

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ELLIE M. PEELER and U.S. POSTAL SERVICE,  
POST OFFICE, Little Rock, Ark.

*Docket No. 96-1579; Submitted on the Record;  
Issued March 16, 1998*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment in the amount of \$11,221.89, and that, therefore, the overpayment was not subject to waiver.

The Board has duly reviewed the record in the present appeal and finds that the Office properly determined that appellant was not without fault in the creation of an overpayment in the amount of \$11,221.89, and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act 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. 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 the Act or would be against equity and good conscience."<sup>1</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

---

<sup>1</sup> 5 U.S.C. § 8129.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320(b) of Title 20 of the Code of Federal Regulations<sup>2</sup> provides 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
- (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>3</sup>

On October 1, 1992 appellant, a 58-year-old rural relief letter carrier, sustained multiple injuries in a motor vehicle accident at work. The claim form indicated that appellant worked a rotating shift, but did not specify the number of hours she worked. On November 4, 1992 the Office accepted appellant’s claim for fracture of the left humerus with open reduction. The Office advised appellant of the terms of the wage-loss compensation to which she was entitled, upon the submission of wage information pursuant to a form it provided for her completion. Upon the submission of the completed form for wage-loss compensation, together with information from the employing establishment which noted a loss of 12 hours per week since the injury, the Office paid wage-loss compensation following the 45-day period for which she received continuation of pay. The record shows that the Office correctly paid wage-loss compensation for the first month based on 3/4 of the wage rate of \$12.20 per hour for 12 hours per week. The record however shows that the Office computed appellant’s wage-loss compensation based on a 40-hour week, and after the first month of payment, began to pay appellant based on the 3/4 rate of compensation for a 40-hour week.

The Office continued paying appellant 3/4 of the full-time rate of pay, until 1994, when advised by the employing establishment that appellant had worked an average of 12 hours per week. After obtaining employment records which showed an average of 12 hours of work per week for the 14-week period prior to appellant’s injury, the Office issued a preliminary overpayment determination in September 1994, finding that the payments the prior year resulted in an overpayment of \$11,221.89.

---

<sup>2</sup> 20 C.F.R. § 10.320(b). Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S.Ct. 2535 (1979), the Office established procedures to be followed in handling overpayment of compensation cases; see 20 C.F.R. §§ 10.320-10.324.

<sup>3</sup> 20 C.F.R. § 10.320(c). With respect to whether an individual is without fault, section 10.320(c) of the Office’s regulations provides in relevant part: “Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting requirements.”

At a hearing held on September 12, 1995 appellant testified that, while she knew the checks were greater than the checks she received while working, she did not realize she was not entitled to the amount she received. She submitted a financial statement indicating that her family's income exceeded expenses by \$103.00 per month. By decision dated March 19, 1996, the Office hearing representative finalized the preliminary overpayment determination finding appellant not without fault in the creation of the overpayment, which she declared recoverable in its entirety, based on the lack of supporting documentation of appellant's expenses.

The Office applied the third standard of the regulations in determining that appellant was at fault in creating the overpayment, namely that she should have known that the payment was incorrect. The Board notes that appellant received continuation of pay and payment for 1 month based on 3/4 of a wage rate of \$12.20 for 12 hours a week, equalling \$439.20 per month. Appellant later received a greater amount of compensation which was based on a 40-hour work week, to equal \$1,464.00 per month. This was more than triple the amount she should have been receiving based on her wages prior to the injury. The Board finds that as appellant's compensation check was so far greater than the correct amount for partial disability, she cannot be considered "without fault" in the creation of the overpayment.<sup>4</sup> The Board finds that she should have known that she was not entitled to wage-loss compensation in excess of the amount of wages she received while working, and that the excessive payment should have placed her on notice that she was being incorrectly paid.

The decision of the Office of Workers' Compensation Programs dated March 19, 1996 is hereby affirmed.

Dated, Washington, D.C.  
March 16, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

---

<sup>4</sup> See *Patricia E. LaMorte*, 39 ECAB 113 (1987); *Luis D. Alamo*, 35 ECAB 1045 (1984).