

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUE ANN THOMPSON and DEPARTMENT OF JUSTICE,  
IMMIGRATION & NATURALIZATION SERVICE, Los Angeles, CA

*Docket No. 01-933; Oral Argument Held July 18, 2002;  
Issued September 19, 2002*

Appearances: *Steven E. Brown, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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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 received an overpayment of compensation in the amount of \$14,735.57; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, such that a waiver is not possible; and (3) whether the Office properly set the rate of recovery of the overpayment.

The Office accepted that on March 20, 1991 appellant, then a 29-year-old criminal investigator, sustained a thoracic strain and a herniated nucleus pulposus at L5-S1, for which she underwent surgery. She received compensation benefits as appropriate.

Appellant returned to work on March 12, 1999 as a buyer's agent and worked as such through January 19, 2000, earning approximately \$22,000.00. However, during this period she also received and kept wage-loss compensation for temporary total disability, which created an overpayment of compensation in the amount of \$14,735.57.<sup>1</sup>

By notice dated June 8, 2000, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation in the amount of \$14,735.57 had occurred in her case as she had actual earnings as a buyer's agent during the period March 12, 1999 through January 19, 2000, yet she continued to receive and keep compensation checks for total disability. The Office made a preliminary determination that appellant was at fault in the creation of this overpayment, as she knew or reasonably should have known that she was not entitled to receive compensation for total disability while earning wages from outside employment. The Office advised appellant that if she disagreed with these findings, she had 30 days within which to

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<sup>1</sup> Appellant was not removed from the periodic rolls until April 7, 2000.

submit further evidence or argument supporting her position. Alternatively, the Office advised that appellant could request a prerecoupment hearing with the Branch of Hearings and Review and it enclosed an overpayment recovery questionnaire for her completion.

On July 6, 2000 appellant requested a prerecoupment hearing. In support she completed the overpayment recovery questionnaire and submitted supporting financial information.<sup>2</sup> In an accompanying statement, appellant claimed that she was advised that her pay was to be reduced one year after she was released to work, that she earned no income but was paid only commissions, that she did believe that the overpaid amount was due her as she reported her employment to the Office and to the rehabilitation counselor and that she did not believe she was at fault in its creation as she had done everything she was supposed to do.

A hearing was held on November 13, 2000 at which appellant testified that she was not at fault in the overpayment creation and that therefore, it should be waived.<sup>3</sup> By decision dated January 30, 2001, the hearing representative affirmed the June 8, 2000 Office decision finding that the overpayment occurred as alleged, that appellant was at fault in its creation because she accepted compensation which she knew or should have known was incorrect, such that she is not entitled to waiver and that the overpayment would be recovered by withholding \$600.00 per month from her continuing compensation benefits. The hearing representative found that appellant's monthly income was \$6,300.00,<sup>4</sup> that her allowable reasonable and necessary expenses were \$5,250.00 and that therefore, she had \$1,050.00 excess per month from which to collect the overpayment.

On February 28, 2001 appellant's monthly compensation was adjusted to allow for the \$600.00 withholding for recovery of the overpayment.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$14,735.57 for the period March 12, 1999 through January 19, 2000.

The Office correctly determined that the overpayment occurred because appellant received and retained compensation for temporary total disability for the period March 12, 1999 through January 19, 2000 while she was working and earning \$22,000.00 in commissions as a

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<sup>2</sup> According to the information submitted on the overpayment recovery questionnaire, appellant's monthly income was \$6,495.87, her monthly expenses were \$9,076.63 and she was left with a negative balance of \$2,580.76 per month. Many of these monthly expenses were found to be excessive and/or were not allowable, such as her ADT alarm system, family entertainment allowance and cellular telephones costs. Current assets were noted as amounting to approximately \$39,600.00.

<sup>3</sup> Appellant claimed that she told her rehabilitation counselor of her job and that the rehabilitation counselor told her that she would be entitled to both wage-loss compensation for temporary total disability and to her earnings as a buyer's agent for one year and she alleged that she relied on this misinformation and was therefore, not at fault. The Board notes that the record is devoid of any evidence of such advice given by the rehabilitation counselor to appellant.

<sup>4</sup> At the hearing appellant's representative alleged that her monthly income was \$7,095.87, which is the calculated amount on the overpayment recovery questionnaire plus \$600.00 per month in rental income from the subsequently rented second property and that her monthly expenses were \$7,831.52.

buyer's agent. As she was not entitled to wage-loss compensation while she was earning wages in the form of commissions, an overpayment in the amount of \$14,735.57 occurred.

The Board further finds that appellant was at fault in the creation of this overpayment of compensation such that recovery of the overpayment is 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 conscious."<sup>5</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault in its creation.<sup>6</sup> Section 10.433(a) of Title 20 of the Code of Federal Regulations explains that the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

"(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 or should have known to be material; or

"(3) Accepted a payment which he or she knew or should have known to be incorrect."

In this case, appellant knew from her previous periodic receipt and completion of multiple Forms CA-1032 and her receipt of a July 16, 1991 Form CA-1049, that she was required to report any employment during the period covered by the form and that after she returned to work she was not entitled to continuing compensation benefits for temporary total disability. She therefore, knew or should have known, that after she began working as a buyer's agent she was no longer entitled to wage-loss total disability compensation benefits. However, appellant continued to receive these compensation payments and did not return the improper payments to the Office, but instead kept and cashed the checks. Therefore, under 20 C.F.R. § 10.433(a)(3) the Office properly found that appellant was at fault in the creation of the overpayment amount because she failed to return the incorrect compensation checks, but instead kept and cashed them. Accordingly, no waiver of recovery of the overpayment is possible.

The Board also finds that the rate of recovery of the overpayment by withholding \$600.00 per pay cycle was properly determined.

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<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> See *Beverly E. Labbe*, 50 ECAB 440 (1999); *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.<sup>7</sup> If no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.

In the instant case, according to the overpayment recovery questionnaire and other documentary evidence of record appellant's monthly income, including recent rental income, equals approximately \$7,095.87 per month and her allowable "ordinary and necessary" monthly expenses amount to approximately \$5,250.00.<sup>8</sup> The procedure manual explains that the finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary, such that the burden is on the claimant to show that the expenses claimed are normal and needed for a legitimate purpose. Appellant has provided no such elucidation related to her claimed large food, clothing and home maintenance expenses in this case. Reducing these expenses to an ordinary level, as well as eliminating the nonordinary and nonnecessary expenses from the monthly expenses tabulation results in the difference between monthly income and permissible expenses as being approximately \$1,845.87 per month excess income from which to recover the overpayment.

Moreover appellant appears to have significant assets, including stocks and bonds, mutual funds, a third vehicle and a second and a third house.<sup>9</sup>

The Board, therefore, finds that the Office determination that the overpayment would be recovered by withholding \$600.00 per month from appellant's continuing compensation benefits is not unreasonable, as appellant is left with \$1,245.87 in excess income per month after such withholding and that it is a rate at which the overpayment will be recovered within the least amount of time without causing hardship on appellant.

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<sup>7</sup> 20 C.F.R. § 10.441(a).

<sup>8</sup> Ordinary and necessary living expenses include fixed living expenses, expenses for one or two vehicles, unreimbursed medical expenses, expenses for support of others, charitable contributions made on a regular basis, and miscellaneous expenses not to exceed \$50.00. Appellant, however, claimed multiple expenses for three vehicles, a Toyota truck, a Honda Accord and a BMW motorcycle, plus their use and maintenance costs, multiple cellular telephones, an alarm system, family entertainment, very high charitable contributions, mortgages for a second and third house and utility bills therefore, and unusually large amounts for accepted fixed living expenses. As many of the expenses claimed by appellant are not considered to be ordinary and necessary, they do not figure in the calculation of income available for recovery of the overpayment. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(3). Therefore, the reasonable amount of monthly expenses seems, based upon the remainder of the overpayment recovery questionnaire, to be approximately \$5,250.00, leaving a significant amount of excess income per month available for recovery of the overpayment.

<sup>9</sup> Appellant lives at 5495 N. Mountain View Avenue in San Bernardino, CA but also owns a house at 3245 Belle St. and a vacation home in Big Bear, CA.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 30, 2001 is hereby affirmed.

Dated, Washington, DC  
September 19, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member