000 at which he testified.

By decision dated December 22, 2000 and finalized December 27, 2000, the hearing representative found that, because appellant had been performing the duties of his position as a modified rural carrier associate for more than one year without interruption, *i.e.*, for the period March 1, 1999 to March 10, 2000, that position fairly and reasonably represented his wage-earning capacity. The hearing representative also found that appellant's earnings in that capacity were higher than his earnings at the time of the injury, such that he had no loss of wage-earning capacity. The hearing representative affirmed the Office's March 10, 2000 wage-earning capacity decision.

On July 2, 2001 the Office issued appellant a notice of preliminary determination that an overpayment of compensation had occurred for the period April 24, 1998 to February 27, 1999 because he received compensation at an incorrect rate. The Office noted that for that period appellant was paid at a pay rate of \$661.22 per week, assuming that he had had a 36-hour workweek, for a total compensation payment of \$20,191.03, when in actuality his pay rate should have been \$389.44 for a 27-hour workweek with no additional allowances, for a total amount of compensation owed of \$12,934.97, which resulted in an overpayment of \$7,256.06. The Office advised that appellant had been found to be without fault in the creation of the overpayment, such that he could be entitled to waiver of recovery of the overpayment. It further advised that appellant had 30 days within which to request waiver of recovery of the overpayment and to provide the required financial information or to request a precoupment hearing and that, after that time period, a decision would be made final based on the evidence of record. The relevant forms were again provided to appellant.

¹ Appellant's total earnings for a year, \$20,250.62, divided by 52 equals \$389.44 per week average.

Appellant did not complete or return the Form OWCP-20 overpayment recovery questionnaire and did not otherwise provide any of the personal financial information that had been requested. He claimed that the hearing representative had dismissed the overpayment issues as no representative of the Office had appeared.

However, on August 2, 2001 appellant signed a request for consideration of waiver of recovery of the overpayment. The form was faxed to the Office on August 20, 2001. Appellant stated that he could not fill out the Form OWCP-20 overpayment recovery questionnaire as he felt finances were a private matter. He requested a precoupment hearing.

A hearing was held on December 6, 2001 at which appellant testified.

By decision dated March 25, 2002, the hearing representative affirmed the determination of the creation of the overpayment, finding that appellant did not provide any evidence to support that his pay rate for 1997 to 1998 was any higher than \$389.44 per week and that, although he was without fault, he did not submit the requested financial information to establish entitlement to waiver of recovery of the overpayment. The hearing representative found that, therefore, the overpayment would be recovered in full.

The Board finds that appellant received an overpayment of compensation in the amount of \$7,256.06 for the period April 24, 1998 to February 27, 1999 because he was paid compensation at an incorrect rate.

In this case, appellant was paid compensation at an hourly rate of \$15.05 for the period April 24, 1998 to February 27, 1999, based on the most recent pay rate calculated for hours worked from November 22, 1997 to April 23, 1998, plus \$65.10 for subsistence and \$54.32 for working express mail for a total weekly pay rate of \$661.22 working 36 hours per week.² Appellant therefore, received \$20,191.03 total compensation for the period April 24, 1998 to April 23, 1999. However, he was not entitled to the \$65.10 subsistence allowance nor the \$54.32 allowance for working express mail and he had worked only 27 hours per week during the period April 23, 1997 to April 23, 1998 at the \$389.44 weekly pay rate, such that his compensation should have equaled only \$12,934.97. Subtracting \$12,934.97 from the amount actually received of \$20,191.97 resulted in an overpaid amount of \$7,256.06.

This overpayment occurred due to the Office's error in its calculations by assuming that appellant had worked 36 hours per week and qualified for a vehicle allowance as well as payment for working express mail, when in actuality he had worked only 27 hours per week and qualified for no additional allowances. Therefore, the Office found that appellant was not at fault in the creation of the overpayment and entitlement to waiver could be considered.

² Appellant's hourly rate from November 22, 1997 to April 23, 1998 was \$15.05 per hour. Fifteen dollars and five cents times 36 hours equals \$541.80 per week plus \$65.10 equals \$606.90 plus \$54.32 equals \$661.22.

In considering whether to waive recovery of an overpayment, section 10.434 of Title 20 of the Code of Federal Regulations provides that if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:³

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the FECA [Federal Employees’ Compensation Act] (*see* 10.436), or

(1) Adjustment or recovery of the overpayment would be against equity and good conscience (*see* 10.437).”

Section 10.436 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:⁴

“(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.”

The Office’s procedure manual explains that both conditions in (a) and (b) above must be met to defeat the purpose of the Act. When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.⁵

Section 10.437 provides:⁶

“(a) 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.

“(b) Recovery of the 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

³ 20 C.F.R. § 10.434(a),(b).

⁴ 20 C.F.R. § 10.436(a),(b).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management; *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994). The procedure manual specifies that the individual’s assets must 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. An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.

⁶ 20 C.F.R. § 10.437(a),(b).

position for the worse. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.”

The Form OWCP-20 overpayment recovery questionnaire is designed to obtain the financial information necessary to determine whether adjustment or recovery would defeat the purpose of the Act.⁷

In this case, appellant did not timely submit the completed Form OWCP-20 that the Office had provided with its preliminary determination dated March 10, 2000 and he did not otherwise timely submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Neither has he argued or submitted evidence to establish that recovery of the overpayment would be against equity or good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the matter of creation of the overpayment, he nonetheless bears responsibility for providing the financial information necessary to support his request to waive recovery of the overpayment.

Section 10.438 of Title 20 of the Code of Federal Regulations states in this regard:⁸

“(a) 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.

(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁹ Generally, an abuse of discretion can be shown only through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.¹⁰ The Board has long held that when a claimant submits no financial evidence to support his request to waive recovery of an overpayment, the Office commits no abuse of discretion in denying that request.¹¹ As noted above, in this case appellant submitted no evidence regarding income, assets

⁷ See Federal (FECA) Procedure Manual, Part -- 6, Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (September 1994).

⁸ 20 C.F.R. § 10.438(a),(b).

⁹ See *William J. Murphy*, 40 ECAB 569 (1989).

¹⁰ See *Loretta R. Celi*, 51 ECAB 560 (2000); *Bonnie Goodman*, 50 ECAB 139 (1998); *Lecil E. Stevens*, 49 ECAB 673 (1998).

¹¹ E.g., *William J. Murphy*, *supra* note 4; *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); *Joseph H. Light*, 13 ECAB 358 (1962).

or expenses, to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, such that the Board must find that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.

As the evidence in this case does not support that waiver of recovery of the overpayment is warranted and as appellant has failed to provide any financial information sufficient to establish a repayment plan, the Office did not abuse its discretion by requiring repayment in a lump sum.

The Board further finds that the Office properly required repayment of the overpayment.

In section 10.441(b) of Title 20 of the Code of Federal Regulations it is provided as follows:¹²

“(b) When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.”

In this case, appellant returned to work with no loss in wage-earning capacity on March 1, 1999 and was, therefore, not entitled to further compensation benefits from which to withhold payments to repay the overpayment. Therefore, in accordance with 20 C.F.R. § 10.441(b), the Office properly required repayment of the overpayment in full. As there is no withholding of any amount from continuing compensation benefits in this case, the Board does not have jurisdiction over the method of recovery.¹³

¹² 20 C.F.R. § 10.441(b).

¹³ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000) (The Board’s jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act).

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 25, 2002 is hereby affirmed.

Dated, Washington, DC
September 4, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member