

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUBY DELOACH and U.S. POSTAL SERVICE,
DALLAS GENERAL MAIL FACILITY, Dallas, Tex.

*Docket No. 96-2624; Submitted on the Record;
Issued September 18, 1998*

DECISION and ORDER

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

The issues are: (1) whether an overpayment of compensation was created in appellant's case in the amount of \$16,098.28 for the period July 25, 1993 to November 12, 1994 as appellant was employed while receiving compensation payments for temporary total disability; (2) whether appellant was at fault in creation of the overpayment; and (3) whether the Office of Workers' Compensation Programs properly required recovery of the overpayment at the rate of \$700.00 per month from appellant's continuing compensation benefits.

The Office accepted that on April 18, 1990 appellant, then a 56-year-old clerk, sustained a lumbar sprain when her chair seat dropped out of position. Appellant received benefits on the daily rolls through June 15, 1990 and appropriate medical benefits.

In an August 1, 1990 letter, appellant was advised that effective June 16, 1990, she would receive compensation on the periodic rolls in the net amount of \$1,715.48 every four weeks, based on 75 percent of a weekly pay rate of \$591.82.

Following vocational rehabilitation appellant returned to modified-duty work on April 8, 1991 for four hours per day, at which time the Office began compensation payments based on her loss of wage-earning capacity.

By letter decision dated June 3, 1991, the Office noted that appellant had been "reemployed as a modified clerk with wages of \$305.40 per week ... effective on April 8, 1991."¹ The Office advised appellant that her compensation would be adjusted effective April 8, 1991, based on "75 percent (one or more dependents) of the difference between [her] pay rate as determined for compensation purposes and [her] ability to earn wages in [her] new position." The Office noted a weekly pay rate of \$639.78 and adjusted earning capacity of

¹ The Office determined as of March 7, 1991 that the modified clerk position was suitable work within appellant's medical restrictions.

\$294.30, resulting in a loss of wage-earning capacity of \$345.48 per week. The Office advised that after deduction of life and health insurance premiums, appellant's net compensation each four weeks would be \$926.80. The Office also advised appellant that she was "required to report ... [her] employment whenever ... requested by the O[ffice] to do so."

From March 8, 1992 to April 3, 1993, appellant received a check for \$948.82 each four weeks. This increased to \$953.38 from approximately March 1 to June 24, 1993. The Office issued appellant a check in the amount of \$875.09 for the period June 1 to 26, 1993 and in the amount of \$953.38 for the period June 27 to July 24, 1993.

The Office issued appellant a check in the amount of \$1,887.38 for the period July 25 to August 21, 1993, an increase of more than \$900.00 from the previous check. Checks were issued every 4 weeks at this rate, with an increase to \$1,933.66 as of March 6 through November 12, 1994.²

By notice dated February 27, 1995, the Office advised appellant of its preliminary determination that an overpayment of compensation had occurred in her case in the amount of \$16,098.28 for the period July 25, 1993 to November 12, 1994 on the grounds that she received compensation for total disability while employed. The Office noted that appellant was advised by the June 3, 1991 decision that her compensation was being reduced as she had returned to part-time work, and of the amount of compensation she would receive at the new rate. The Office also noted that as of July 25, 1993, it made an error and paid benefits to appellant at the total disability rate instead of the partial disability rate. The Office found that appellant was with fault in creation of the overpayment, as she accepted payments which she "either knew or should have been expected to know w[ere] incorrect," as she "should have been reasonably aware that her payments were being made at an incorrect rate beginning July 25, 1993."

In an April 27, 1995 overpayment recovery questionnaire (Form OWCP-20), appellant asserted that she was not at fault in creation of the overpayment. Appellant stated that she was first advised of her responsibility to report changes in earnings and employment on August 2, 1990 by mail. In response to Part VI, question c, "Did you believe that the overpaid amount was due to you?" appellant wrote "No." She provided information regarding monthly income, including \$980.00 per month in unemployment benefits to her spouse, \$10.00 per month in interest,³ and assets of \$250.00 in savings and checking accounts. Appellant noted more than \$3,582.00 in monthly expenses, but did not provide any supporting documentation. She requested a preresoupment hearing on the issues of fault and waiver.

² By decision dated November 18, 1994, the Office suspended appellant's wage-loss compensation benefits effective November 13, 1994 on the grounds that appellant had not returned the Form CA-1032 affidavit of earnings and employment sent to her on June 3, 1994. On December 16, 1994 appellant returned a partially completed Form CA-1032 dated July 7, 1994, and requested reconsideration. The Office returned the form to appellant requesting additional information about her employment. Appellant returned the form with the requested information. By decision dated February 27, 1995, the Office vacated its November 18, 1994 decision, and reinstated appellant's compensation benefits for loss of wage-earning capacity.

³ Appellant received \$1,033.46 in wage-loss compensation benefits every 4 weeks.

A prerecoumment hearing was scheduled for February 13, 1996 at 4:15 p.m. In a February 13, 1996 note, the Office hearing representative recorded that appellant did not appear at the scheduled hearing, but that appellant's attorney and an associate were present. The hearing representative noted waiting "until 5:00 p.m. [Appellant] stated that she would be [at the hearing]. May want a telephone hearing -- Attorney will send letter explaining why [appellant] failed to appear and request telephone hearing or review of record." The record indicates that no additional correspondence or communication was received by the Office prior to May 28, 1996.

By decision dated May 28, 1996 and finalized June 3, 1996, the Office hearing representative found an overpayment of \$16,098.28, that appellant was at fault in creation of the overpayment, and that it was not subject to waiver. The hearing representative found that appellant began part-time work on April 8, 1991, and that she was advised by a June 3, 1991 letter of her new compensation rate and net compensation each four weeks. The hearing representative found that the Office paid appellant at the total disability rate from July 25, 1993 to November 12, 1994, although appellant was employed during that period. The hearing representative noted that on the April 27, 1995 overpayment recovery questionnaire, appellant stated that she did not believe that the overpaid amount was due her, and that appellant did not dispute the fact or amount of the overpayment. The hearing representative found that appellant was at fault in creation of the overpayment as she accepted payments which she knew or should have been expected to know were incorrect. The hearing representative noted that as appellant did not complete the overpayment recovery questionnaire in its entirety, the Office did not have sufficient information to develop an overpayment recovery plan, but determined that the overpayment would be collected by deducting \$700.00 per month from appellant's continuing compensation payments.

Regarding the first issue, the Board finds that the Office's calculations, as reflected in the decision dated May 28, 1996 and finalized June 3, 1996, are correct as to the fact, period and amount of the overpayment.

The record establishes and appellant does not dispute that she received an overpayment of compensation in the amount of \$16,098.28 for the period July 25, 1993 through November 12, 1994. The record establishes that she received wages following her return to work while at the same time receiving compensation for total disability from July 25, 1993 through November 12, 1994.

Section 8115 of the Act provides that when the disability is partial, compensation may be determined by the employee's actual earnings.⁴ Thus, appellant should only have received disability compensation for the difference between her wage earnings prior to her disability and her current actual earnings. The evidence of record establishes that appellant received an overpayment of compensation benefits. The Office correctly determined that appellant received a \$16,098.28 overpayment of compensation for the period July 25, 1993 through November 12, 1994.

⁴ 5 U.S.C. § 8115.

Regarding the second issue, the Board finds that appellant was with fault in creation of 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 without fault in 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
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁵

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect. In this case, the record establishes such knowledge.

In an August 1, 1990 letter, appellant was advised that effective June 16, 1990, she would receive total disability compensation on the periodic rolls, based on 75 percent of a weekly pay rate of \$591.82, in the net amount of \$1,715.48 each 4 weeks. After she returned to work on April 8, 1991 for 20 hours per week with wages of \$305.40 per week, the Office notified appellant by a June 3, 1991 decision that, effective April 8, 1991, her compensation would be reduced based on 75 percent of her loss of wage-earning capacity of \$345.48 per week, resulting in net compensation each four weeks of \$926.80. Thus, appellant was apprised that her wage-loss compensation while employed 20 hours per week was approximately \$800.00 less than her compensation for total disability. Also, the Office set forth the formulas used to compute appellant's compensation rate, thus informing her of how her pay rate was used to calculate her wage-loss compensation.

From March 8, 1992 to July 24, 1993, while working 20 hours per week, appellant received checks for between \$948.82 and \$953.38 every four weeks, reflecting cost of living adjustments to the \$926.80 amount set forth in the Office's June 3, 1991 decision. Then, the Office issued appellant a check in the amount of \$1,887.38 for the period July 25 to August 21, 1993, an increase of \$933.80. Checks were subsequently issued every 4 weeks at this rate, with an increase to \$1,933.66 as of March 6 through November 12, 1994. There is no indication of record that appellant received a schedule award, salary increase or had any expectation to other monetary benefits that would reasonably lead her to believe that the increase from \$953.38 to

⁵ 20 C.F.R. § 10.320(b).

\$1,933.66, a difference of nearly one thousand dollars was correct.⁶ This increase was so great that appellant reasonably knew or should have known that the amount of the checks issued for the period July 25, 1993 to November 12, 1994 was incorrect.⁷ Even if the overpayment resulted from negligence by the Office, this does not excuse appellant from accepting payment she knew or should have known she was not entitled.⁸

The Board notes that in the April 27, 1995 overpayment recovery questionnaire, appellant stated that she knew that the overpaid amount of compensation was not due her. Appellant thus acknowledges that the \$16,098.28 overpayment of compensation was improperly paid to her. As appellant was at fault in the creation of the overpayment, waiver of the overpayment is not possible. Consequently, the Office has met its burden of proof in finding appellant with fault in creation of the overpayment.

Regarding the third issue, the Board further finds that the Office did not abuse its discretion in requiring repayment of the overpayment by withholding \$700.00 from appellant's continuing monthly compensation benefits.

Section 10.321(a) of the regulations provides:

“Whenever an overpayment of compensation has been made to an individual who is entitled to future 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.”⁹

As noted above, appellant failed to provide the requested information regarding her income, assets and expenses. She noted more than \$3,500.00 in monthly expenses, but did not provide the requested supporting financial documents to substantiate these expenses. The Office's decision to withhold \$700.00 a month from appellant's continuing compensation payments was made with due regard to appellant's receipt of continuing wage-loss compensation benefits of \$1,033.46 every four weeks, her spouse's unemployment income of \$980.00 per month, as well as appellant's salary working 20 hours per week in the modified clerk position. The Board finds that recovery of the overpayment by withholding \$700.00 from appellant's periodic compensation payments does not constitute an abuse of discretion.¹⁰

The decision of the Office of Workers' Compensation Programs dated May 28 and finalized June 3, 1996 is hereby affirmed.

⁶ See *Linda E. Padilla*, 45 ECAB 768 (1994).

⁷ See *Claude T. Green*, 42 ECAB 274 (1990).

⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ 20 C.F.R. § 10.321(a).

¹⁰ See *Burnett Terry*, 46 ECAB 457 (1995); *Fred A. Cooper*, 44 ECAB 498 (1993).

Dated, Washington, D.C.
September 18, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member