

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENEE BIGGERS and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Cleveland, Ohio

*Docket No. 96-2197; Submitted on the Record;
Issued October 9, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment of \$11,677.57 was created during the period September 18, 1994 to March 4, 1995; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly found that repayment would include deducting appellant's \$130.00 continuing compensation every 4 weeks.

In the present case, the Office accepted that appellant sustained a left shoulder sprain and left shoulder impingement syndrome causally related to her federal employment. Appellant returned to work in a part-time light-duty position, and eventually returned to work at eight hours per day on April 12, 1994. By decision dated September 14, 1994, the Office determined that appellant had a loss of wage-earning capacity of \$32.12 per week. The Office indicated that appellant's compensation rate commencing September 18, 1994 would be \$128.00 every 4 weeks.

In a letter dated May 2, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment of \$11,677.57 had occurred during the period September 18, 1994 to March 5, 1995. The Office found that appellant should have been paid \$744.43 in compensation during this period, but was paid \$12,422.00. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment.

Appellant requested a hearing and on November 27, 1995 a hearing was held before an Office hearing representative. By decision dated March 5, 1996, the hearing representative finalized the finding of an \$11,677.57 overpayment and that appellant was at fault in the creation of the overpayment. The hearing representative also found that appellant could repay the overpayment at a rate of \$400.00 per month.

The Board has reviewed the record and finds that the Office properly found that an overpayment of \$11,677.57 had occurred during the period September 18, 1994 to March 5, 1995.

In this case, the Office determined in its September 14, 1994 decision that, based on appellant's loss of wage-earning capacity, she was entitled to \$128.00 in compensation every four weeks. This determination was properly based on appellant's actual wages of \$696.69 per week.¹ The record indicates that on October 15, 1994, appellant received a compensation payment of \$2,069.00, and she continued to receive payments in this amount every 4 weeks through March 4, 1995. Appellant therefore received an overpayment of compensation. The Office calculated that during the period September 18, 1994 to March 4, 1995, appellant was paid \$12,422.00, although she should have been paid \$744.43. An overpayment of \$11,677.57 was therefore created.

The Board further finds that the Office properly found appellant to be at fault in creating the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act² provides: "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."³ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in creating the overpayment.⁴

On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent 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."

In this case, the Office found that appellant accepted payments that she should have known were incorrect. The Board also finds that appellant should have known the payments for

¹ See 20 C.F.R. § 10.303, which provides the method of computing the compensation rate based on a loss of wage-earning capacity.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(b).

⁴ *Gregg B. Manston*, 45 ECAB 344 (1994).

\$2,069.00 she received commencing October 15, 1994 were incorrect. The record establishes that appellant was advised by decision dated September 14, 1994 that she was entitled to compensation at a rate of \$128.00 every 4 weeks, commencing with a payment covering the period September 18 to October 15, 1994. The Office issued a payment on October 15, 1994 for \$2,069.00. It is appellant's contention that she believed this payment and subsequent payments of \$2,069.00 were for a schedule award, and therefore did not represent incorrect payments. The record does contain an investigative memorandum dated May 8, 1995, reporting that an employing establishment compensation specialist stated that during September or October 1994 she had spoken with appellant about her claim. The compensation specialist indicated that appellant's claim was reviewed on a computer terminal and appellant was told, "Based upon the amount of money you are receiving it appears this is a scheduled award."

A review of the relevant evidence of record, however, does not support a reasonable belief that the payments commencing October 15, 1994 represented a schedule award. Appellant had previously received a schedule award for the period March 11, 1990 to April 8, 1991. By decision dated December 17, 1993, the Office denied her claim for an additional award. Although appellant claimed she did not receive this decision, the record indicates that it was mailed to her address of record.⁵ Moreover, there is no evidence that the Office ever advised appellant that she was entitled to an additional schedule award. An employing establishment compensation specialist apparently indicated to appellant that it could be a schedule award, but there is no indication that appellant contacted the Office regarding a schedule award after she began receiving payments of \$2,069.00 every 4 weeks.

The Board accordingly finds that, based upon the September 14, 1994 decision which advised appellant that she was entitled to \$128.00 every 4 weeks, and the lack of any contrary evidence from the Office, appellant should have been expected to know that payments of \$2,069.00 commencing October 15, 1994 were incorrect. Appellant is therefore found to be with fault in the creation of the overpayment pursuant to 20 C.F.R. § 10.320(b), and she accordingly is not entitled to waiver of the overpayment.

The Board further finds that the Office properly determined that recovery of the overpayment would include deducting appellant's continuing compensation of \$130.00 every 4 weeks.

Section 10.321 of the Office's regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further 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,

⁵ There is a presumption that items mailed in the ordinary course of business are received by the addressee; *see Bonnye Matthews*, 45 ECAB 657 (1994).

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”⁶

In this case, the Office hearing representative found that appellant could repay the overpayment at a rate of \$400.00 per month. The record indicates that \$130.00 was to be deducted from appellant’s continuing compensation every 4 weeks.⁷ In considering the repayment rate, the hearing representative discussed appellant’s financial situation, noting that appellant’s monthly income was approximately \$1,000.00 greater than necessary expenses. The Board finds that the hearing representative did consider the relevant factors enumerated in section 10.321 in determining the rate of repayment from continuing compensation. There is no evidence of an abuse of discretion in this case.

The decision of the Office of Workers’ Compensation Programs dated March 5, 1996 is affirmed.

Dated, Washington, D.C.
October 9, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

⁶ 20 C.F.R. § 10.321.

⁷ The Board’s jurisdiction is limited to recovery of funds from continuing compensation benefits under the Act; see *Levon H. Knight*, 40 ECAB 658 (1989).