

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JUDY J. COX and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Olympia, Wash.

*Docket No. 96-2425; Submitted on the Record;  
Issued December 14, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation of \$13,292.70 had been created during the period March 9, 1993 to April 1, 1995; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by deducting \$100.00 every four weeks from her continuing compensation.

On August 5, 1983 appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on June 21, 1983 she injured her tailbone when she slipped while planting.<sup>1</sup> The Office accepted the claim for sacral contusion and permanent aggravation of disc disease of the thoracic and lumbar spine. Appellant began receiving compensation benefits and was placed on the periodic rolls in February 1986. In the March 4, 1986 Form CA-1049, which notified appellant of this action, the Office advised her that, in order to avoid an overpayment of compensation, she must immediately notify the Office when she returned to work and return any compensation check received after her return to work.<sup>2</sup>

The Office periodically requested that appellant complete Forms CA-1032 regarding her employment status. Appellant consistently complied with these requests and informed the Office of her employment activities, including her self-employment as the forms advised appellant that the information which she provided on the forms would be used to determine whether an adjustment in her benefits might be warranted.

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<sup>1</sup> The evidence numbered 1-647 will be noted as "R," the evidence numbered 1-656 will be noted as "A," and the evidence numbered 1-83 will be noted as "B."

<sup>2</sup> On May 3, 1990 the Office sent appellant a Form CA-1049 with the same language.

Appellant continued to receive temporary total disability compensation benefits up until October 10, 1991 when she returned to her regular position of forest technician performing clerical and maintenance duties. In a decision dated June 11, 1992, the Office determined that appellant's position as forestry technician fairly and reasonably represented her wage-earning capacity and that there was no loss of wage-earning capacity.

In a letter dated September 4, 1992, appellant informed the Office that she completed her appointment with the employing establishment on July 17, 1992 and that she began working with the vocational rehabilitation services.

By decision dated March 9, 1993, the Office determined that the position of general clerk fairly and reasonably represented her wage-earning capacity. In the cover letter, the Office advised appellant that her compensation payments would be computed by the difference between her pay rate as determined for compensation purposes less her ability to earn wages in her new positions. In the attached computation of loss of wage earning, appellant was notified that her net compensation each four weeks would be \$194.56 effective March 8, 1993.

In a letter dated August 3, 1995, the Office advised appellant that a preliminary determination had been made that an overpayment in the amount of \$13,292.70 had been created. The Office explained that the overpayment occurred because appellant had received compensation for total disability of \$680.96 each four weeks during the period March 9, 1993 through April 1, 1995, as the Office erred by failing to use appellant's adjusted earning capacity of \$194.56 each four weeks. The Office also advised appellant that a preliminary determination had been made that she was at fault in the creation of the overpayment because she should have known that she was not entitled to compensation for total disability during this period.

In an overpayment recovery questionnaire completed by appellant, she listed her monthly expenses to include \$50.00 for food, \$365.14 for her mortgage, \$35.10 for utilities, \$41.00 for insurance, \$29.30 for medical insurance and a debt of \$225.00 which was due "now." Appellant's monthly expenses totaled \$518.54 or \$743.54 with her short-term loan included. She also noted other expenses to include current taxes and homeowner's insurance without listing any amount.

Appellant requested a hearing on the issue of fault and waiver before an Office hearing representative. A hearing was held on March 16, 1996. She asserted that she was not at fault in the creation of the overpayment and that recovery should be waived. Appellant stated that she was demoted from forest technician to clerical when she had no clerical training and her compensation was reduced from \$960.00 per month to \$633.00 per month as of March 24, 1993. She testified that in May 1995 her income was reduced to \$204.00 per month and that is when she was informed by the Office that she had been overpaid. Appellant noted that she did not understand when she received \$633.00, but decided she could live on that amount and still appeal the determination that she could work as a general clerk. She testified that her mortgage is in default and that the foreclosure proceedings would be starting within 10 days.

In a decision dated July 2, 1996, the hearing representative finalized the preliminary determination with respect to overpayment and fault. The hearing representative found that appellant had a monthly income of \$204.00 each four weeks in compensation and the capacity to

earn \$240.00 per week in the position of General Clerk which equals a monthly income of approximately \$1,164.00. He noted that he had considered appellant's overpayment questionnaire and then directed repayment at the rate of \$100.00 from continuing compensation.

The Board finds that the Office properly determined that an overpayment of compensation of \$ 13,292.70 had been created during the period March 9, 1993 to April 1, 1995.

The record contains evidence which shows that appellant received a \$13,292.70 overpayment in compensation between March 9, 1993 to April 1, 1995, which occurred because she received incorrect payments of \$680.96 per week instead of the correct pay rate of \$194.56 for the period March 9, 1993 to April 1, 1995 as appellant continued to receive compensation for total disability instead of her adjusted earning capacity. Appellant has not shown, nor does the record otherwise establish, that the Office erred in calculating the amount of the overpayment. Therefore, the Office properly determined that appellant received a \$13,292.70 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act<sup>3</sup> provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>4</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery 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."<sup>5</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provide in relevant part:

An individual is with fault in the creation of an overpayment who:

"(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

"(2) Failed to furnish information which the individual knew or should have known to be material; or

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> 5 U.S.C. § 8129(a).

<sup>5</sup> 5 U.S.C. § 8129(b).

“(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>6</sup>

In the present case, the Office determined in its decision dated August 3, 1995 and finalized July 2, 1996 that appellant was not “without fault” in the creation of the overpayment for the period March 9, 1993 to April 1, 1995. In support of its fault determination, the Office noted that it had clearly advised appellant in a March 9, 1993 decision which determined her loss of wage-earning capacity and informed her that future compensation payments would be \$194.96. In addition, appellant testified at the hearing that she knew that the amount she received was incorrect. The issue is whether appellant knew or should have been expected to know that the compensation payments she received from March 9, 1993 to April 1, 1995 were incorrect. Under the circumstances presented in this case, the Board finds that appellant should have been expected to know these payments were incorrect and the Office therefore was proper in finding appellant at fault.

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$100.00 every four weeks from his continuing compensation.

Section 10.321(a) of the Code of Federal Regulations states in relevant part:

“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 factors so as to minimize any resulting hardship upon such individual.”<sup>7</sup>

In the present case, the Office hearing representative considered appellant’s financial circumstances, finding that, based on appellant’s OWCP-20, other financial evidence submitted, and appellant’s statements at the hearing, that she had a household income of approximately \$1,164.00, with expenses of approximately \$743.54, including her short-term loan. The Office hearing representative concluded that based on this information appellant could reasonably repay the overpayment by deducting \$100.00 from her continuing compensation every four weeks. It is evident that the hearing representative gave due regard to the factors enumerated in section 10.321(a), and there is no indication that the Office failed to consider other factors with respect to minimizing the financial hardship on appellant. The Board therefore finds that the Office properly determined the rate of repayment in this case.

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<sup>6</sup> 20 C.F.R. § 10.320(b).

<sup>7</sup> 20 C.F.R. § 10.321(a).

The decision of the Office of Workers' Compensation Programs dated July 2, 1996 is affirmed.

Dated, Washington, D.C.  
December 14, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member