

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELOISA ORTEGA and DEFENSE LOGISTICS AGENCY,
HEADQUARTERS, San Antonio, TX

*Docket No. 03-1932; Submitted on the Record;
Issued September 22, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant received a \$1,189.64 overpayment of compensation for the period November 22, 2002 to April 19, 2003; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

On September 22, 2002 appellant, then a 38-year-old sales store checker, filed a claim alleging that she sustained a left lower back and left shoulder injury on the date when she moved grocery items across a scanner at work. The Office accepted appellant's claim for left shoulder impingement syndrome with costochondritis and paid appropriate compensation for periods of disability.¹

On May 7, 2003 the Office advised appellant of its determination that she received a \$1,189.64 overpayment of compensation. The Office noted that the overpayment occurred because she was paid for total disability during the period November 22, 2002 to April 19, 2003 despite the fact that she had been working on a part-time basis during this period.² The Office further advised appellant that it had determined she was not at fault in the creation of the overpayment and informed her that she had 30 days from the date of its notice to request waiver of the overpayment and to complete and return an attached overpayment questionnaire (Form OWCP-20).³

By decision dated June 10, 1993, the Office finalized its preliminary determination that appellant received a \$1,189.64 overpayment and that she was not at fault in the creation of the

¹ Appellant stopped work for intermittent periods after September 22, 2002.

² The Office indicated that appellant's weekly pay rate for this period should have been \$315.23 instead of \$436.26.

³ It appears that the Office sent appellant a waiver form but did not send a Form OWCP-20. The Office's notice was sent to the following address: 48664 Wickam Court, Apt. 4, Ft. Hood, TX 76544.

overpayment.⁴ The Office indicated that it had not received “any response or information from appellant” and determined that it was denying waiver of the overpayment. It stated that “at this time recovery of the \$1,189.64 overpayment will be required.”

The Board finds that the case is not in posture for decision.

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.⁵ These statutory guidelines are found in section 8129(b) of the Federal Employees’ Compensation Act which states: “Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”⁶ If the Office finds an employee to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁷

Section 20 C.F.R. § 10.438 states:

“(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.”

In the present case, the Office determined that appellant received a \$1,189.64 overpayment, that she was not at fault in the creation of the overpayment, and that waiver of the overpayment would be denied. On appeal appellant contended that she did not receive the May 7, 2003 preliminary overpayment determination and therefore did not have an opportunity to request waiver of the overpayment, submit financial information, or otherwise contest the overpayment.⁸ In the absence of evidence to the contrary, there is a presumption that a letter

⁴ The Office incorrectly stated that it had initially found appellant at fault in its preliminary determination.

⁵ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁶ 5 U.S.C. § 8129(b).

⁷ Appellant argued that the overpayment should be waived because she was not found to be at fault in its creation but she would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁸ See generally Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (September 1994).

properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.⁹ However, the record reveals that the May 7, 2003 preliminary determination notice was not properly addressed and, therefore, the presumption that appellant received the notice does not arise. The May 7, 2003 notice was mailed to 48664 Wickam Court, Apt. 4, Ft. Hood, TX 76544. However, appellant has consistently listed her address as 48664 Wickam Court, Apt. 1, Ft. Hood, TX 76544. Moreover, it does not appear that the Office included an overpayment questionnaire (Form OWCP-20) when it mailed its May 7, 2003 notice.

For these reasons, appellant did not have an adequate opportunity to respond to the Office's May 7, 2003 preliminary determination notice and contest the amount of the \$1,189.64 overpayment, request waiver or submit financial information. Therefore, the Office's June 10, 1993 decision regarding the overpayment will be set aside and the case will be remanded to the Office in order to provide appellant with such an opportunity. After such development as it deems necessary, the Office shall issue an appropriate decision.

The June 10, 1993 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
September 22, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ *Marlon G. Massey*, 49 ECAB 650, 652 (1998).