

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THELDA K. FREEMAN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Roseburg, OR

*Docket No. 98-1255; Submitted on the Record;
Issued April 19, 2000*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of a \$25,027.47 overpayment in compensation; and (2) whether the Office properly pursued collection of the full amount of the overpayment.

On November 2, 1982 appellant, then a 36-year-old medical supply technician, sustained employment-related subluxations at C1-2, T2, T5 and T6, and a left dorsoscapular strain with fibromyalgia of the left upper extremity. She missed intermittent periods, began working four hours a day five days per week in October 1984 and has received wage-loss compensation for an additional four hours since that time. By decision dated August 14, 1989, the Office granted appellant a schedule award for a 35 percent permanent impairment for partial loss of use of the left arm for the period March 14, 1989 to April 17, 1991 for a total of 109.20 weeks of compensation. She resigned her part-time position, effective February 23, 1991. By decision dated June 17, 1991, the Office determined that appellant's wage-earning capacity was represented by her actual earnings at the employing establishment.¹ Beginning in November 1991, appellant began part-time outside employment as a counselor-aide. By letter dated December 13, 1997, appellant informed the Office that her name had changed because of a remarriage and submitted a health benefits enrollment form. The record indicates that the June 17, 1991 wage-earning capacity determination was omitted when the Office keyed in the name change and that appellant did not inform the Office of her June 1997 separation and July 1997 divorce until she submitted a Form CA-1032 in September 1997.

By letter dated December 15, 1997, the Office informed appellant that it had made a preliminary determination that she had received an overpayment in compensation in the amount of \$25,027.47 for the period January 8, 1995 to October 11, 1997. The Office stated that it had found appellant at fault in the creation of the overpayment because she should have known that it

¹ The record also contains a decision dated March 9, 1987 in which the Office determined that her wage-earning capacity was represented by her actual earnings.

was unreasonable for her compensation payments to go from \$584.58 to \$1,244.72 without explanation. In response, appellant submitted an overpayment questionnaire and stated that she thought the increase in compensation was due to a more recent medical report that would entitle her to full-time disability due to her chronic pain. She also stated that she was unaware of her reporting responsibilities. By decision dated January 23, 1998, the Office finalized the overpayment decision. In the attached memorandum, the Office noted that appellant had been informed on numerous occasions regarding the reporting requirements, that there was no medical evidence contemporaneous with the increase in compensation, listed the Forms CA-1032 filed by appellant and noted that she had indicated that she had five plus years of college. The Office concluded that a reasonable individual of her educational level would have known there was an error in the sudden increase in benefits and found that, as she had sufficient equity in real estate, she could repay the overpayment in full.

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period from January 8, 1995 through October 11, 1997. The Office, however, erred in determining the amount.

In this case, the record shows the Office paid appellant compensation totaling \$50,566.32 gross, when she should have been paid \$25,538.85, yielding an overpayment in compensation in the amount of \$25,012.47.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment in compensation and, therefore, the overpayment for that period was not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act 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."² Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.³

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

² 5 U.S.C. § 8129.

³ See *Linda E. Padilla*, 45 ECAB 768 (1994).

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁴

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 (*e.g.*, age, comprehension, memory, physical and mental condition).⁵

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.⁶ In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.⁷ Factors to be weighed are the individual’s understanding of reporting requirements and the obligation to return payments, which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, and ability, efforts and opportunities to comply with reporting requirements.⁸ Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances, which may affect entitlement to, or the amount of, benefits.⁹

The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he or she knew or should have expected to know he or she was not entitled to.¹⁰ In the instant case, appellant should have been aware that an increase in compensation from \$584.58 to \$1,244.72, a more than double increase, was incorrect. Upon receipt of the increase in compensation, appellant had

⁴ 20 C.F.R. § 10.320(b).

⁵ 20 C.F.R. § 10.320(c).

⁶ *Danny L. Paul*, 46 ECAB 2822 (1994).

⁷ *Stephen A. Hund*, 47 ECAB 432 (1996).

⁸ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁹ *Id.*

¹⁰ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. The record does not indicate that appellant inquired regarding her increase in compensation.¹¹

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 increase in compensation issued by the Office from January 8, 1995 to October 11, 1997 was in error. Appellant was, therefore, at fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$25,012.47 is not subject to waiver.

The Board, however, finds that the Office erred in pursuing collection of the full amount of the overpayment of compensation.

Office regulations regarding the recovery of an overpayment in compensation provide:

“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, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”¹²

In the present case, appellant is receiving continuing compensation benefits for four hours per day, and there are no accrued compensation benefits due and owing to appellant. Recovery of the overpayment must therefore be made by decreasing subsequent payments of compensation. Neither the Act nor its implementing regulations make any provision for a mandatory lump-sum repayment by a claimant who is receiving continuing compensation benefits and is not entitled to any accrued compensation benefits.¹³ The case will be remanded to the Office for application of the criteria of 20 C.F.R. § 10.321 to arrive at a proper repayment schedule.

¹¹ On September 20, 1997 appellant submitted an Office Form CA-1032 in which she indicated a change in dependents. At that time, the Office discerned the error.

¹² 20 C.F.R. § 10.321(a).

¹³ See *Barbara Hughes*, 48 ECAB 398 (1997).

The decision of the Office of Workers' Compensation Programs dated January 22, 1998 is hereby modified with regard to the amount of the overpayment and affirmed with regard to the finding of fault. The decision is vacated with regard to the lump-sum recovery of the overpayment in compensation and is remanded to the Office for proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
April 19, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member