

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

BARBARA F. HARVEY, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, San Diego, CA, Employer**

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**Docket No. 03-1819
Issued: June 14, 2004**

Appearances:
Barbara F. Harvey, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On July 14, 2003, appellant filed a timely appeal of the June 13, 2003 decisions of the Office of Workers' Compensation Programs, which found that appellant received an overpayment of benefits and denied waiver of recovery of the overpayment. Appellant also timely appealed the Office's January 16, 2003 decision which modified a May 2, 1996 determination regarding appellant's loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether the Office properly modified the May 2, 1996 wage-earning capacity determination; (2) whether the Office properly determined that appellant received an overpayment in the amount of \$11,146.20 for the period October 16, 1995 to July 14, 2001; (3) whether the Office properly denied waiver of recovery of the overpayment; and (4) whether the Office properly required repayment of the overpayment by deducting \$200.00 every four weeks from appellant's continuing compensation payments.

FACTUAL HISTORY

On May 13, 1995 appellant, then a 47-year-old registered nurse, suffered a traumatic injury while in the performance of duty. Appellant was assisting a patient in moving from a hospital bed to a chair when she allegedly injured her left shoulder, neck and upper back. She described her injury as pain in the left shoulder with numbness radiating down the left arm to the fingers. The Office accepted appellant's claim for cervical radiculitis. Because of her May 13, 1995 injury, appellant was unable to resume her regular employment duties. On October 16, 1995 appellant accepted a permanent, light-duty position as a telephone advice nurse and returned to work. In a May 2, 1996 decision, the Office determined that appellant's position as a telephone advice nurse fairly and reasonably represented her wage-earning capacity. Appellant's earnings as a telephone advice nurse were less than her earnings in her date-of-injury job, therefore, the Office paid compensation based on appellant's loss of wage-earning capacity.¹

On June 6, 2001 appellant filed a claim for compensation (Form CA-7) seeking additional compensation retroactive to October 16, 1995. Appellant claimed wage loss for her inability to earn holiday pay. She also identified her granddaughter as a dependent. In a June 14, 2001 letter, appellant explained that the compensation she had received to date was based on her having no dependents. However, she believed that her granddaughter, who she had supported since her birth in 1985, should be considered her dependent, thereby entitling appellant to augmented compensation. Appellant also explained that she was seeking compensation for the holiday pay differential she had previously earned as a registered nurse. Lastly, appellant requested additional wage-loss compensation because her employer had downgraded her pay scale. Appellant submitted an employing establishment computer printout of the premium pay she received during the year immediately preceding her May 13, 1995 employment injury. She also provided a copy of a June 6, 2001 letter from the employing establishment explaining the reason for certain retroactive salary adjustments.²

In a July 3, 2001 decision, the Office denied appellant's claim for additional compensation for holiday pay and compensation due to a salary downgrade. Additionally, the Office found that appellant was not entitled to claim her granddaughter as a dependent under the Act. The Office also indicated that pay rate information recently provided by the employing establishment revealed that the Office had initially miscalculated appellant's pay rate, which

¹ While appellant's base pay rate as a telephone advice nurse was identical to her base pay rate of \$57,791.00 as a registered nurse, the latter position required appellant to work evenings, weekends and holidays, for which she received premium pay. As a telephone advice nurse, appellant worked the day tour, Monday through Friday. Consequently, she was no longer eligible to earn certain premium pay she had previously earned as a registered nurse. The Office calculated appellant's compensation benefits based on a date of injury pay rate of \$1,472.77.

² The employing establishment advised that certain salary increases implemented after appellant's return to work as a technical advice nurse were mistakenly calculated under the critical care salary chart rather than the appropriate non-critical care salary chart. The overall result was that appellant received several annual pay increases, particularly in 1999, 2000 and 2001, which she was not fully entitled to receive. The employing establishment advised that appellant's current salary was \$69,236.00, which was reduced from \$72,956.00. At no point was appellant paid less than her October 16, 1995 base pay rate of \$57,791.00 nor did the employing establishment indicate that she was entitled to less than her base pay rate.

resulted in an overpayment of compensation dating back to October 16, 1995. The Office indicated that the overpayment issue would be addressed in a separate decision.

On July 20, 2001 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$11,020.20. The Office explained that the overpayment occurred because the employing establishment initially provided incorrect information regarding appellant's pay rate, which resulted in appellant receiving compensation based on a higher pay rate than she was entitled to. The Office determined that appellant was not at fault in creating the overpayment.

Appellant requested waiver of overpayment and an oral hearing. Additionally, appellant submitted a June 11, 2002 overpayment questionnaire (Form OWCP-20) that included information concerning her income, expenses, assets and liabilities. In a decision dated August 28, 2002, the Office hearing representative reversed the July 20, 2001 preliminary determination regarding overpayment and affirmed the July 3, 2001 decision regarding appellant's entitlement to augmented compensation.³

In a January 16, 2003 decision, the Office modified the May 2, 1996 loss of wage-earning capacity determination. The Office determined that the prior rating was issued in error based on inaccurate pay rate information regarding the amount of premium pay appellant received in the year preceding her injury. Appellant's date-of-injury pay rate was recalculated to be \$1,431.20.⁴ Accordingly, the Office adjusted appellant's entitlement to compensation retroactive to October 16, 1995.

On March 19, 2003 the Office issued a preliminary determination of an overpayment in the amount of \$11,020.20 for the period October 16, 1995 to June 16, 2001. The Office explained that the overpayment resulted from the Office's reliance on an incorrect pay rate of \$1,472.77 in calculating appellant's compensation. Appellant should have been paid compensation based on the correct pay rate of \$1,431.20 effective October 16, 1995. The Office found that appellant was not at fault in creating the overpayment.

On March 26, 2003 the Office also informed appellant that an overpayment of compensation in the amount of \$126.00 existed because it used an incorrect pay rate of \$1,472.77 in calculating appellant's compensation from June 17 to July 14, 2001.

Appellant responded on April 15, 2003 noting that she already had a hearing and a decision related to all overpayments. She stated that she did not understand why this was a continuing issue and requested that the matter be closed. Appellant did not specifically request a waiver of the overpayment or submit any supporting financial documentation.

³ Regarding the overpayment issue, the hearing representative reasoned that the employing establishment's June 2001 retroactive adjustment of appellant's salary likely created a greater wage-loss than previously determined. She explained that the change would result in an increase in appellant's wage-loss compensation retroactive to October 16, 1995 rather than an overpayment.

⁴ The Office had previously calculated appellant's date-of-injury pay rate as \$1,472.77.

On June 13, 2003 the Office issued two separate decisions finalizing its preliminary determinations regarding overpayments in the amounts of \$11,020.20 and \$126. The Office denied waiver of recovery of the overpayment and ordered that \$200 be deducted every four weeks from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE I

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

ANALYSIS -- ISSUE I

When the Office initially determined appellant's date-of-injury pay rate it relied upon a formula provided by the employing establishment. As a registered nurse appellant received a base pay of \$57,791.00, which represented an hourly rate of \$27.78 and a weekly pay rate of \$1,111.37. Appellant worked Friday through Monday and a substantial portion of her work was performed during evening hours. For her evening work appellant received a 10 percent night differential, which amounted to an additional \$2.78 per hour. Appellant also received a 25 percent differential for weekend work, which amounted to an additional \$6.95 per hour. The employing establishment represented that appellant received the 10 percent night differential for 40 hours each week and the 25 percent weekend premium was paid for 36 hours each week. Based on this information the Office calculated that appellant received \$361.40 in premium pay per week in addition to her base pay of \$1,111.37, for a total weekly pay of \$1,472.77.

Appellant requested additional compensation in June 2001 and at that time she submitted a June 14, 2001 computer printout from the employing establishment that detailed the amount of night differential, weekend and holiday premium pay she received during the 52-week period preceding her May 13, 1995 employment injury. The more detailed payroll records revealed that there was at least one two-week period when appellant did not receive any type of premium pay and an additional four weeks when appellant did not receive premium pay for Saturday work. The Office's May 2, 1996 pay rate calculation was based on the erroneous assumption that appellant received an average of \$361.40 in premium pay per week. However, the June 14, 2001 payroll records revealed a weekly average premium pay of only \$319.83.⁷ The actual premium pay appellant received when combined with her base weekly rate of \$1,111.37 amounts to an average weekly pay rate of \$1,431.20 for the year preceding her May 13, 1995 employment injury. As it is apparent the Office relied on erroneous information in issuing the May 2, 1996

⁵ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ The June 14, 2001 payroll records identified \$4,540.44 attributable to night differential, \$3,056.32 for Saturday pay and \$6,145.59 for Sunday pay. Additionally, the payroll records included \$2,889.12 in holiday pay, an amount which the Office had not previously taken into account in its May 2, 1996 pay rate determination.

wage-earning capacity determination, the Office properly modified this earlier decision to reflect appellant's actual date-of-injury pay rate of \$1,431.20, effective October 16, 1995. Accordingly, the Board finds that the Office met its burden to modify the May 2, 1996 wage-earning capacity determination.⁸

LEGAL PRECEDENT -- ISSUE II

Compensation benefits are computed based on an employee's pay rate during the relevant timeframe.⁹ In computing one's pay rate, section 8114(e) of the Act provides for the inclusion of certain "premium pay" received.¹⁰ However, overtime pay, among other things, is excluded from consideration in determining one's rate of pay.¹¹ As pay rate is a critical component in the determination of the amount of compensation to which one is entitled, an incorrect pay rate may result in either the underpayment or overpayment of compensation. In cases where compensation payments were based erroneously on a pay rate greater than that to which the employee was entitled, the difference between the compensation the employee should have received and did receive constitutes an overpayment of compensation.¹²

ANALYSIS -- ISSUE II

After modifying the May 2, 1996 loss of wage-earning capacity determination to properly reflect appellant's pay rate in her date-of-injury job, the Office recalculated appellant's entitlement to compensation based on the correct pay rate and determined that she received a total overpayment of \$11,146.20 for the period October 16, 1995 to July 14, 2001. In the instant case, the record reflects that appellant received compensation for the period October 16, 1995 to June 16, 2001 in the amount of \$76,160.20. And for the period June 17 to July 14, 2001 she received additional compensation in the amount of \$1,075.00. The payments totaling \$77,235.20 were calculated based on an erroneous pay rate of \$1,472.77. Applying the correct pay rate of \$1,431.20, the Office determined that appellant should have received \$65,140.00 for the period October 16, 1995 to June 16, 2001 and \$949.00 for the period June 17 to July 14, 2001, for a total of \$66,089.00. The Office, therefore, subtracted the amount appellant should have received

⁸ The Board further notes that the employing establishment's June 6, 2001 retroactive salary adjustments did not directly impact appellant's entitlement to wage-loss compensation either prospectively or retrospectively. Although the employing establishment effectively rescinded portions of previously authorized annual salary increases, these adjustments did not result in a decrease in appellant's pay rate below the \$57,791.00 base rate for the technical advice nurse position appellant accepted October 16, 1995. Both the initial May 2, 1996 decision and the January 16, 2003 modified wage-earning capacity determination relied on a current weekly earnings figure that was based on an annual salary of \$57,791.00 as a technical advice nurse. As there is no evidence of record that appellant earned less than \$57,791.00 a year as a technical advice nurse beginning October 16, 1995, the employing establishment's June 6, 2001 action to correct an overpayment of salary is not relevant to the issue of appellant's wage-earning capacity or any overpayment of compensation that arose from the miscalculation of appellant's date-of-injury pay rate.

⁹ 5 U.S.C. §§ 8101(4), 8114; *see Marco Padilla*, 51 ECAB 202, 207-08 (1999).

¹⁰ 5 U.S.C. § 8114(e).

¹¹ *Id.*

¹² *See generally Monte Fuller*, 51 ECAB 571 (2000) (discussion of proper determination of pay rate).

from the amount she was paid and correctly calculated an overpayment of compensation in the amount of \$11,146.20.

LEGAL PRECEDENT -- ISSUE III

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered 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.¹³

Waiver of recovery of an overpayment is not possible if the individual is at fault in creating the overpayment.¹⁴ However, a finding that appellant is without fault is insufficient, of itself, for the Office to waive recovery of the overpayment.¹⁵ The Office must determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹⁶

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 a specified amount as determined by the Office.¹⁷ Additionally, 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 or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁸

Section 10.438 of the regulations provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].”¹⁹ As the regulation indicates, this information is necessary to determine whether or not recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.²⁰ Appellant's financial information is also used to determine any necessary repayment schedule.²¹ The regulation further specifies that “failure to

¹³ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

¹⁴ 20 C.F.R. § 10.433(a) (1999).

¹⁵ *Jorge O. Diaz*, 51 ECAB 124 (1999).

¹⁶ 20 C.F.R. § 10.434 (1999).

¹⁷ 20 C.F.R. § 10.436 (1999).

¹⁸ 20 C.F.R. § 10.437 (1999).

¹⁹ 20 C.F.R. § 10.438(a) (1999).

²⁰ *Id.*

²¹ *Id.*

submit the requested information ... shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”²²

ANALYSIS -- ISSUE III

Appellant did not specifically request a waiver of recovery of the overpayment nor did she submit any current financial information in support of a waiver. Her April 15, 2003 response merely expressed her confusion over the Office’s continued adjudication of an issue she believed to have been resolved by the hearing representative’s August 28, 2002 reversal. Although appellant did not submit the requested financial information in April 2003, the record includes a June 11, 2002 overpayment questionnaire that appellant submitted in response to the Office’s first overpayment decision dated July 20, 2001. Those records reveal monthly income of \$4,681.00, monthly expenses of \$5,496.00²³ and total assets of \$329,500.00, which included \$46,500.00 of liquid assets. Based on the information provided in the June 11, 2002 overpayment questionnaire, appellant’s assets of \$329,500.00 preclude her from establishing that recovery of the overpayment would defeat the purpose of the Act.²⁴

The record also fails to establish that appellant would experience severe financial hardship in attempting to repay the debt. While appellant’s claimed monthly expenses exceed her reported monthly income by \$815.00, appellant has adequate cash reserves of \$46,500.00. Thus, the record does not establish that appellant would experience severe financial hardship in trying to repay the \$11,146.20 debt. Lastly, appellant has not alleged nor does the record establish that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received. Accordingly, appellant failed to establish that recovery of the overpayment would be against equity and good conscience.²⁵ The Board finds that the Office properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE IV

Section 10.441(a) of the regulations authorizes the Office to recover an overpayment by decreasing later payments of compensation.²⁶ In exercising its authority under section 10.441(a), the Office must take into account the “probable extent of future payments, the rate of

²² 20 C.F.R. § 10.438(b) (1999).

²³ The monthly expenses attributable to food, clothing, rent, utilities, home maintenance, automobile maintenance, medical expenses, charitable contributions, commuting expenses and “other” household expenses totaled \$4,548.00. Appellant identified additional liabilities totaling \$77,000.00 that included two credit cards, a student loan and two additional mortgages. With respect to these liabilities, appellant indicated she was required to pay \$948.00 monthly.

²⁴ See 20 C.F.R. § 10.436(b) (1999). For an individual with zero dependents, total nonexempt assets must not exceed a resource base of \$3,000.00. The resource base increases to \$5,000.00 for an individual with a spouse or at least one other dependent and the base increases by \$600.00 for each additional dependent. *Frederick Arters*, 53 ECAB __ (Docket No. 01-1237, issued February 27, 2002).

²⁵ 20 C.F.R. § 10.437 (1999).

²⁶ 20 C.F.R. § 10.441(a) (1999).

compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”²⁷

ANALYSIS -- ISSUE IV

With respect to the Office’s decision to deduct \$200.00 from appellant’s continuing compensation benefits, the Board finds that such a repayment schedule is in accordance with 20 C.F.R. § 10.441(a). Given the total value of appellant’s assets and her sizeable cash reserves, the Office properly deducted \$200.00 every four weeks from appellant’s continuing compensation payments.

CONCLUSION

The Board finds that the Office properly modified the May 2, 1996 wage-earning capacity determination. Additionally, the Office properly determined that appellant received an overpayment in the amount of \$11,146.20 for the period October 16, 1995 to July 14, 2001. The Board further finds that the Office properly denied waiver of recovery of the overpayment and properly required repayment of the overpayment by deducting \$200.00 every four weeks from appellant’s continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers’ Compensation Programs dated January 16 and June 13, 2003 are affirmed.

Issued: June 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²⁷ *Id.*