

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROZELL HUNT and U.S. POSTAL SERVICE,
ROY ROYALL STATION, Houston, TX

*Docket No. 99-212; Submitted on the Record;
Issued August 21, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of a \$115,606.86 overpayment of compensation.

On August 2, 1980 appellant, then a 37-year-old mail clerk, was placing a 52-pound box of books on a scale when she developed back pain. The Office accepted appellant's claim for a lumbosacral stain. Appellant received continuation of pay for the period August 5 through September 18, 1980. She returned to regular duty on September 29, 1980. She filed a claim for recurrence of disability for the period November 3 through 16, 1981 and subsequently received temporary total disability compensation for that period. Appellant stopped working again on July 10, 1982. A myelogram showed a herniated L5-S1 disc. Appellant underwent surgery on August 30, 1982 for a hemilaminectomy with removal of the ruptured disc and foraminotomy of the S1 nerve root. The Office accepted appellant's herniated disc as causally related to her employment injury and paid temporary total disability compensation for the period July 10 through December 25, 1982. She returned to work on December 27, 1982.

On August 19, 1994 appellant filed a claim for a recurrence of disability, effective August 4, 1994. She indicated that she had worked as a real estate sales associate and as a tax preparer since 1988. In a January 18, 1995 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between the injury and the claimed condition or disability. In a February 8, 1995 letter, appellant submitted additional medical evidence and requested a review of the written record by an Office hearing representative. In a June 14, 1995 decision, an Office hearing representative found that the evidence submitted by appellant was sufficient to require further development of her claim. He therefore set aside the Office's January 18, 1995 decision and remanded the case for further development, to be followed by a *de novo* decision. The Office subsequently accepted appellant's claim and began payment of compensation.

In a September 25, 1996 letter, the Office informed appellant that it had made a preliminary determination that she had received an overpayment in the amount of \$130,691.43 because the Office erroneously paid her for the wrong period, the wrong pay date, and the wrong effective pay date. In an accompanying memorandum, the Office indicated that appellant had been paid compensation retroactive to September 22, 1988 when she had stopped working for the employing establishment. The Office stated that appellant was not entitled to compensation for the period September 22, 1988 through August 3, 1994. The Office further indicated that appellant's compensation was computed on the basis of a loss of wage-earning capacity but, at the time compensation was paid, payment was made on the basis of total disability. The Office indicated that, effective August 18, 1996, appellant's compensation was adjusted to the correct loss of wage-earning capacity compensation but she had received an overpayment for the period August 4, 1994 to August 17, 1996. The Office stated that it had made a preliminary finding that appellant was at fault in the creation of the overpayment because, based on the date of her recurrence and the amount of compensation she received, she should have been reasonably aware that "something was wrong." Appellant was advised of her right to submit additional evidence if she disagreed that an overpayment had occurred, disagreed with the amount of the overpayment, believed that the overpayment occurred through no fault of her own and that the overpayment should therefore be waived. She was also informed of her right to request a hearing before an Office hearing representative. In a separate September 25, 1996 decision, the Office found that appellant had an 82 percent loss of wage-earning capacity based on her earnings as an real estate agent.

In a November 6, 1996 letter, appellant requested a review of the written record. She indicated that she had stopped working at the employing establishment on December 17, 1987. She stated that she resigned September 2, 1988, claiming that she was coerced into resigning because the employing establishment threatened to have her charged with embezzlement and misappropriation of funds if she did not pay a \$8,561.68 shortage in her window account. Appellant related that she had been negligent in leaving cash and checks in an unlocked drawer in the window area of the employing establishment when it was burglarized instead of transferring the cash and checks from her drawer for safety purposes. She indicated that, after she exhausted the grievance process, she had no other recourse but to resign and pay the shortage from her retirement account. Appellant contended that her resignation was involuntary due to duress and coercion by employing establishment officials. She stated that she was surprised when she was informed that she would be paid compensation for the period September 22, 1988 through May 25, 1995. Appellant concluded that the Office claims examiner had perceived the employing establishment's lack of social responsibility, good conscience and equity which had caused her a loss of wage-earning capacity beginning December 18, 1987.

In a June 30, 1997 decision, an Office hearing representative found that the Office had made several errors in that it had paid appellant on the basis of her pay rate at the time of her last employment rather than her pay at the time of recurrence of disability. He also noted that appellant claimed she was entitled to augmented compensation due to a daughter born on October 1, 1970, who attended college and became married on March 18, 1991. The hearing representative concluded that the amount of the overpayment might therefore be incorrect. He also noted appellant's argument that her resignation from the employing establishment was under duress was not reviewed to determine whether appellant had a reasonable belief that she

was entitled to compensation for the period after her resignation. The hearing representative noted that the Office had to review its records to determine whether appellant had filed a claim for the alleged coercion and duress which she contended resulted in her resignation. The Office hearing representative therefore vacated the Office's preliminary determination of overpayment and remanded the case to the Office to recalculate the amount of the overpayment and make a *de novo* decision on the issue of fault. He stated that the overpayment should be calculated for the periods before and after August 4, 1994 and a separate determination of fault should be issued for each period.

In a November 6, 1997 letter, the Office informed appellant that it had made a preliminary determination that she had received a \$115,606.86 overpayment because the Office had erroneously paid compensation for the period September 22, 1988 through August 3, 1994. The Office indicated that it had made a preliminary finding that she was fully aware that her recurrence of disability had not occurred until August 4, 1994 and that the amount of compensation she received for the period beginning September 22, 1988 should have caused her to reasonably realize or been aware that she was paid incorrectly. The Office again informed appellant of her right to submit additional evidence and her right to a hearing before an Office hearing representative.

In a November 14, 1997 letter, the Office informed appellant that it had made a preliminary determination that she had received a \$6,976.09 overpayment in compensation for the period August 4, 1994 through August 17, 1996 because she had been paid temporary total disability compensation when she was only entitled to compensation for a loss of wage-earning capacity. The Office further found that appellant was not at fault in the creation of the overpayment and therefore was entitled to waiver of recovery of the overpayment. In a December 14, 1997 letter, appellant requested waiver of recovery of the overpayment. In a January 15, 1998 decision, the Office granted appellant's request for waiver of recovery of the overpayment for the period August 4, 1994 through August 17, 1996.

In a separate January 15, 1998 decision, the Office found that appellant received a \$115,606.86 overpayment in compensation for the period September 22, 1988 through August 3, 1994. The Office further found that appellant was at fault in the creation of the overpayment on the grounds that she was aware that her recurrence of disability had not occurred until August 4, 1994 and she should have reasonably realized by the amount of compensation she received for the period beginning September 22, 1988 that she had been paid incorrectly. The Office began recovering the overpayment by withholding \$408.76 from her continuing compensation checks.

The Board finds that appellant received a \$115,606.86 overpayment of compensation.

Appellant filed a claim for a recurrence of disability for the period beginning August 4, 1994. Although she had resigned from the employing establishment effective September 2, 1988, she did not file a claim for compensation for any period prior to August 4, 1994. She also did not submit any medical evidence to establish that she was disabled for work from the employing establishment after September 2, 1988 due to the effects of her accepted back injury or due to any other employment injury. Appellant, therefore, has not established that she claimed or was otherwise entitled to compensation for the period

September 22, 1988 to August 1, 1994 or any part of that period. As a result, any compensation received for the period in question constituted an overpayment in compensation.

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

Section 8129(a) of the Federal Employees' Compensation Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."¹ 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 regulations provide 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."²

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Appellant filed a claim for compensation due to a recurrence of disability only for the period after August 4, 1994. Therefore, when she received a payment for the period September 22, 1988 through August 3, 1994, she knew or should have known that the payment of compensation for that period was incorrect. Appellant alleged that she had informed the Office that she had been forced to resign her position under duress and coercion and, therefore, she formed a reasonable belief that the Office had determined that she was entitled to compensation for the period in question. Appellant, however, had received compensation for her back condition only after she had submitted a claim for compensation and submitted medical evidence to establish that her back condition was causally related to her August 2, 1980 employment injury. Appellant, therefore, could not have reasonably expected to receive compensation for this period of time. Appellant should have known that the \$115,606.86 check she received representing almost six years of retroactive compensation payments was incorrect because she had not filed a claim for compensation for the period in question and had not submitted any medical evidence to establish an employment-related disability for the pertinent

¹ 5 U.S.C. § 8129(b).

² 20 C.F.R. § 10.320(b).

period. Appellant claimed that the Office was equally at fault in the creation of the overpayment. The Board has held, however, that where a claimant is at fault in the creation of the overpayment, the overpayment must be recovered, even though the overpayment resulted through negligence on the part of the government.³

The decision of the Office of Workers' Compensation Programs, dated January 15, 1998, is hereby affirmed.

Dated, Washington, D.C.
August 21, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³ *Fergus Tait*, 30 ECAB 929 (1979).