

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LENORA R. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

*Docket No. 02-1095; Submitted on the Record;
Issued January 3, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received overpayments of compensation in the amounts of \$521.18 for the period September 21 through 27, 1996 and \$2,226.79 for the period May 22 through June 19, 1999; and (2) whether the Office properly found appellant at fault in creation of the overpayments and that, therefore, the overpayments were not subject to waiver.

On August 1, 1985 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that on July 19, 1985 she first became aware that the severe pain in her right back, right shoulder, arm, neck and right side of her head was caused by factors of her federal employment. She stopped work on July 19, 1985.

By letter dated July 23, 1986, the Office accepted appellant's claim for irritation at subacromial bursa with subacromial bursitis and impingement at the right rotator cuff. The Office authorized right shoulder arthroscopies, which were performed on August 5, 1987 and August 9, 1996.¹ Appellant received appropriate disability compensation.

On May 21, 1999 appellant accepted the employing establishment's May 11, 1999 job offer of limited-duty work as a modified city carrier effective May 22, 1999 based on the April 12, 1999 work capacity evaluation of Dr. Hormz Zahiri, an orthopedic surgeon.

On August 26, 1999 appellant filed a traumatic injury claim alleging that on May 22, 1999 she hurt her right shoulder and hit her head, arm and hands when she slipped and fell in water next to her car in the parking lot. By decision dated January 6, 2000, the Office found the

¹ Appellant returned to the limited-duty position of modified city carrier on June 20, 1995. By decision dated December 6, 1995, the Office found that appellant's limited-duty position fairly and reasonably represented her wage-earning capacity. In a January 1, 1996 letter, appellant requested a review of the written record by an Office representative. By decision dated May 28, 1996, the hearing representative affirmed the Office's decision. Appellant stopped work on August 14, 1996.

evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. In a January 31, 2000 letter, appellant requested an oral hearing before an Office representative. By decision dated September 20, 2000, the hearing representative affirmed the Office's decision.

In a letter dated July 28, 1999, the Office advised the employing establishment that prior to appellant's June 21, 1999 statement describing her May 22, 1999 injury and notification of her injury to the employing establishment, it was not aware of appellant's return to work on May 22, 1999.

In an October 30, 2000 letter, the Office advised appellant of its preliminary determination that an overpayment of compensation had occurred in the amount of \$521.18. The Office explained that the overpayment occurred because appellant received two compensation checks covering the period September 21 through 27, 1996. The Office stated that it issued a compensation check to appellant on October 18, 1996 in the amount of \$521.18 for the period September 21 through 27, 1996. The Office further stated that this check was returned and cancelled. The Office issued a check on December 6, 1996 covering the period September 21 through November 8, 1996.² The Office stated at that point, appellant had been properly paid for the dates September 21 through 27, 1996. The Office, however, noted that a second check was issued to appellant on January 17, 1997 for the period September 21 through 27, 1996. The Office advised appellant that she was with fault in the creation of the overpayment because she should have reasonably been aware that she had already been paid for those dates since the payment dates are on the checks. In addition, the Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

In a letter of the same date, the Office issued a second preliminary determination that an overpayment in compensation had occurred in the amount of \$2,226.79. The Office stated that appellant returned to work on May 22, 1999 and stopped work a few days later. The Office explained that appellant failed to notify the Office about her return to work and she received compensation payments dated May 22 and June 19, 1999. The Office determined that appellant was with fault in the creation of the overpayment because she should have been aware that she was not entitled to compensation after she returned to work. In addition, the Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and her eligibility for waiver of the overpayment.

In a January 8, 2001 letter, appellant stated that she disagreed with the finding of fault. She stated that she contacted the Office for over a year to clear up the transfer of her health benefits and the Office should have known that she was returning to work based on this contact. Appellant submitted correspondence from herself, her congressional representative, the

² It appears that the December 6, 1996 check covering the period September 28 through November 8, 1996 was a replacement check. The record indicates that the original check for this period was issued on November 15, 1996 and a trace was placed on the missing check.

employing establishment and the Office regarding her difficulty in transferring her health benefits back to the employing establishment because she had returned to work. She also submitted an August 2, 1999 letter requesting a review of the written record of the Office's March 30, 1995 decision terminating her benefits on the grounds that she refused suitable work,³ correspondence from the employing establishment and her congressional representative regarding the availability of jobs, a September 21, 1999 letter to the Office indicating that she returned to work on May 22, 1999, the Office's December 12, 1996 letter regarding reissuance of checks covering the period September 21 through November 8, 1996, payroll records, an Office memorandum regarding a conflict in the medical opinion evidence as to whether appellant's left shoulder condition was employment related, copies of postal return receipts and Dr. Zahiri's June 16 and August 4, 1999 disability certificates.

In separate decisions dated March 4, 2002, the Office finalized its preliminary determinations that appellant received overpayments in the amount of \$521.18 for the period September 21 through 27, 1996 and \$2,226.79 for the period May 22 through June 19, 1999, and that she was at fault in the creation of both of them.

The Board finds that the Office properly determined that appellant received overpayments of compensation in the amounts of \$521.18 for the period September 21 through 27, 1996 and \$2,226.79 for the period May 22 through June 19, 1999.

The record establishes that an October 10, 1996 daily computation log worksheet indicates that appellant was issued a compensation check dated October 18, 1996 in the amount of \$521.18 for the period September 21 through 27, 1996. The record further establishes that appellant never received this check. The Office then issued appellant a check dated December 6, 1996 for the period September 21 through November 8, 1996, which included the September 21 through 27, 1996 period. A January 14, 1997 daily computation log worksheet indicates that appellant was issued another compensation check dated January 17, 1997 at the temporary total disability rate for the period September 21 through 27, 1996 in the amount of \$521.18. Thus, the record clearly reflects and appellant does not dispute, that she received two compensation checks in payment of compensation for temporary total disability during the period September 21 through 27, 1996 resulting in the creation of an overpayment in the amount of \$521.18.

Further, the record demonstrates that appellant returned to limited-duty work as a city carrier on May 22, 1999. However, a June 18, 1999 daily computation log worksheet indicates that appellant was issued a compensation check dated June 25, 1999 at the temporary total disability rate for the period May 23 through June 19, 1999 in the amount of \$2,226.79. The Board has reviewed the Office's calculations and found them correct. Also, appellant does not contest the accuracy of this calculation or the amount of the overpayment. Thus, the finding of a \$2,226.79 overpayment of compensation was proper.

³ By decision dated March 30, 1995, the Office terminated appellant's compensation on the grounds that she refused the January 18, 1995 offer of suitable work. Appellant requested a review of the written record by an Office representative who reversed the Office's finding by decision dated August 12, 1995. The hearing representative noted that appellant accepted the employing establishment's job offer and returned to work on June 20, 1995.

The Board finds that appellant was at fault in creation of the overpayments, and thus, the overpayments were not subject to waiver.

Section 8129(b) of Federal Employees' Compensation Act⁴ 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 would be against equity and good conscience."⁵ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.⁶

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation provides in relevant part 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 he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.⁷

The Office applied the third standard in determining that appellant was at fault in creating the overpayments. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.⁸ The evidence of record reflects that by check dated December 6, 1996 appellant was paid compensation for temporary total disability compensation during the period September 21 to November 8, 1996. The period of wage loss appears on the December 6, 1996 check. The Board notes that appellant received the December 6, 1996 check as it was not returned to the Office and appellant did not advise the Office as she had done so previously when she did not receive a compensation check. Although the Office erred in sending appellant a second wage-benefit statement on January 17, 1997, indicating that a second check had been issued for compensation from September 21 to 27, 1996, this fact does not excuse appellant's acceptance of the January 17, 1997 replacement check.⁹ Appellant was informed with the December 6, 1996 check and accompanying letter of the period of compensation for which payment was being made. Based on this information, appellant should have been expected to know that the January 17, 1997 check she received was an incorrect payment. While the Office erred in issuing the January 17, 1997 replacement check, appellant is at fault in accepting a payment,

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *Diana L. Booth*, 52 ECAB ____ (Docket No. 99-1760, issued May 10, 2000); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁷ 20 C.F.R. § 10.433(a) (1999).

⁸ *Diana L. Booth*, *supra* note 6.

⁹ The Board has held that even if an overpayment results from negligence by the Office, this does not excuse the employee from accepting payment which the employee knew or should have been expected to know he or she was not entitled. *Russell E. Wageneck*, 46 ECAB 653 (1995).

which she knew or should have been expected to know she was not entitled. The Board finds, therefore, that the Office properly found appellant was at fault in the creation of the overpayment in the amount of \$521.18. As appellant is not without fault in the creation of the overpayment, the overpayment may not be waived under section 8129(b) of the Act.¹⁰

Further, by letter dated January 13, 1998, the Office informed appellant that she should notify the Office when she returned to work and return any compensation check she received after her return to work. Although appellant submitted correspondence regarding her attempt to transfer her health benefits back to the employing establishment after she returned to work. The Office's January 13, 1998 letter supports that appellant knew or should have been expected to know that any payment she received after her return to work was incorrect. In addition, while the Office may have been negligent in issuing a check to appellant after she returned to work, this does not excuse her acceptance of the check.¹¹ Appellant is therefore at fault in the creation of the overpayment in the amount of \$2,226.79.¹²

The March 4, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 3, 2003

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ See also *John L. Wolf*, 48 ECAB 148 (1996).

¹¹ *Russell E. Wageneck*, *supra* note 9.

¹² The Board notes that on the issue of repayment its jurisdiction is limited to repayments deducted from continuing compensation. *Levon H. Knight*, 40 ECAB 658 (1989). The March 4, 2002 decisions did not indicate that the overpayments were to be recovered from continuing compensation payments.