

FACTUAL HISTORY

On May 14, 1994 appellant, then a 35-year-old mail processor clerk, filed an occupational disease claim alleging that she sustained right wrist, forearm and shoulder conditions due to factors of her federal employment. She stopped work on May 5, 1994.¹ The Office accepted the claim for right elbow tendinitis, right shoulder strain and right rotator cuff syndrome. Appellant underwent a repair of the right rotator cuff on July 16, 1996.

Following her employment injury, appellant returned to limited-duty employment working on the day shift. On February 8, 1999 the employing establishment offered her limited-duty employment working at night. Appellant refused the position on February 16, 1999 on the grounds that it was not within her physical restrictions.

In a return to work slip dated September 10, 1999, Dr. Donna M. Boehme, a Board-certified orthopedic surgeon and appellant's attending physician, opined that she could work during the day with restrictions, but not at night due to increased pain.

By letter dated October 20, 1999, the Office requested that Dr. Boehme clarify the hours that appellant could work. In a response dated October 26, 1999, she indicated that appellant could work at night.

The employing establishment offered appellant a limited-duty position working at night on December 8, 1999. In a report dated December 8, 1999, Dr. Boehme opined that she should continue working in her day position so that she did not have to pitch mail over her head. In a response to Dr. Boehme of the same date, the employing establishment indicated that the offered position did not require pitching mail and was "prepared in accordance with your prior restrictions."² The employing establishment noted, "[appellant] does not have to perform any activities that are not within her restrictions, however, whatever job she does perform wi[ll] be at her new scheduled time...."

The employing establishment issued appellant a notice of removal on June 20, 2000 for failure to follow instructions resulting in absence without leave. She filed a grievance on August 14, 2000 indicating that she was sent home by the employing establishment on that date due to contradictory medical documentation. The record contains an arbitration decision dated January 23, 2002, changing the removal to a disciplinary suspension. The arbitrator did not award back pay.

On July 20, 2002 appellant filed a claim for compensation (Form CA-7), requesting compensation from August 14, 2000 to February 1, 2002. On the form she indicated that she "was not allowed to work" by the employing establishment. The form was signed by Karen D.

¹ Appellant worked the night shift at the time of her injury.

² In a progress report dated April 24, 2000, Dr. Segundo Briones, Board-certified in family practice, recommended that appellant work the day shift due to anxiety, migraines and insomnia. In a report dated August 8, 2000, he found that she could temporary work at night while waiting a position with daytime hours.

Padalecki, an employing establishment official. On August 9, 2002 the Office issued compensation in the amount of \$43,101.16, for the period August 14, 2000 to February 1, 2002.

In an investigative memorandum dated September 20, 2002, an inspector with the employing establishment noted that appellant submitted the July 20, 2002 Form CA-7 directly to the Office rather than through the employing establishment injury compensation office. The inspector noted that she was terminated on July 24, 2000 for unexcused absences, but later reinstated following arbitration. The inspector noted that appellant missed work due to her termination from August 14, 2000 through February 1, 2002. The inspector related that she stated that she did not send the Form CA-7 to the injury compensation office in order to avoid delays or changes in her paperwork. When shown the arbitrator's decision denying back pay, appellant indicated that "someone needed to pay her for the two years she was unemployed. According to her, since the [employing establishment] did not have to pay her, then the [Office] did." The inspector further related that Ms. Padalecki stated that appellant told her that she needed the Form CA-7 signed "so that her employment could be verified."

On December 2, 2000 the Office informed the employing establishment that it had paid appellant compensation from August 14, 2000 to February 1, 2002 because the medical evidence established that she was disabled from work.

In a report dated December 18, 2002, Dr. Boehme indicated that she had not treated appellant from March 2000 to January 2002 and stated, "I did not give [appellant] a no work pass for the time period between March 2000 and January 2002."³

In a letter dated February 14, 2003, the Office informed the employing establishment that as appellant's physician had "retracted her prior disability statement," the compensation she received for the period from August 14, 2000 to February 1, 2002 would be deemed an overpayment.

On August 7, 2003 the Office issued a notice of proposed termination of compensation, indicating that it proposed to rescind its finding that appellant was entitled to compensation from August 14, 2000 through February 1, 2002 on the grounds that the evidence established that she was not disabled from her employment during this period.

By decision dated September 25, 2003, the Office finalized its proposed termination of appellant's entitlement to wage-loss compensation from August 14, 2000 through February 1, 2002. On September 25, 2003 the Office also notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$43,101.16, for the period August 14, 2000 through February 1, 2002, as she received compensation to which she was not entitled.⁴ The Office found that she was at fault in creating the overpayment and requested that appellant complete an enclosed overpayment recovery questionnaire and submit

³ The record indicates that on January 28, 2003 the employing establishment issued appellant a notice of removal for embezzlement of funds. An arbitrator set aside the finding after determining that the Office had the jurisdiction to determine whether appellant embezzled funds.

⁴ In a decision dated September 24, 2003, the Office determined that appellant had not established that she sustained a recurrence of disability on February 28, 2002 due to her accepted employment injury.

financial documents in order to support waiver of the overpayment if it was subsequently determined that she was without fault in creating the overpayment.

On October 21, 2003 appellant requested a preresoupment hearing and submitted a completed overpayment recovery questionnaire. She listed her monthly income as \$4,514.00 and her monthly expenses as \$942.00 for housing, \$500.00 for food, \$150.00 for clothing, \$759.00 for utilities and \$200.00 for miscellaneous expenses. Appellant also listed monthly payments of \$1,458.18 for credit card expenses, insurance, cable television and the internet. She specified assets of \$2,715.20 in her checking and savings accounts.

At the hearing, held on September 21, 2004, appellant related that she talked to an Office claims examiner who told her to file the Form CA-7 for wage-loss compensation during the period that she was off work. She further stated that the balances in her checking and savings accounts were now less than \$200.00 and that, while her husband had received a pay raise, they also had increased debts and had recently purchased a new house. Appellant stated that the mortgage payment was the same as that specified in the overpayment recovery questionnaire.

By decision dated January 19, 2005, the hearing representative affirmed the September 25, 2003 decision rescinding the payment of compensation for total disability compensation from August 14, 2000 through February 1, 2002.⁵ The hearing representative found that appellant received an overpayment of \$43,101.16, during this period and that she was without fault in creating the overpayment as she relied upon the Office to correctly determine her entitlement to compensation. He relied on the financial information from the overpayment recovery questionnaire as he found that appellant had not adequately specified the subsequently changes in her assets and liability discussed at the hearing. The hearing representative determined that her monthly income of \$4,514.00, exceeded her monthly expenses of \$4,009.18, by 504.82 and thus, appellant did not require all of her income to meet ordinary and necessary living expenses. He concluded that she was not entitled to waiver and that the overpayment should be recovered by paying \$125.00 per month to the Office.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁶ It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ This holds true where the Office later decides that it has erroneously accepted a claim

⁵ The Board notes that the hearing representative properly analyzed the issue of whether appellant's compensation from August 14, 2000 through February 1, 2002 should be rescinded .

⁶ *Andrew Wolfgang-Masters*, 56 ECAB ____ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

⁷ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁸

The Board has held that, if the record establishes that limited-duty work within a claimant's work restrictions would be available for her if her behavior was acceptable and there is no evidence in the record that the claimant was terminated due to her physical inability to perform her assigned duty and no evidence that the claimant stopped work due to her physical condition, then the claimant has no disability within the meaning of the Act.⁹

ANALYSIS -- ISSUE 1

In order to rescind acceptance of appellant's claim for total disability compensation for the period August 14, 2000 through February 1, 2002, the Office must establish that her inability to earn wages was not due to her accepted employment injury. Following her employment injury, appellant returned to a limited-duty position on the day shift. The employing establishment offered her a modified duty position working on the night shift on February 8, 1999. Appellant declined the position; however, her attending physician, Dr. Boehme, indicated in a report dated October 26, 1999 that she could work at night. The employing establishment again offered appellant a modified position working at night on December 8, 1999. In a report dated December 8, 1999, Dr. Boehme indicated that she should continue working days so that she could work within her restrictions. In a letter of the same date, the employing establishment noted that the night position was prepared according to the physician's restrictions. On June 20, 2000 the employing establishment issued appellant a notice of removal for failure to follow instructions resulting in unexcused absences. The employing establishment sent her home on August 14, 2000. Appellant returned to work in February 2002, after arbitration reduced the removal to a disciplinary suspension.

On July 20, 2002 appellant filed a claim requesting compensation from August 14, 2000 through February 1, 2002, contending that she was not permitted to work by the employing establishment. The Office paid her wage-loss compensation from August 14, 2000 through February 1, 2002. In an investigative memorandum, however, a postal inspector noted that she did not work during this period as she had been terminated for cause by the employing establishment. Appellant was later reinstated after arbitration and the termination reduced to a disciplinary suspension without back pay. Dr. Boehme submitted a statement dated December 18, 2002, clarifying that she did not treat her or find appellant unable to work from March 2000 to January 2002. The medical evidence, consequently, does not establish that appellant was disabled for work at modified duty due to her accepted employment conditions of right shoulder strain, right elbow tendinitis and right rotator cuff syndrome.¹⁰ Rather, her work stoppage resulted from the employing establishment's termination of her employment for cause. The Board finds that, in rescinding acceptance of appellant's claim for compensation for total

⁸ *Andrew Wolfgang-Masters, supra* note 6.

⁹ *Janice Green*, 49 ECAB 307, 308 (1998); *Lester Covington*, 47 ECAB 539, 542 (1996).

¹⁰ Dr. Briones recommended that appellant work the day shift due to anxiety, migraines and insomnia; however, none of these conditions are accepted as employment related.

disability from August 14, 2000 through February 1, 2002, the Office provided reasons for its decision and properly explained that she had no employment-related disability entitling her to compensation benefits. It did not act arbitrarily in this case.

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹¹

ANALYSIS -- ISSUE 2

On August 9, 2002 the Office paid appellant the amount of \$43,101.16 in wage-loss compensation for total disability for the period August 14, 2000 through February 1, 2002. As discussed above, the Office erred in issuing compensation for this period as she was not disabled from employment period due to residuals of her accepted conditions. The Office properly rescinded its finding that appellant was entitled to compensation during this period. Consequently, She received an overpayment of compensation in the amount of \$43,101.16.

LEGAL PRECEDENT -- ISSUE 3

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436, provides:

“(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.”¹²

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered 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 an 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

¹¹ 5 U.S.C. § 8102(a); *see also* *Rose E. Tausel*, Docket No. 04-369 (issued April 21, 2004).

¹² 20 C.F.R. § 10.436.

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

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."¹³

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.¹⁴ The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁵

ANALYSIS -- ISSUE 3

In support of her request for waiver, appellant submitted an overpayment recovery questionnaire in which she listed monthly income of \$4,514.00 per month. She listed monthly expenses of \$942.00 for housing, \$500.00 for food, \$150.00 for clothing, \$759.00 for utilities, \$200.00 for miscellaneous expenses and \$1,458.18 for credit card expenses, insurance, cable television and the internet, for a total of \$4,009.18. The Board finds that as her monthly income of \$4,514.00 exceeds her monthly expenses of \$4,009.18 by \$504.82, she is not entitled to waiver as she does not need substantially all her income to meet current ordinary and necessary expenses.¹⁶ The hearing representative noted that appellant related at the hearing that she had increased income and debts. He determined, however, that she had not adequately specified the change in income and expenses and thus, relied upon the information overpayment recovery questionnaire. The Board finds that the hearing representative's analysis is reasonable and his determination that appellant is not entitled to waiver of the overpayment under the "defeat the purpose of the Act" standard is affirmed.

¹³ 20 C.F.R. § 10.437.

¹⁴ *Linda Hilton*, 52 ECAB 476 (2001).

¹⁵ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹⁶ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

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.¹⁷

In this case, appellant has neither alleged, nor submitted evidence demonstrating that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation payments she received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

CONCLUSION

The Board finds that the Office properly rescinded payment of compensation for the period August 14, 2000 through February 1, 2002 on the grounds that appellant was not disabled from employment during this period due to her work injury. The Board further finds that she received an overpayment of compensation in the amount of \$43,101.16 and that the Office properly denied waiver the overpayment.¹⁸

¹⁷ 20 C.F.R. § 10.437.

¹⁸ The Board notes that it does not have jurisdiction to review the Office's recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB ___ (Docket No. 03-2270, issued February 24, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 19, 2005 is affirmed.

Issued: September 13, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board