

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH B. WATKINS and DEPARTMENT OF VETERANS AFFAIRS,
OMAHA VETERANS ADMINISTRATION HOSPITAL, Omaha, NE

*Docket No. 98-1048; Submitted on the Record;
Issued August 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$10,363.54 occurred; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

The Office accepted appellant's claim for multiple contusions to the head, left knee and right hand and for cervical strain. Appellant returned to work on May 16, 1991 as a rehabilitation technician and was paid benefits for her loss of wage-earning capacity as a head nurse. On March 27, 1996 appellant informed the Office that her daughter was no longer a dependent. Appellant stopped working in March 1996 and began receiving benefits from the Office of Personnel Management (OPM) and compensation benefits beginning May 1, 1996. On April 1, 1997 the Office informed appellant that she needed to elect between the two types of benefits but received no response. On May 20, 1997 the Office informed appellant for a second time that she must make an election but she did not respond. The Office terminated compensation on May 25, 1991.

In a preliminary determination dated August 4, 1997, the Office found that appellant received an overpayment of \$10,363.54 because appellant received retirement benefits from OPM and compensation benefits from May 1, 1996 through May 24, 1997. The Office also found that appellant received an overpayment from March 1 to April 30, 1996 when she was paid compensation at three-quarters of her pay rate and should have been paid at only two-thirds of her pay rate since her daughter was no longer a dependent. The Office found that appellant was at fault in the creation of the overpayment because the Office sent her several questionnaires informing her that she needed to report the receipt of benefits from OPM which she did not do and she did not provide her CSA number. The Office stated that appellant did not respond to their letter which requested an election of benefits. The Office informed appellant that, if she disagreed with the fact or the amount of the overpayment or that she was at fault in the creation of the overpayment or that recovery should not be waived, she had the right to submit new

evidence in support of her contention. The Office described the specific information appellant should provide pertaining to her income and her expenses if she should seek a waiver of repayment. The Office also stated that appellant could request a telephone conference or a precoupment hearing. The Office gave appellant 30 days to respond.

By decision dated November 5, 1997, the Office affirmed the August 4, 1997 preliminary determination, finding that appellant received an overpayment of compensation in the amount of \$10,363.54 and was at fault in the matter of the overpayment. The Office informed appellant that she should forward them a check in the amount of \$10,363.54. By letter dated December 12, 1997, the Office stated that it had not heard from appellant and that, if appellant did not pay the debt within 30 days, interest and administrative charges might be added to the debt.

The Board finds that appellant received an overpayment in the amount of \$10,363.54.

The Office found in its August 4, 1997 preliminary determination that appellant received an overpayment from May 1, 1996 through May 24, 1997 because appellant received retirement benefits from OPM as well as compensation benefits during that time period and that she received an overpayment from March 1 through April 30, 1996 because she received compensation at an erroneous pay rate based on her daughter being a dependent when, in fact, she was no longer a dependent. A worksheet of the Office's calculation and computer printouts supports the Office's finding that the overpayment totaled \$10,363.54. Further, appellant does not dispute the amount of the overpayment.

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

Section 8129(b) of the Federal Employees' Compensation Act¹ 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.² Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.³

The implementing regulation⁴ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

¹ 5 U.S.C. § 8129(b).

² *Russell E. Wageneck*, 46 ECAB 653, 660-61 ((1995); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁴ 20 C.F.R. § 10.320(b).

In the August 4, 1997 preliminary determination, the Office stated that on April 1, 1997 appellant was informed that she need to make an election between the receipt of OPM retirement benefits and workers' compensation benefits. The April 1, 1997 letter is not in the record. However, by letter dated April 22, 1997, appellant's attorney at the time stated that appellant had received the Office's correspondence concerning her election to continue receiving either workers' compensation benefits or retirement benefits, and that appellant requested additional information concerning the amount of her workers' compensation benefits in order to make her election. A handwritten note dated April 22, 1997, on the letter, apparently from the Office, stated that the case was returned to appellant's attorney with an explanation that appellant had the information necessary to make an informal decision.

By letter dated May 20, 1997, the Office informed appellant that its records indicated that she was in receipt of dual benefits from the Office and OPM. The Office stated that on April 1, 1997 a letter was generated requiring her to make an election between the two kinds of benefits but no response was received. The Office stated that effective May 14, 1997, appellant's compensation benefits were terminated.

By letter dated June 27, 1997, addressed to the Office, the employing establishment informed the Office that appellant was provided an opportunity to elect either OPM or workers' compensation benefits but they did not receive an election form from her and therefore her benefits should have been suspended effective May 1, 1996, the date her receipt of dual benefits began.

On appeal, by letter dated February 4, 1998, appellant's attorney contended that appellant did not receive the August 4, 1997 preliminary determination and the November 5, 1997 decision from the Office "until recently" because appellant had been staying in Kansas City, Kansas to care for a grandchild. He stated that the Office's reference to a "dependent" in the November 5, 1997 preliminary determination did not identify the child but he presumed that the Office meant appellant's daughter who was legally blind, in school and unemployed.

The August 4, 1997 preliminary determination gave appellant 30 days to respond to the Office's findings and submit additional evidence. Although, on her February 4, 1998 letter, appellant contended that she did not receive the preliminary determination and November 5, 1997 decision "until recently" because she had been staying in Kansas City, Kansas to take care of a grandchild, the August 4 and November 5, 1997 documents have appellant's proper, permanent address on them, 552 South 122nd Street, Omaha, NE 68154. Under the "mailbox rule" a properly addressed correspondence is presumed mailed in the ordinary course of business unless rebutted. The record does not contain any evidence showing that this particular correspondence was not properly mailed, and therefore the presumption arose and was not rebutted.⁵ The fact that, according to appellant's attorney, appellant was staying at an address other than her permanent address and therefore did not timely receive the correspondence from the Office, does not negate that the correspondence was properly mailed or excuse appellant from failing to respond.

⁵ See, e.g., *Clara T. Norga*, 46 ECAB 473, 487 (1995).

The evidence of record therefore establishes that appellant had knowledge that she was to make an election of benefits and did not exercise this option. The correspondence from the Office dated April 1 and May 20, 1996 informed appellant that she needed to make an election. The employment status questionnaire, Form EN-1032, which appellant signed on March 27, 1996, informed appellant that she was to inform the Office if she received any retirement benefits (either disability or regular) and indicate whether she received a "CSA" number. At the end of the questionnaire, appellant was informed that she "must immediately report to [the] Office any improvement in [her] medical condition, any employment, any change in the status of claimed dependents, any third party settlement, and any change in income from [f]ederally assisted disability or benefits programs." At the time appellant received that questionnaire, appellant was not receiving any benefits from OPM and had not been assigned as CSA number and so indicated. Therefore, when appellant began receiving retirement benefits from OPM on May 1, 1996, she failed to furnish information which she knew or should have known to be material and accepted a payment which she knew or should have been expected to know was incorrect. From the Office's April and May 1997 correspondence and the March 1996 Form EN-1032, appellant knew or should have known that she should not simultaneously receive retirement benefits from OPM and compensation benefits from the Office. Appellant is therefore at fault in the creation of the overpayment for the time period May 1, 1996 through May 24, 1997.

Regarding whether appellant was at fault in the creation of the overpayment from March 1 to April 30, 1996, on the March 1996 Form EN-1032, appellant indicated that her daughter was born on December 16, 1966 (and was therefore 29 years old) and was legally blind but had found employment and was no longer a dependent. The regulation's definition of a "dependent" includes an unmarried child over 18 who is incapable of self-support.⁶ Compensation for total disability is payable at 75 percent of the pay rate if the employee has at least one dependent but is otherwise payable at 66 2/3 percent of the employee's pay rate.⁷ Consistent with the regulations, a statement on the March 1996 Form EN-1032 informed appellant that she could claim compensation for a dependent which it defined, in part, as an unmarried child who is 18 or over, who cannot support himself or herself because of mental or physical disability." The form also stated that "a claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate" and a "claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate." The burden was on appellant to establish that her daughter was a dependent and she did not submit any evidence to establish her daughter's alleged dependent status. Nor did appellant submit any evidence to establish that her daughter was a dependent in response to the Office's August 4, 1997 preliminary determination.

At the time the Office issued its August 4, 1997 preliminary determination and the November 5, 1997 decision, based on the evidence available to it at the time which appellant had submitted on the March 1996 Form EN-1032, the Office properly determined that appellant's daughter was no longer a dependent and that appellant had been erroneously paid at the higher

⁶ See 20 C.F.R. § 10.405(a).

⁷ 20 C.F.R. §§ 10.301-303, 10.401(b).

compensation rate from March 1 to April 30, 1996. Despite appellant's contention on appeal that her daughter was a dependent during the time period in question, her failure to submit the relevant evidence prior to her appeal to the Board precludes the Board's review of that evidence. The Board does not have jurisdiction to review evidence that was not before the Office before the final decision was issued.⁸ From reading the March 1996 Form EN-1032, appellant therefore accepted a payment, *i.e.*, disability compensation at the 75 percent rate, which she knew or should have known was incorrect given that she indicated that her daughter was not a dependent at the time. Appellant was therefore at fault in the creation of the overpayment from March 1 to April 30, 1996.

As appellant is at fault in the creation of the overpayments from March 1 to April 30, 1996 and from May 1, 1996 through May 24, 1997, recovery of the overpayments is not subject to waiver.⁹

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
August 2, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁸ *Samuel J. Chavez*, 44 ECAB 431, 437 (1993).

⁹ *See Barbara L. Kanter*, 46 ECAB 165, 171 (1994).