

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNIFER LEONARD and DEPARTMENT OF THE ARMY,
FORCES COMMAND, Fort Richardson, Alas.

*Docket No. 96-1038; Submitted on the Record;
Issued September 2, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are whether the Office of Workers' Compensation Programs properly determined: (1) that an overpayment of \$1,043.03 occurred in appellant's case; (2) that appellant was not entitled to waiver; and (3) that repayment should be made by withholding \$100.00 from her periodic compensation payments.

The Office accepted that appellant sustained a left ankle sprain, chronic instability of the left ankle and post-traumatic anterior synovial impingement syndrome of her left ankle due to her July 1, 1987 employment injury and authorized compensation benefits. On November 14, 1994 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$1,173.53 as she returned to work on October 17, 1994 and received compensation for total disability through November 12, 1994. Appellant requested an oral hearing and by decision dated November 20 and finalized November 27, 1995 the hearing representative found appellant received an overpayment in the amount of \$1,043.03, that she was at fault in the creation of the overpayment and that the overpayment was not subject to waiver. He further found that overpayment should be recovered by withholding \$100.00 per month from appellant's continuing compensation benefits. The Office issued a decision on December 21, 1995 finding that appellant received an overpayment in the amount of \$1,043.03 and that the overpayment would be recovered by withholding the sum of \$100.00 from continuing compensation payments.

The Board finds that appellant received an overpayment in the amount of \$1,043.12.

The Office entered appellant on the periodic rolls on December 19, 1988 and provided her with a Form CA-1049 which instructed her to notify the Office immediately when she returned to work to avoid an overpayment of compensation. Appellant returned to work on October 17, 1994 and received continuing compensation benefits through November 12, 1994. Appellant acknowledged at the oral hearing that she had received an overpayment. The hearing representative calculated the overpayment amount by determining that appellant received a

check for the amount of \$1,217.00 covering the period from October 16 through November 12, 1994. He determined that appellant was not entitled to compensation for October 17 through November 6 and November 10 through November 12, 1994.¹ Therefore, appellant received an overpayment in the amount of \$1,043.12.²

The Board further finds that appellant was not without fault in the creation of the overpayment and that therefore it is not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act³ 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."⁴ 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 regulations⁵ 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

¹ Appellant did not return to work until October 17, 1994 and was therefore entitled to compensation for October 16, 1994. The hearing representative also found that appellant did not work from November 7 through November 9, 1994 and that the Office had not established whether her disability on these dates was due to her accepted employment injury.

² Appellant's compensation rate entitles her to \$43.47 per day.

³ 5 U.S.C. §§ 8101-8193, 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.320(b).

received the compensation check in question, she knew or should have known that the payment was incorrect.⁶

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 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).”⁷

In a letter dated November 2, 1994, the Office noted that appellant had been reemployed by the employing establishment and stated that as appellant had no loss of wage-earning capacity she was not entitled to continuing compensation payments. The Office stated, “Your last compensation check was for the period ending October 15, 1994. You will receive payment for October 16, 1994.”

The Office issued the check covering the period from October 16 through November 12, 1994 on November 12, 1994. Therefore, at the time appellant received the check covering the period from October 16 through November 12, 1992 she knew or should have known that she was not entitled to receive the entire amount of \$1,217.00 and that receipt of this sum of money constituted an overpayment.

As appellant was not without fault in the creation of the overpayment, the Office may not consider waiver of the overpayment.

The Board further finds that the Office properly determined to withhold \$100.00 from her periodic compensation payments.

Section 10.321(a) of the regulations⁸ 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.”

⁶ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

⁷ 20 C.F.R. § 10.320(c).

⁸ 20 C.F.R. § 10.321(a).

In the present case, the hearing representative noted that appellant received \$1,250.00 per month in compensation benefits and that her monthly expenses totaled \$1,050.00. He determined that appellant had an excess of \$200.00 per month and that \$100.00 should be withheld from her periodic compensation payments. The Board finds that the hearing representative properly considered the necessary factors in reaching his determination.

The decisions of the Office of Workers' Compensation Programs dated December 21 and November 27, 1995 are affirmed.

Dated, Washington, D.C.
September 2, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member