

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of JOANNA J. (SHANK) CALVIN and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Nashville, Tenn.

*Docket No. 97-1143; Submitted on the Record;
Issued June 1, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was with fault in creating an overpayment of \$20,910.27.

The Board has carefully reviewed the record and finds that the Office met its burden of proof in determining that appellant was with fault in creating the \$20,910.27 overpayment, thereby precluding waiver of recovery, because she accepted total disability compensation benefits while also earning wages.

Section 8129(a)¹ of the Federal Employees' Compensation Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. Section 8129(b)² provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.³ Therefore, adjustment or recovery must be made when an incorrect payment has been made to an individual who is found to be with fault.⁴

The implementing regulation⁵ provides that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which the

¹ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8129(b).

³ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.320(b).

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) accepted a payment which the individual knew or should have been expected to know was incorrect. Any overpayment resulting from the Office's negligence does not permit an employee to accept compensation to which he knew or should have known he was not entitled.⁶

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.⁷ In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition.⁸ Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, and ability, efforts, and opportunities to comply with reporting requirements.⁹

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to, or the amount of, benefits.¹⁰ It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.¹¹

In this case, appellant's occupational disease claim, filed on June 26, 1989, was accepted for two work-related conditions -- temporary aggravation of inflammatory osteoarthritis of the small joints and permanent aggravation of degenerative arthritis of both hands.¹²

On October 2, 1995 the Office made a preliminary determination that an overpayment of \$20,910.27 had occurred because appellant worked for Progress, Inc., from August 18, 1991 until August 1, 1993 and for the Rocky Mountain Candy Factory from November 8, 1993 through November 12, 1994 while receiving total disability compensation. Appellant was found to be with fault in creating the overpayment because she accepted compensation payments which she either knew or should have been expected to know were incorrect.¹³

⁶ *Russell E. Wageneck*, 46 ECAB 653, 660 (1995).

⁷ *Danny L. Paul*, 46 ECAB 282, 285 (1994).

⁸ *Stephen A. Hund*, 47 ECAB 432, 435 (1996).

⁹ *Henry P. Gilmore*, 46 ECAB 709, 719 (1995).

¹⁰ *Ruth Moreno Rios*, 48 ECAB ____ (Docket No. 94-1977, issued July 14, 1997).

¹¹ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹² Appellant last worked on April 5, 1988 and retired on disability on June 14, 1989. Her claim was initially denied on October 5, 1990 on the grounds that the work-related aggravation of her arthritic condition had ceased. A hearing representative vacated this decision on February 19, 1991. On October 22, 1991 appellant filed a claim for a schedule award. On October 2, 1995 the Office terminated appellant's disability compensation but a hearing representative vacated this decision after written review. The termination issue is not before the Board.

¹³ 20 C.F.R. § 10.320(b)(3).

Appellant disputed the finding that she was with fault on the grounds that she had notified the Office every time she obtained employment.

On January 7, 1997 the Office issued a formal decision finding that appellant was with fault in creating the overpayment of \$20,910.27. The Office noted that appellant's failure to report promptly her earnings contributed to the overpayment and set a recovery schedule of \$200.00 every 4 weeks from appellant's continuing disability compensation.

The Board finds that appellant was with fault in creating the overpayment because she knew or should have been expected to know that she was not entitled to disability benefits while she was working and earning wages.

In its letters to appellant accepting her claim on July 24 and October 16, 1991, the Office stated that she would be paid compensation under the conditions set forth. Among those conditions was the following:

"In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result."
(Emphasis added.)

The letters warned appellant that willful failure to comply with the conditions could result in termination or forfeiture of benefits and liability for resulting overpayments and that falsification or willful omission might result in criminal prosecution.

The Office also informed appellant that if she returned to her former job or obtained other employment, she must "at once" submit information to the Office regarding the name and address of her employer, the date of her return, the rate of pay, and the type and hours of work she was doing.

In a May 24, 1991 letter to appellant, the Office calculated her compensation from April 7 through June 1, 1991 and stated that she would be paid benefits every four weeks provided that she complied with the conditions of entitlement. On June 16, 1991 appellant signed and returned a copy of this letter to the Office, indicating by her signature that she understood the conditions under which she would receive disability compensation and the items that she must report to the Office. In a letter dated July 18, 1991, appellant reported that she had submitted applications for several jobs and worked a week in June 1991.

Subsequently, the Office provided appellant with CA-1032 reporting forms which she completed and signed on the following dates, stating her wage rate and the dates and the companies for whom she had worked:

<u>Date Signed</u>	<u>Employer</u>	<u>Dates Worked</u>	<u>Rate of Pay</u>
5-10-92	Progress	started 8-19-91	\$5.00 per hour

	Thrifty Car	last day 6-1-90	\$4.50
2-22-93	Progress	9-91	\$5.00
2-10-94	Progress	9-91 to 7-93	\$5.25
	Rocky Mt.	11-8-93 to now	\$5.00
2-7-95	Rocky Mt.	11-94	\$5.25

Each time appellant signed these forms she attested to her understanding that she “must immediately report” to the Office any employment, certified that her statements were “true, complete, and correct,” and indicated her knowledge that fraudulently concealing or failing to report income or other information affecting the amount of disability benefits might result in criminal prosecution.

In response to an Office inquiry, appellant explained that she took a full-time job in August 1991 transporting clients to and from a group home for the mentally handicapped, which was “good therapy,” but proved too taxing. Appellant subsequently reported that she began working as a job coach for the same employer in June 1992 but had to give up this job in July 1993 because she needed more surgery on her hands. Appellant added that she started working for the Rocky Mountain Candy Factory as a clerk because she needed the money and something to keep her mind off the pain in her hands.

The record contains a report from Rocky Mountain stating that appellant worked full time from November 8, 1993 through the present as an assistant manager earning \$210.00 a week. Progress reported that appellant worked as a job coach from August 1991 through August 1993 earning \$5.75 an hour.

The Board finds that appellant failed to exercise a reasonable degree of care in reporting changes in circumstances that would decrease the amount of disability benefits to which she was entitled. Appellant was well aware that she could not earn wages and receive wage-loss compensation at the same time.

While she reported her employment to the Office, she did not do so “at once” as required. She informed the Office about her employment much later in time, thereby facilitating her use of both wages from her jobs and disability benefits.

Appellant understood that she was to return compensation checks to the Office if she obtained employment. Appellant indicated her knowledge of this requirement on June 16, 1991 when she signed the form accompanying the Office’s acceptance of her claim.

The Social Security Administration’s itemized statement of earnings (ISE) reports show wages of \$3,208.75 for Progress, starting in the third quarter of 1991, \$10,660.64 in 1992, and \$6,352.46 in 1993. Also reported were \$1,779.25 in 1993 for New Horizons Corporation and a total of \$11,999.76 for Rocky Mountain Chocolate Factory in 1993 to 1994.

Appellant reported none of this income to the Office. While she told the Office in handwritten letters that she had obtained employment, at no time did she mention any actual earnings, the receipt of which would reduce the amount of disability benefits she was receiving. On the February 7, 1995 CA-1032 form she completed, she left blank the space for actual earnings. Appellant stated that she was working as “therapy” to keep her mind off her pain. However, she avoided reporting the start of her employment “at once” as required.

Based on this analysis, the Board finds that appellant deliberately attempted to under-report her actual employment and earnings and provided incomplete answers to the questions on the Form CA-1032 reports.¹⁴ By failing to report her jobs with Progress, New Horizons, and Rocky Mountain to the Office “at once” as instructed, appellant was able to conceal her actual earnings from the Office for lengthy intervals and thus have the use of both disability benefits and wages.

Moreover, the record establishes that appellant was fully aware of the prohibition against receiving disability benefits and earning wages at the same time.¹⁵ The Office’s instruction was straightforward -- appellant was to return any compensation checks if she obtained employment and this she completely failed to do.

Even if the Office could be found to have been negligent in monitoring appellant’s claim, and there is no evidence of Office inaction here, such a situation does not excuse appellant from failing to return the compensation checks once she began working.¹⁶ Inasmuch as appellant was at fault in creating the overpayment, the Board need not address her arguments regarding waiver of recovery of the overpayment.¹⁷

The Office also properly calculated appellant’s wage-earning capacity, based on her actual earnings from her work at Progress from August 19, 1991 to August 1, 1993 and for Rocky Mountain from November 8, 1993 to November 12, 1994. During these periods of employment, appellant received a total of \$63,279.46 in disability benefits.

Using a wage-earning capacity of \$174.82 per week based on her actual earnings during the same periods and deducting the total amount earned, appellant should have received only \$42,369.19 during these periods, leaving an overpayment of \$20,910.27. Finally, the Board

¹⁴ See *John L. Wolf*, 48 ECAB ____ (Docket No. 95-1932, issued October 23, 1996) (finding that appellant was at fault in creating the overpayment because he knew that he could not receive both retirement benefits and disability compensation at the same time).

¹⁵ Appellant had experienced another overpayment of \$7,886.30, which occurred as a result of appellant’s receipt of disability retirement benefits concurrently with wage-loss compensation from September 4, 1990 through August 30, 1991. Appellant was found to be without fault, but appealed the eventual overpayment of \$11,343.20 to the Merit Systems Protection Board, which waived recovery in a decision dated May 23, 1995.

¹⁶ See *George A. Hirsch*, 47 ECAB 520 (1996) (finding that appellant’s claim of mental incompetence in handling his financial affairs was unsupported by the factual and medical record).

¹⁷ See *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994) (finding that adjustment or recovery must be made when an incorrect payment has been received by an individual who is found to be with fault).

rejects appellant's argument that withholding \$200.00 every 4 weeks from her continuing disability compensation is inequitable.¹⁸

The January 7, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 1, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ See *Forrest E. Brown II*, 44 ECAB 278, 286 (1992) (finding that withholding \$1,000.00 every four weeks from appellant's compensation constituted a reasonable repayment schedule).