

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

CYNTHIA A. LIVELSBERGER, Appellant)	
)	
and)	Docket No. 04-1377
)	Issued: October 28, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Hanover, PA, Employer)	
)	

Appearances:
Cynthia A. Livelsberger, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 12, 2004 appellant filed a timely appeal of the March 25, 2004 decision of the Office of Workers' Compensation Programs, which found that appellant received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the overpayment issue.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant received an overpayment of \$788.98 from September 16 to October 4, 2003; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On April 25, 2002 appellant, then a 47-year-old rural letter carrier, filed a claim alleging that on that date she picked up a tub of parcels and injured her back. The Office accepted that appellant sustained a lumbar strain and a herniated disc at L4-5. Appellant continued to work full-time limited duty until August 3, 2002, when she stopped to undergo back surgery. On

August 7, 2002 and March 10, 2003 appellant underwent a bilateral lumbar discectomy at L4-5 and a lumbar decompression at L4-5.

In a work capacity evaluation dated September 10, 2003, Dr. Robert J. Schlegel, an attending Board-certified neurologist, returned appellant to work for four hours per day for three weeks and then increased her schedule to six hours per day for the following three weeks and thereafter a full-time schedule. On September 15, 2003 the employing establishment offered appellant a limited-duty position as a rural carrier effective September 16, 2003 for four hours per day from September 16 to October 6, 2003; six hours per day from October 7 to 27, 2003; and eight hours per day from October 28, 2003 forward. Appellant accepted the job offer and began work on September 16, 2003.

In a letter dated October 1, 2003, the Office advised appellant that it did not receive timely notification of her return to work effective September 16, 2003 and therefore proper adjustments were not made to her October 4, 2003 compensation payment. The Office informed appellant that she should anticipate receiving an overpayment of compensation. The Office indicated that, since appellant returned to work part time, she was not entitled to compensation for total disability for the period September 16 to October 4, 2003.

In an October 30, 2003 overpayment worksheet, the Office calculated that appellant had been paid on the periodic roll for total disability through October 4, 2003, at the pay rate of \$926.79 a week at the augmented three-quarter compensation rate. However, appellant returned to part-time limited duty four hours per day on September 16, 2003 and was not entitled to total disability payments from September 16 to October 4, 2003. The Office calculated the overpayment as follows: for the period September 16 to October 4, 2003, appellant received gross compensation of \$1,886.65, less deductions for health benefits of \$142.80, basic life insurance of \$10.74 and optional life insurance of .81, for a net compensation payment of \$1,732.30. Taking into account her earnings beginning September 16, 2003, she was entitled to partial disability compensation of \$943.32. The Office noted that this resulted in an overpayment of \$788.98 (\$1,732.30 minus \$943.32).

On January 8, 2004 the Office informed appellant that it had made a preliminary finding that she received an overpayment in the amount of \$788.98 because she returned to duty for four hours per day beginning September 16, 2003; however, compensation for total disability was paid through October 4, 2003. The Office advised appellant that if she disagreed with the fact or amount of overpayment she had the right to submit evidence in support of her contention. The Office advised appellant that she was without fault in the matter and that the Federal Employees' Compensation Act prohibited recovery of an overpayment when it could be shown that the claimant was not at fault and that such recovery would defeat the purpose of the Act or would be against equity or good conscience. The Office defined these terms and noted that submission of information pertaining to income and expenses was important in determining whether the overpayment should be waived. The Office enclosed an overpayment recovery questionnaire (Form OWCP-20) and requested that appellant complete this form. The Office advised appellant that she had the right to request a precoupment hearing on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days from the date of the January 8, 2004 letter.

By decision dated March 25, 2004, the Office finalized the overpayment determination and found that appellant received a \$788.98 overpayment of compensation from September 16 to October 4, 2003 for which she was without fault in creating. In an accompanying memorandum, the Office noted that appellant did not respond to the Office's notice of preliminary overpayment of benefits. The Office found that the overpayment was not subject to waiver and that the full amount was due and payable.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(b) of the Act¹ provides as follows:

“Recovery of overpayments

“(a) 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 the individual is entitled.”

Office regulation, at 20 C.F.R. § 10.500(a), provides as follows:

“Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

ANALYSIS -- ISSUE 1

The record establishes that appellant received an overpayment of compensation in the amount of \$788.98 for the period September 16 to October 4, 2003. Appellant began part-time work four hours per day on September 16, 2003 and worked through October 4, 2003. During this time, she received wages while also receiving compensation for total disability. Appellant should only have received disability compensation for the difference between her wage earnings prior to her disability and her current actual earnings.² Appellant has submitted no evidence indicating that she did not receive an overpayment of compensation and the evidence before the Board indicates that she received an overpayment. The Office correctly calculated the amount of the overpayment, as noted above, as \$788.98. The Board finds that appellant received a \$788.98 overpayment of compensation for the period September 16 to October 4, 2003.

LEGAL PRECEDENT -- ISSUE 2

Sections 10.441(a) of Title 20 of the Code of Federal Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual,

¹ 5 U.S.C. §§ 8101-8193.

² See *Linda E. Padilla*, 45 ECAB 768, 771-72 (1994).

as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides “[a]djustment or recovery by the United States may not be made when incorrect payment had 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.”³

The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations. Section 10.436(a) provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses⁴ and if the individual’s nonexempted assets do not exceed a resource base determined by the Office with advice from the Department of Labor’s Bureau of Labor and Statistics.⁵ An overpaid individual must meet both of these criteria in order to establish financial hardship. 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 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.⁶

Section 10.438 of the regulation⁷ provides:

“(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.”⁸

³ *Id.* at § 8129(b).

⁴ 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. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.

⁵ 20 C.F.R. § 10.436(a).

⁶ 20 C.F.R. § 10.437.

⁷ 20 C.F.R. § 10.438.

⁸ *Id.*

ANALYSIS -- ISSUE 2

Appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire, OWCP-20 form, issued on January 8, 2004 if she wanted to request waiver. However, appellant failed to respond to the preliminary notice of overpayment, failed to submit a completed OWCP-20 form or request a waiver of the overpayment determination. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act.⁹ Section 10.438(b) of the regulations mandates that failure to furnish the information shall result in a denial of waiver.¹⁰

With respect to whether recovery would be against equity and good conscience, section 10.438 of the federal regulation provides that information about income, expenses and assets is needed to determine whether or not recovery of an overpayment would be against equity and good conscience. As noted above, appellant did not provide any argument in support of waiver of the overpayment nor did she submit any financial information to show that she would experience severe financial hardship; that she relinquished a valuable right; or showed that her position changed for the worse. Therefore under section 10.438(b) of the regulations denial of waiver is mandated.

Accordingly, 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 denied waiver of recovery of the overpayment.¹¹

CONCLUSION

The Board finds that appellant received an overpayment of \$788.98 in compensation from September 16 to October 4, 2003. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment.¹²

⁹ *Supra* note 1.

¹⁰ *Id.* (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹¹ Because the Office has issued no final decision on repayment of the overpayment, the Board has no jurisdiction over repayment. 20 C.F.R. § 501.2(c).

¹² With her appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 28, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member