

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BEVERLY E. LABBE and U.S. POSTAL SERVICE,  
POST OFFICE, Portland, Maine

*Docket No. 98-39; Submitted on the Record;  
Issued July 6, 1999*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$1,247.63 overpayment of compensation from April 17 through May 24, 1996; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment at the rate of \$50.00 per month.

The Office accepted that appellant sustained a closed fracture of the left ankle as a result of a traumatic injury on August 10, 1995. By letter dated April 11, 1996, the Office informed appellant that she would be paid compensation every four weeks until June 1, 1996 or until she returned to work. The Office further stated that appellant should notify the Office immediately upon her return to work to avoid an overpayment of compensation.

In response to the Office's April 11, 1996 letter, appellant submitted a note in which she indicated that she had returned to work for two hours per day on April 17, 1996.

In a letter dated September 4, 1996, the Office informed appellant of its preliminary determination that she received an overpayment of \$1,247.63. The Office stated that the overpayment occurred because appellant concurrently received compensation from the employing establishment for hours worked and total disability compensation benefits from the Office for the period April 17 to May 24, 1996. The Office further notified appellant of its preliminary determination that she was at fault in the creation of the overpayment and advised appellant that she could submit additional evidence or arguments and provided her an overpayment recovery questionnaire to complete and submit.

Appellant submitted a completed overpayment recovery questionnaire and requested a prerecoupment hearing, which was held on June 24, 1997.

By decision dated August 18, 1997 and finalized August 29, 1997, an Office hearing representative found that appellant received an overpayment of compensation in the amount of \$1,247.63, that she was not without fault in the creation of the overpayment and that she should submit \$50.00 per month in repayment.

The Board finds that the Office properly determined that an overpayment of compensation occurred in this case, but that the case is not in posture for a decision on the amount of the overpayment.

The record establishes that appellant returned to work at the employing establishment for two hours per day from April 17 to 30, 1996, three hours per day from May 1 to 7, 1996, four hours per day from May 8 to 15, 1996, five hours per day from May 16 to 20, 1996 and six hours per day from May 21 to 24, 1996. Office computer printouts establish that the Office paid appellant compensation for total disability from April 17 to 27, 1996 as part of a check issued April 27, 1996 and covering the period March 31 to April 27, 1996. However, the record contains no Office computer printout or other evidence indicating that appellant received compensation for temporary total disability from the Office for the period April 28 to May 24, 1996. As it is unclear from the record whether appellant received compensation for that period, the case will be remanded to the Office to redetermine the period and the amount of the overpayment of compensation. On remand the Office should obtain all relevant records and thereafter issue a decision with regard to the amount of the overpayment.

The Board further finds that the Office's determination of fault must also be set aside.

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 conscience."<sup>1</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>2</sup>

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

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<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

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

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 with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.<sup>4</sup>

The Office determined that appellant was at fault in creating the overpayment because it had informed her by letter dated April 11, 1996, that she would receive compensation from March 31 to April 27, 1996 and specified the amount of compensation for that period. The Office further informed appellant that she would thereafter receive compensation every four weeks until June 1, 1996 and that she must inform the Office immediately when she returned to work to avoid an overpayment. However, the Board has held that form letters cannot be used to establish what a claimant knew or should have known with regard to the receipt of a subsequent payment because it contains no information regarding the period covered by a specific subsequent check.<sup>5</sup> The Board has explained that where the record contains no evidence that the employee was apprised by the Office, as of the time he or she accepted compensation checks, of the specific periods the checks covered so as to put the employee on notice that he or she was being paid incorrectly for a period of time during which the employee worked, the employee cannot be found at fault in the creation of the resulting overpayment.<sup>6</sup> In the present case, the Office failed to produce copies of the checks or other relevant payment records demonstrating notation of the dates covered by the checks that appellant improperly received and therefore, it has not established that she knew or should have known she received improper payments of compensation. Therefore, appellant cannot be found to be at fault in the creation of the overpayment on that basis and the case must be remanded to the Office for consideration of waiver.

The Board additionally finds that it does not have jurisdiction over the method of recovery in this case.

In the present case, the Office is not seeking recovery from continuing compensation benefits. The Board notes that it does not have jurisdiction under the Debt Collection Act<sup>7</sup> to consider the matter of recovery of an overpayment against the assets of the salary of an

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<sup>3</sup> 20 C.F.R. § 10.320.

<sup>4</sup> See *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>5</sup> *Claude T. Green*, 42 ECAB 174 (1990).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 5511 *et seq.*

employee.<sup>8</sup> The Board's jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Act.

The decision of the Office of Workers' Compensation Programs dated August 18, 1997 and finalized August 29, 1997 is affirmed in part, set aside in part and reversed in part and the case is remanded for further proceedings in accordance with this decision.

Dated, Washington, D.C.  
July 6, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>8</sup> See *Levon H. Knight*, 40 ECAB 658 (1989).