

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

J.J., Appellant

and

**U.S. POSTAL SERVICE, CHICAGO BULK
MAIL CENTER, Chicago, IL, Employer**

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**Docket No. 10-869
Issued: April 12, 2011**

Appearances:
Belinda Jackson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 17, 2010 appellant filed a timely appeal from a December 8, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,640.89 for the period March 24, 2003 through January 24, 2004; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly directed recovery of the overpayment at the rate of \$150.00 per month from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. Appellant, a 45-year-old mail handler, injured her right knee and lower back on March 16, 1999, when her right foot became tangled in a plastic band, causing her to fall. She filed a claim for benefits on March 25, 1999, which the Office accepted for lumbosacral strain, right knee contusion and aggravation of degenerative disc disease. Appellant underwent spinal fusion surgery on October 28, 1999. Subsequently, hardware implanted during the surgery became infected; the hardware was surgically removed on August 21, 2000. Appellant was placed on the periodic rolls and underwent additional surgery due to an osteomyelitis infection. She returned to work in a modified position on March 24, 2003.

On December 29, 2003 the Office granted appellant a schedule award for a three percent permanent impairment of each leg. The award ran for the period November 18, 2002 to March 18, 2003, or a total 17.28 weeks of compensation. The Office stated that appellant reached maximum medical improvement on November 18, 2002, which was the date her schedule award commenced; the ending date of the award was March 18, 2003. It noted that she was not entitled to concurrently receive compensation for a schedule award and temporary total disability at the same time. The Office therefore found that, since appellant received compensation for temporary total disability during this period, it was changing its records to reflect that she received compensation for a schedule award during this period.

By decision dated January 14, 2004, the Office found that appellant's actual earnings in her modified position fairly and reasonably represented her wage-earning capacity. It found that her new wage rate was at 93 percent of her prior earnings. The Office determined that she sustained a \$58.43 loss of wage-earning capacity.

On March 25, 2004 the Office modified the January 14, 2004 wage-earning capacity decision, finding that appellant had actually no loss of wage-earning capacity due to her March 16, 1999 work injury. It noted that she had recently been employed as a mail handler equipment operator which wage rate equaled her date-of-injury wages. The Office therefore determined that appellant's entitlement to compensation for wage loss ended the date she was reemployed with no loss in wage-earning capacity. Accordingly, it terminated her compensation for temporary total disability.

On July 28, 2004 the Office issued a preliminary determination that an overpayment in compensation in the amount of \$1,640.89 was created because it had incorrectly determined in its January 14, 2004 decision that the job appellant returned to on March 24, 2003 paid less than the salary for her date-of-injury position. It calculated the overpayment of \$1,640.89 by taking the amount of temporary total disability compensation she was paid from March 24 to November 29, 2003, \$1,559.79, adding the amount of compensation it paid her from November 30, 2003 to January 14, 2004, \$384.00, and subtracting \$266.90 for the period May 28 to June 2, 2003, the amount of compensation she was paid due to the intermittent unavailability of light duty.²

² The addition of \$1,559.79 and \$384.00 equals \$1,943.79. After subtracting \$266.90 the total amount of the overpayment is \$1,676.89. This mathematical error is harmless error.

Appellant was found without fault and advised of her rights in the event she disagreed with the preliminary finding.

On August 23, 2004 appellant requested a preresoupment hearing with the Branch of Hearings and Review regarding waiver of the overpayment in compensation.

By letter dated March 8, 2007, the Office informed appellant that financial records regarding the overpayment were not in the record and forwarded an overpayment questionnaire.

By decision dated June 22, 2007, the Office finalized its preliminary overpayment finding. It stated that it had considered the evidence and arguments submitted and found that the information provided was insufficient to justify waiving recovery of the overpayment. By order dated March 10, 2009,³ the Board set aside the Office's June 22, 2007 overpayment decision because it had failed to provide a preresoupment hearing. As appellant had timely requested the hearing and was not provided the opportunity to present testimonial evidence regarding the requested waiver, the Board remanded the case to the Office to consider her request for a hearing. The complete facts of this case are set forth in the Board's March 10, 2009 order and are herein incorporated by reference.⁴

A preresoupment hearing was held on September 16, 2009. At the hearing appellant acknowledged that when she returned to work in March 2003 she was working at a job which paid her a higher salary than the job she was working at the time of her March 1999 work injury. She testified that she initially believed she was receiving the compensation from the Office for the schedule award. Appellant was subsequently informed, however, that the Office had incorrectly been paying her compensation benefits due to a loss of wage-earning capacity. The payment of compensation for the presumed loss of wage-earning capacity from March 24, 2003 to January 24, 2004 created the overpayment. Appellant noted that she had made several payments to the Office in partial repayment of the overpayment.

Following the hearing, appellant submitted a Form OWCP-20 overpayment recovery questionnaire. She reported monthly income of \$2,800.00 and monthly expenses in the amount of \$2,799.83; these expenses entailed a monthly mortgage payment of \$765.00, \$350.00 for food, \$90.00 for clothing, \$500.00 for utilities, \$265.00 for other expenses, and monthly debt payments of \$389.00 to GMC and \$440.83 to Systems and Service Technologies, Inc. Appellant asserted that her available assets or funds consisted of a combined \$210.00 in cash and a checking account.

On September 24, 2009 appellant underwent a total right knee arthroplasty procedure. She filed CA-7 forms indicating that she would be off work as of September 22, 2009 and

³ Docket No. 08-649 (issued March 10, 2009).

⁴ The Board noted in this order that appellant had filed a second appeal with the Board, Docket No. 08-1286 (issued March 10, 2009), which pertained to Office decisions dated August 8, 2007 and March 7, 2008. These decisions denied modification of the Office's March 25, 2004 wage-earning capacity determination; the Board stated that it was adjudicating these decisions separately. In a decision issued on March 10, 2009, the Board affirmed the March 7, 2008 loss of wage-earning capacity determination, finding that appellant had not met her burden of proof to establish that the March 25, 2004 wage-earning capacity determination should be modified.

continuing in order to undergo this procedure. By letter dated October 13, 2009, the Office accepted appellant's claim for a recurrence of her work-related disability as of September 22, 2009.

On October 28, 2009 the Office informed appellant that it was placing her on the periodic rolls and would be paying her monthly compensation at the rate of \$2,960.13 every 28 days, effective September 22, 2009. It calculated this amount based on a gross payment of \$3,092.53, minus monthly deductions for insurance.⁵

The Office hearing representative finalized its preliminary determination by decision dated December 8, 2009 regarding the overpayment of \$1,640.89 for the period March 24, 2003 through January 24, 2004. He found that the overpayment had occurred because appellant was incorrectly paid compensation for a loss of wage-earning capacity after her return to work on March 24, 2003. The hearing representative further found appellant to be without fault in the creation of the overpayment.

The hearing representative further found that appellant was not entitled to waiver. He stated that, as appellant was now on the periodic rolls, receiving monthly compensation benefits in the amount of \$3,171.57, her current income exceeded her monthly expenses, \$2,799.83, by more than \$50.00 per month and therefore she did not qualify for a waiver under the "defeat the purpose of the Act" standard. The hearing representative also found that, since appellant submitted no evidence to establish that she relinquished a valuable right or detrimentally relied on the overpaid compensation, recovery of the overpayment would not be against equity or good conscience under section 10.437. Therefore he concluded that appellant was not entitled to waiver.

Finally, the hearing representative stated that, under section 10.321(a) of the Office's regulations, whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual. Based on the above criteria, he determined that a deduction of \$150.00 per month from appellant's continuing compensation payments was reasonable in an effort to recover the overpayment of compensation and not cause undue hardship. The hearing representative noted that, as appellant had previously repaid \$698.73 of the stated overpayment, the current balance of the overpayment was \$942.16, to include interest at the applicable rate of three percent effective as of the date of the decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act states that, while an employee is receiving workers' compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the armed forces, including benefits administered by the Department of Veterans Affairs

⁵ The monthly calculations by the Office were incorrectly based on 28 days, rather than 30 days. The gross amount should have been \$3,313.43 and the net amount should have been \$3,171.57.

unless such benefits are payable for the same injury or the same death being compensated for under the Act.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,640.89 for the period March 24, 2003 through January 24, 2004. During this time period appellant had returned to work and earned equivalent wages to what she earned in her date-of-injury position. She therefore had no loss of wage-earning capacity. As noted above, the overpayment was calculated by taking the amount of temporary total disability compensation appellant was paid from March 24 to November 29, 2003, \$1,559.79, adding the amount of compensation the Office paid her from November 30, 2003 to January 14, 2004, \$384.00, and subtracting \$266.90 for the period May 28 to June 2, 2003, when she was properly paid compensation for periods where light duty was unavailable. The Office properly computed the wage-loss compensation she received from it for a period beginning on or after March 24, 2003, while she was in fact working and had no loss of wage-earning capacity. This amount constitutes the overpayment of benefits. Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$1,640.89 for the period March 24, 2003 through January 24, 2004.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁷ provides that 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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁸

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment and therefore eligible for waiver. An overpayment may be waived only upon a showing that recovery would defeat the purpose of the Act or would be against equity and good conscience.

Appellant did not contend that she relinquished a valuable right in reliance on these compensation payments or otherwise demonstrate that recovery of the overpayment would be against equity and good conscience. She submitted financial information pertaining to her monthly income and expenses, asserting that recovery of the overpayment would defeat the purpose of the Act as it would deprive her of substantially all of her current income to meet ordinary and necessary living expenses. However, the record reflects that appellant began receiving total disability compensation every 30 days in the amount of \$3,171.57 as of September 22, 2009; therefore, her total monthly income exceeded her monthly expenses,

⁶ 5 U.S.C. § 8116(a).

⁷ *Id.* at § 8129(a)-(b).

⁸ *Bonnye Mathews*, 45 ECAB 657 (1994).

\$2,799.83, by more than \$50.00 per month and she did not qualify for a waiver under the “defeat the purpose of the Act” standard. As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in denying a waiver of recovery of the overpayment of \$1,640.89.

LEGAL PRECEDENT -- ISSUE 3

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office’s discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.⁹ Section 10.441(a) of the Office’s regulations provide:

“When an overpayment has been made to an individual who is 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. If no refund is made, [it] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁰

The statutory authority for the Office to charge interest on an overpayment is found in 31 U.S.C. § 3717(a)(1) and (g)(11). Section 3717(a)(1) provides in relevant part that the head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person. Section (g)(1) states that section 3717 does not apply if a statute, regulations required by statute, loan agreement or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges.¹¹ Inasmuch as the Act does not prohibit the charging of interest on overpayments, the Office has the requisite statutory authority to assess interest on an overpayment.¹²

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. The Office directed recovery of the overpayment from appellant’s continuing compensation benefits in the amount of \$150.00 every four weeks. The financial information of record reveals that she is in receipt of net compensation in the amount of \$3,171.57 per month. In view of the financial information submitted, there is no evidence of any financial hardship in setting the rate of recovery of the overpayment at \$150.00 from appellant’s continuing compensation payments every four weeks. The Board finds that the Office gave proper consideration to the implementing regulations in setting the rate of recovery of the overpayment in this case and

⁹ *Howard R. Nahikian*, 53 ECAB 406 (2002).

¹⁰ 20 C.F.R. § 10.441(a).

¹¹ 29 U.S.C. § 3717(a)(1), (g)(1).

¹² *Jorge O. Diaz*, 51 ECAB 124 (1999).

deducting \$150.00 every four weeks from appellant's continuing compensation. Furthermore, the Board finds that the Office acted within its authority in assessing interest on the overpayment amount.¹³

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,640.89 for the period March 24, 2003 through January 24, 2004. The Board further finds that the Office properly denied waiver of the recovery of the overpayment. Finally, the Board finds that the Office properly set the rate of recovery of the overpayment at the rate of \$150.00 from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 12, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *id.*