

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAY Y. SHARP and U.S. POSTAL SERVICE,
POST OFFICE, Houston, Tex.

*Docket No. 96-1787; Submitted on the Record;
Issued May 24, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,309.30 for the period November 13 through December 10, 1994; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment by withholding \$50.00 every four weeks from her continuing compensation.

On August 6, 1993 appellant, a 47-year-old clerk, injured her lower back and filed a claim for benefits based on traumatic injury. The Office accepted appellant's claim for lumbar strain and commenced payment for temporary total disability.

On October 31, 1994 appellant returned to part-time limited duty working four hours per day. However, an Office memorandum dated December 5, 1994 indicated that appellant continued to receive compensation for total disability through December 10, 1994. The Office informed appellant by letter dated December 6, 1994 that it had been advised on December 1, 1994 that she returned to work performing limited duties on October 31, 1994 for four hours per day, and that it had been unable to prevent her December 10, 1994 compensation check -- which was based on her continuing total disability -- from being issued. The Office advised appellant that she was only entitled to partial disability compensation since her return to work date, October 31, 1994, and that therefore an overpayment of compensation existed from October 31 to December 10, 1994. The Office advised appellant that if she did not return the December 10, 1994 check within 10 days, it would calculate the amount of the overpayment for which she would be found at fault in creating because she knew or should have known that once she returned to work she was no longer entitled to total disability compensation.

In a letter received by the Office on December 19, 1994, appellant advised the Office that she would forward to them the amount of the overpayment, minus whatever workdays she had missed since her return to work.

By letter dated March 2, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$894.17, covering the period from November 13 through December 10, 1994. The Office found that appellant was at fault in creating the overpayment because she had been informed in the December 6, 1994 letter that the December 10, 1994 check for temporary total disability benefits that had been issued to her had not accounted for the fact that she had returned to work for four hours per day as of October 31, 1994, at which time she was only entitled to partial disability compensation. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review.

By letter dated March 2, 1995, the Office issued an additional preliminary determination that an overpayment had occurred with regard to the period from October 31 to November 12, 1994, and that she had been found to be without fault in creating the overpayment for this period. In addition, the Office informed appellant that if she felt entitled to a waiver instead of repaying the overpayment, she could request a prerecoupment hearing with the Branch of Hearings and Review, or she could make her request directly with the Office. The Office further informed appellant that she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in her possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that, pursuant to 20 C.F.R. § 10.324,¹ the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment, and that no further request for waiver would be considered until the requested information was furnished.²

In response to the Office's preliminary determination, appellant completed and returned the form, dated March 29, 1995, and requested a prerecoupment hearing. Appellant requested a waiver of recovery of overpayment for the period from October 31 to November 12, 1994, in which she was found to be without fault, and stated that she disagreed with the Office's finding that she was at fault with regard to the overpayment covering the period from November 13 through December 10, 1994. Appellant also claimed that recovery of the overpayment would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. In addition, appellant submitted a completed Form

¹ 20 C.F.R. § 10.324.

² In a memorandum dated March 2, 1995, the Office found that appellant was without fault with respect to compensation paid from October 31 to November 12, 1994, in the amount of \$415.13, because it "had no evidentiary value in establishing what [appellant] knew or should have known with regard to the receipt of the November 12, 1994 check since it contains no information in the file regarding the period covered by that compensation check." In contrast, the Office found that appellant was not without fault with respect to compensation paid from November 13 to December 10, 1994, in the amount of \$894.17, because "the fact that [appellant] did not returned December 10, 1994 [sic] check, it is clearly apparent that [appellant] was aware that any compensation paid to her after she returned to duty was in error."

OWCPA-20 outlining her income and assets as well as her household expenses and debts, plus checks and financial statements documenting her statements.

The recoupment hearing was held on November 28, 1995 at which appellant testified and stated that she was aware that when she returned to work her compensation benefits would be reduced. She indicated that when she received her compensation payments after she returned to work, she realized that she was not entitled to the full amount. Appellant noted, however, that, after she returned to work on October 31, 1994, she continued to have days where she was totally disabled and unable to work. Appellant contended, therefore, that she is entitled to eight hours of compensation for total disability on those dates. Appellant stated that she raised this issue with an Office official at her employing establishment, and indicated she was told that the Office would make the proper adjustments in her compensation payments to account for days of total disability, and was also told that she should submit paperwork indicating her days of total disability. Appellant stated she was willing to repay the overpayment if the Office deducted from the overpayment those days she was totally disabled and unable to work.

At the conclusion of the hearing, appellant submitted a completed Form OWCP-20 outlining the total household income and assets as well as expenses and debts. Appellant contended that the overpayment from October 31 to December 10, 1994 should be adjusted to account for those days during the period when she was totally disabled, based on medical reports from Dr. Warhola indicating she was unable to work due to increased pain.

In a decision dated April 12, 1996, the hearing representative found that appellant was at fault in creating the overpayment of compensation for the entire period in which it occurred, including the period from October 31 to November 12, 1994, which amounted to a total overpayment of \$1,309.30. The hearing representative noted that the compensation check issued to appellant on November 12, 1994 indicated that temporary total disability compensation was paid from October 16 through November 12, 1994, and that, since appellant returned to work on October 31, 1994, she was aware that she was not entitled to total disability compensation for the entire period indicated on the November 12, 1994 compensation payment, or for the period indicated on the December 10, 1994 compensation payment. The hearing representative stated that appellant had therefore accepted payments which she either knew or reasonably should have been expected to know were incorrect and was therefore at fault in creating the overpayment of compensation. The hearing representative further found that as appellant was at fault in creating the overpayment of compensation, recovery of the overpayment could not be waived. The hearing representative also determined that Dr. Warhola's medical reports failed to provide a description of specific objective findings of disability and were therefore not sufficient to meet appellant's burden of proof that she was entitled to compensation for the workdays she missed following her October 31, 1994 return to work.

The hearing representative also found that recovery of the overpayment, and any applicable interest, by deductions from appellant's continuing compensation benefit payments in the amount of \$50.00 per month, would not deprive appellant of income required to meet ordinary and necessary living expenses. The hearing representative stated that appellant listed \$2,714.00 in monthly income on the overpayment recovery questionnaire, and had regular monthly expenses exceeding \$3,600.00, and therefore exceeded her household income. The

hearing representative stated that appellant listed \$125.00 per month in telephone expenses, which he characterized as excessive, and that therefore \$50.00 a month in deductions from appellant's continuing compensation benefits would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,309.30 for the period from October 31 through December 10, 1994. The record shows the Office incorrectly issued two checks for temporary total disability compensation to appellant covering the period from October 31 through December 6, 1994, when she had returned to a part-time job and was therefore only partially disabled, and that therefore an overpayment had occurred in the amount of \$1,309.30.

The Board further finds that appellant was not without fault in creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act³ provides that an overpayment must be recovered 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁴

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations 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."⁵

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected to know

³ 5 U.S.C. § 8129(a)-(b).

⁴ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁵ 20 C.F.R. § 10.320(b).

she was not entitled.⁶ In the instant case, appellant should have been aware that as of October 31, 1994 she was not entitled to temporary total disability compensation, which was contained in the checks she received on November 13 and December 10, 1994, creating an overpayment in the amount of \$1,309.30. Because appellant returned to part-time employment on October 31, 1994 and was therefore only partially disabled, she knew or should have known that she was no longer entitled to the amount of weekly compensation she had been receiving, and that therefore an overpayment had occurred. Upon receipt of the November 13, 1994 check, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, appellant accepted and deposited this check. Additionally, two weeks after receipt of the November 13, 1994 check, the Office clearly stated in its December 6, 1994 letter that it had mistakenly issued the December 10, 1994 check and that appellant was required to return it to the Office. Although appellant responded to this letter, stating that she would comply with the Office's request, she never returned the check to the Office, and stated in her March 29, 1995 questionnaire that she had deposited both checks into her checking account.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the two checks issued by the Office on November 13 and December 10, 1994, which contained an overpayment in the amount of \$1,309.30, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,309.30 may not be waived. Thus, the decision of the hearing representative dated April 12, 1996 is affirmed in this respect.

The Board further finds that the Office did not abuse its discretion in requiring repayment by withholding \$50.00 every 4 weeks from appellant's continuing compensation.

Section 10.321(a) of the regulations⁷ provides:

“[W]henever an overpayment of compensation has been made to an individual who is entitled to future 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 and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

In the instant case, the hearing representative considered appellant's income, expenses, assets and general financial circumstances and found that appellant's total monthly expenses exceeded her income by approximately \$900.00. However, the hearing representative noted that appellant had listed telephone monthly expenses of \$125.00, which he found exceeded ordinary and necessary expenses for long-distance telephone services. Based on the amount of this expense, the hearing representative found that recovery of the overpayment by withholding \$50.00 every four weeks from her continuing compensation payments would not cause undue

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

⁷ 20 C.F.R. § 10.321(a).

hardship.⁸ The Board finds that the Office arrived at this repayment schedule giving due regard to the factors set forth in section 10.321 of its regulations and that the repayment schedule was not unreasonable under the circumstances.⁹

The decision of the Office of Workers' Compensation Programs dated April 12, 1996 is hereby affirmed.¹⁰

Dated, Washington, D.C.
May 24, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁸ See *Forrest E. Brown, II*, 44 ECAB 278 (1992); see *Robert C. Schenck*, 38 ECAB 531 (1987).

⁹ *Id.*

¹⁰ In a separate finding, the hearing representative stated that the district Office would consider appellant's claims for intermittent total disability from November 8 to December 16, 1994. In a letter dated April 15, 1996, the hearing representative reiterated this finding, noting that appellant had claimed compensation for intermittent periods from November 8 through December 16, 1994, and on a continuing basis on and after December 29, 1994. In addition, the hearing representative recommended that the district Office schedule a second opinion examination for appellant with a Board-certified specialist to address the issues of recurrent total disability and continuing employment-related disability. By letter dated June 21, 1996, the Office advised appellant that, in light of her appeal to the Board, it would have to defer her second opinion evaluation until after the case was referred back to the Office.