

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHY K. DOWNEY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, Pa.

*Docket No. 97-97; Submitted on the Record;  
Issued December 18, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was with fault in the matter of the overpayment that occurred in her case, thereby precluding waiver of recovery.

On March 24, 1994 appellant, a nurse practitioner, sustained an injury while in the performance of her duty when she tripped and fell. The Office accepted her claim for fractured nose, cervical strain and post-concussion syndrome. Appellant received monetary compensation for temporary total disability and was placed on the periodic rolls effective October 16, 1994.

In the October 14, 1994 notice of periodic compensation, the Office advised appellant as follows:

*"In order to avoid an overpayment of compensation, notify this office immediately when you return to work. Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result." (Emphasis in the original.)*

Appellant returned to part-time duty on January 17, 1995 but continued to receive compensation for total disability through April 1, 1995.

On April 18, 1995 the Office issued a preliminary determination that appellant was with fault in the matter of the resulting overpayment of compensation because a reasonable person should have known that she was not entitled to full compensation while working half time. Appellant requested a precoupment hearing.

At the hearing, which was held on May 1, 1996, appellant testified that after returning to part-time duty she continued to receive compensation checks that, she believed, were in the same amount as she had received previously. She testified that she cashed these checks because she needed the money. Appellant also testified concerning the expenses of having adopted a son

in March 1995 and stated that she had no money to repay the overpayment, that repayment would severely affect her financial status. She indicated that she believed part of the compensation she received after returning to part-time duty was for a spa membership and some bills she was owed.

Following the hearing, appellant submitted a revised overpayment recovery questionnaire showing a monthly income of \$4,400.00, monthly expenses of \$6,817.00 and funds (such as checking and saving account balances) of \$2,500.00.

In a decision dated July 30, 1996, the Office finalized its preliminary determination that appellant was with fault in the matter of the overpayment because she accepted payments that she knew or should have known were incorrect. The Office did not accept as accurate the expenses listed by appellant on her overpayment recovery questionnaire, some of which the Office described as extraordinarily high. Noting that appellant had submitted no documentation whatsoever to support her listed expenses, the Office accepted the reported expenses for mortgage, food, utilities and loan debt, which totaled \$3,742.00. The Office explained how it was reasonable to assume that at least some of the listed miscellaneous expenses and expenses for clothing were encompassed in the loan debt. Noting that the reported monthly income exceeded the accepted monthly expenses by \$658.00, the Office found that appellant could repay the overpayment at a rate of \$600.00 per month.

The Board finds that the Office properly found that appellant was with fault in the matter of the overpayment that occurred in her case, thereby precluding waiver of recovery.

Section 8129 of the Federal Employees' Compensation Act<sup>1</sup> 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." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320 of the implementing federal regulations<sup>2</sup> provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. 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

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<sup>1</sup> 5 U.S.C. § 8129(b).

<sup>2</sup> 20 C.F.R. § 10.320(b).

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

The Office found that appellant was with fault under the third criterion above. Appellant testified that she continued to receive compensation checks after she returned to part-time duty, that these checks were in the same amount as those she had previously received for total disability, and that she cashed the checks because she needed the money. Although she indicated that she believed she was owed money for a spa membership and some bills, the facts of the case support the Office’s determination that appellant was with fault because she accepted payments that she knew or should have been expected to know were incorrect.<sup>3</sup>

As appellant was with fault in the matter of the overpayment that occurred in her case, the Office may not waive recovery.

The Board’s jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual is entitled.<sup>4</sup> Appellant testified at the May 1, 1996 precoupment hearing that she returned to work eight hours a day beginning April 17, 1995 and continued to work eight hours a day thereafter. Her overpayment recovery questionnaire indicates that she receives no monetary compensation from the Office. Because it appears that the collection of the overpayment in this case was not made by adjusting later compensation payments but recovered by other means, the Board lacks jurisdiction to review the rate of recovery set by the hearing representative.

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<sup>3</sup> It is immaterial for purposes of determining whether a claimant is with fault that the Office may also have been with fault in the matter.

<sup>4</sup> See 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

The July 30, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
December 18, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member