

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON A. SUPRUM and DEPARTMENT OF THE ARMY,
PENTAGON CIVIL PERSONNEL OFFICE, Washington, D.C.

*Docket No. 95-3005; Submitted on the Record;
Issued January 23, 1998*

DECISION and ORDER

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

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,058.10; if so, (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment and (3) whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$65.00 from each of appellant's compensation payments.

Appellant filed a claim on May 3, 1990 alleging that she developed respiratory illnesses due to factors of her federal employment. The Office accepted appellant's claim for temporary aggravation of dyspnea on September 20, 1990. Appellant received wage-loss compensation for intermittent periods of total disability due to this condition.

Appellant filed a claim for compensation on March 1, 1995 requesting intermittent compensation from January 14 through February 28, 1995. The Office issued a check dated March 24, 1995 for the period January 14 through February 28, 1995 in the amount of \$4,809.60.

Appellant telephoned the Office on March 29, 1995 and informed the Office that she had received a check for \$4,800.00 on the day before. She inquired whether the check was payment for temporary total disability or for her requested leave buy-back. The Office responded with a return telephone call and a letter dated March 30, 1995 and informed appellant the check represented compensation for the entire period January 14 through February 28, 1995. The Office noted that appellant stated that she worked intermittently during this period. The Office informed appellant that the check should be returned as she was overpaid.

In a letter dated April 3, 1995, appellant provided a list of the days she was totally disabled during the period in question. She further stated that she thought she was entitled to the check as she anticipated receiving compensation for leave buy-back. Appellant stated that she had already deposited the check and that the Office should arrange for any refund necessary.

The Office issued a preliminary determination of overpayment on April 21, 1995 and found that appellant received an overpayment of compensation in the amount of \$4,058.10 as she received a check for \$4,809.60 when she was only entitled to \$751.50 for 40 hours of disability. The Office found that appellant was at fault in the creation of the overpayment as she had received compensation since 1987 and knew or should have known that payment was incorrect.

On May 16, 1995 the Office received a statement from appellant alleging that she had requested leave buy-back from August 1987 to the present. She stated that she did not examine the check in question and that her husband deposited it and later informed her of the amount. Appellant stated that she believed this amount to be for leave buy-back and that she called the Office to make sure. Appellant stated that she did not believe that she was at fault in the creation of the overpayment as she had not intentionally sent in a claim that was in error. In a letter dated May 26, 1995, appellant alleged that the check for \$4,809.60 was approximately the amount she expected to receive for leave buy-back.

Appellant completed an overpayment recovery questionnaire and submitted supporting financial information.

By decision dated August 23, 1995, the Office found that appellant had received an overpayment in the amount of \$4,058.10. Appellant claimed compensation for 40 hours of total disability from January 14 through February 28, 1995 and received payment for total disability for 8 hours a day during this period. The Office found no basis for waiver. The Office noted appellant's monthly income and expenses and stated that under the Federal Claims Collections, regulations governing claims, that the overpayment should be collected even where the claimant's ordinary and necessary living expenses approximately equaled income and that this would cause some hardship. The Office determined that recovery in the amount of \$65.00 per pay period from appellant's salary was appropriate. The Office further stated, "Additionally, the claimant has been receiving intermittent compensation benefits and deductions will be made prior to salary offset being implemented.

The Board finds that appellant received an overpayment of compensation in the amount of \$4,058.10.

Appellant received compensation for temporary total disability during the period from January 14 to February 28, 1995, a period during which she was employed and had earnings. The Office found that appellant was entitled to compensation for 40 hours of total disability in the amount of \$751.50 and that she received \$4,809.60. The Office properly determined that appellant received an overpayment in the amount of \$4,058.10. Appellant does not dispute the amount of the overpayment.

The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Act¹ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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."² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations³ 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."

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.⁴ Appellant had submitted a claim for compensation for 40 hours of leave without pay and received a check in the amount of \$4,809.60. That she knew that this amount was not appropriate is demonstrated by her telephone call to the Office requesting whether this check constituted compensation for leave buy-back. Appellant has contended that she was not at fault in the creation of the overpayment as she did not deliberately file a false claim. However, the receipt of an payment which she knew was incorrect is sufficient to establish fault without a deliberate attempt to secure an incorrect payment. Therefore, as appellant was at fault in the creation of the overpayment, waiver of that amount is not possible.

¹ 5 U.S.C. §§ 8101-8193, 8129(a).

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.320(b).

⁴ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

The Board finds that the case is not in posture for a decision on the issue of whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$65.00 from either appellant's intermittent compensation benefits or from her biweekly salary.⁵

Section 10.321(a) of the regulations⁶ 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, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

In the present case, the Office, in determining the rate of repayment by deduction from appellant's continuing compensation payments, did not consider the factors set forth by this section. In particular, the Office did not provide any explanation how deduction of \$65.00 from each of appellant's compensation payments would not result in undue hardship, where appellant's debts exceed her income and where her compensation payments are based on intermittent periods of disability. The case will therefore be remanded to the Office for a decision on the amount of the deduction giving due regard to the factors set forth in section 10.321(a).⁷

⁵ With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act; *see Lewis George*, 45 ECAB 144, 154 (1993).

⁶ 20 C.F.R. § 10.321(a).

⁷ *Alfonso S. Gonzalez*, 45 ECAB 200, 206 (1993).

The decision of the Office of Workers' Compensation Programs dated August 23, 1995 is affirmed insofar as it determined that appellant received an overpayment of compensation in the amount of \$4,058.10 and that appellant was at fault in the creation of the overpayment. Insofar as this decision ordered repayment of the overpayment by deducting \$65.00 from each of appellant's intermittent compensation benefits, it is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
January 23, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member