

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSE CARYE, claiming as widow of ROBERT J. CARYE and
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD,
Portsmouth, NH

*Docket No. 97-749; Submitted on the Record;
Issued July 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in this case in the amount of \$75,567.11 during the period November 19, 1988 through April 30, 1994; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; (3) whether the Office properly determined that recovery of the overpayment would be made by payment in full.

The Board has duly reviewed the case record and finds that an overpayment of compensation did occur in this case.

In the present case, on November 14, 1983 the Office accepted that appellant's husband sustained malignant mesothelioma due to factors of his federal employment and that he died on June 13, 1978 as a result thereof. The Office thereafter commenced payment of monthly compensation benefits to appellant. On December 5, 1988 the Office advised appellant that records showed she had received a total recovery of \$405,150.00 from a third party responsible for the employee's injury and death and that a refund would be made to the Office for \$65,401.08 of past compensation and medical benefits paid. Appellant was also advised that after payments had been made from the total recovery for costs, expenses and outstanding claims, a remainder existed in the amount of \$71,175.53. She was specifically advised that "item 3 below (the remainder) shows the amount remaining that will have to be offset by additional medical expenses or disability benefits before any further payments can be made on account of the injury." Appellant was also advised that "any additional compensation due in your case will be credited against the remainder of the recovery...." The record also contains copies of a "Petition For Leave To Partially Settle By Agreement With Third Parties," allegedly filed and approved by the Superior Court of the Commonwealth of Massachusetts on September 8, 1988 which noted that the Office had paid \$97,117.62 in compensation benefits and that in adjusting the lien of the Office, a surplus of \$71,175.53 existed, which would be retained by the claimant and would offset future compensation on account of the same injury and that the claimant would

not be entitled to further payments until eligible for additional compensation in an amount greater than the surplus.

By letter dated April 11, 1994, the Office advised appellant that the December 5, 1988 letter had advised her that there was a remainder of \$71,175.53 due from her third party recovery which would be offset by additional benefits before any future compensation payments could be made. The Office further stated that appellant's compensation payments should have been stopped at that time, but were not. Appellant was advised that she would receive her compensation entitlement for the period April 3 to April 30, 1994 and then she would stop receiving payments, which would be credited to the remainder. Appellant was advised that since she had received two additional recoveries since 1988, the National Solicitors Office would determine if there was any change in the remainder amount. By letter dated June 17, 1994, the Office advised appellant's representative that an overpayment existed due to appellant's continuing receipt of compensation benefits after the surplus in the amount of \$71,175.53 was established on September 6, 1988. This letter further advised that two additional statements of recovery had been approved and received since 1988. As appellant should not have received further compensation following the 1988 statement of recovery, until the surplus was absorbed, the 1989 and 1992 statements of recovery would be amended to reflect that appellant was not in receipt of compensation. Due to the additional 1989 and 1992 settlement recoveries, an additional surplus amount of \$58,101.61 had been created from which future compensation benefits would also be offset. Finally, appellant's representative was advised that the amount of \$7,000.95 had been erroneously accepted for refunds due the United States and would be credited against any required repayment of the overpayment. In a letter to appellant dated July 22, 1994, the Office advised appellant that records showed she had received third party recoveries in the amount of \$134,342.74, of which \$57,301.61 was a remainder. Appellant was advised that benefits must be offset against the remainder of recovery, before further compensation benefits could be made. On July 22, 1994 the Office also sent a second letter to appellant advising that records showed she had received a third party recovery of \$1,500.00, of which \$800.00 was a remainder from which future compensation benefits would be offset.

An Office worksheet indicates that appellant received compensation during the period November 19, 1988 to April 30, 1994 in the amount of \$75,567.11. The worksheet indicates that this amount should be "less incorrectly accepted additional refunds per N.O. SOL of \$7,000.95, for a total overpayment of \$68,566.16."

By preliminary decision dated November 15, 1994, the Office made a determination that an overpayment existed in appellant's case in the amount of \$75,567.11 because she continued to receive compensation for the death of her husband after reaching a settlement with a third party which resulted in a third party surplus. The Office also made a preliminary finding that appellant was at fault in this matter because she knew or should have known that she was not entitled to compensation while there as an outstanding third party settlement surplus. By decision dated November 15, 1994, the Office advised appellant that on December 5, 1988 the Office had found a remainder of \$71,175.53 from a third party settlement and on July 22, 1994 found an additional remainder of \$58,101.61 from two separate third party settlements. The Office stated that pursuant to section 8132 of the Federal Employees' Compensation Act, the surpluses shall be credited against future compensation benefits. The Office also found that

there was no authority by which appellant's compensation payments could continue to be paid until the surplus was fully absorbed.

Appellant thereafter requested a hearing before an Office hearing representative. By decision dated September 9, 1996, finalized September 13, 1996, the hearing representative found that appellant had received an overpayment of compensation in the amount of \$75,567.11 during the period November 19, 1988 through April 30, 1994. The hearing representative found that appellant was at fault in the creation of the overpayment and that the overpayment was due and payable in full.

The Board finds that an overpayment of compensation did occur in this case.

In the present case, on September 8, 1988 an order was entered in the Superior Court of the Commonwealth of Massachusetts by which appellant settled a third party claim arising from the death of her husband, in the amount of \$405,150.00. This settlement agreement noted that the Office had paid appellant \$97,117.62 in compensation benefits and that in adjusting the lien of the Office, a surplus existed in the amount of \$71,175.53 which would be retained by the claimant and would offset future compensation benefits. This settlement agreement also noted that appellant would not be entitled to further compensation payments until the surplus had been absorbed. By letter dated December 5, 1988, the Office similarly advised appellant that the third party recovery had created a surplus in the amount of \$71,175.53 which would be offset by compensation benefits before any further compensation payments could be made. Appellant also entered into two other third party settlements in 1989 and 1992, which created an additional surplus of \$58,101.61.

In this regard section 8132 of the Act,¹ instructs how adjustments are to be made after recovery from third party actions for compensation benefits paid or payable for that same injury. This section states as follows:

“If an injury or death from which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury.”

As the Office continued to pay appellant compensation benefits in the amount of \$75,567.11 during the period November 19, 1988 until April 30, 1994, during which periods appellant's payments should have been credited towards the surpluses; an overpayment of compensation did occur.

¹ 5 U.S.C. § 8132.

The Board finds, however, that the correct amount of overpayment is \$68,566.16. The evidence of record substantiates that appellant was overpaid \$75,567.11 because she received compensation benefits in that amount which she was not entitled to receive. The evidence of record also indicates that the Office had erroneously accepted \$7,000.95 as a refund, which should have been credited against the overpayment of compensation. With this credit adjustment, the Board finds that appellant received an overpayment of compensation in the amount of \$68,566.16.

The Board also finds that appellant was at fault in the creation of the overpayment and that therefore the overpayment was not subject to waiver.

Section 8129 of the 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

Section 10.320 of the implementing federal regulations⁴ 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
- (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 properly determined that appellant was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to receipt of continued compensation benefits while there was an outstanding third party settlement surplus. Appellant’s representative alleges that appellant did not know she was not entitled to continued compensation benefits because the December 5, 1988 letter advised appellant that an offset would be made against additional medical expenses or disability benefits. The Board notes, however, that the first sentence of the second paragraph of this letter further advised appellant

² 5 U.S.C. § 8129.

³ See *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

⁴ 20 C.F.R. § 10.320.

that “any additional compensation due in your case will be credited against the remainder of the recovery. Furthermore, appellant was very clearly advised by the September 8, 1988 “Petition for Leave to Partially Settle By Agreement with Third Parties” that in adjusting the lien of the Office, a surplus of \$71,175.53 existed, which would be retained by the claimant and would offset future compensation on account of the same injury and that the claimant would not be entitled to further payments until eligible for additional compensation in an amount greater than the surplus. The Board notes in this regard that the standard is “knew or should have known”. Appellant was represented by counsel, in both her third party action as well as in her compensation claim, who should have also fully explained to her the consequences of the third party settlement, before its acceptance. Appellant therefore knew, or should have known, that she was not entitled to receipt of future compensation benefits until the surpluses were absorbed. As appellant was at fault in the creation of the overpayment, waiver cannot be granted.

Finally, with respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.⁵ As appellant was not entitled to receipt of continuing compensation until the third party surpluses were fully absorbed, appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter and this Board lacks jurisdiction to review recovery of the overpayment.

The decision dated September 9, 1996 is hereby affirmed that appellant did receive an overpayment of compensation, that she was at fault in the creation of the overpayment and that the overpayment is therefore not subject to waiver. The decision dated September 9, 1996 is hereby modified to reflect that the amount of the overpayment is \$68,566.16.

Dated, Washington, D.C.
July 21, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ *Lewis George*, 45 ECAB 144 (1993).