

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WANDA L. WISNIEWSKI and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 99-272; Submitted on the Record;
Issued June 23, 2000*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$10,860.34 overpayment of compensation for the period April 17 to September 16, 1995; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision on August 3, 1998¹ which affirmed the Office's September 26, 1995 and April 11, 1996 decisions, on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on or after May 2, 1995, due to her March 19, 1987 employment injury.² The facts and circumstances of the case up to this point are contained in the Board's prior decision and are incorporated herein by reference.

Prior to the Board's August 3, 1998 decision, the Office had issued a preliminary determination on April 29, 1996, which stated that appellant received a \$10,860.34 overpayment of compensation for the period April 17 to September 16, 1995.³ The Office determined that appellant was at fault in the creation of the overpayment such that the overpayment was not subject to waiver. The Office found that appellant knew she could not accept the payments because she was advised by various documents to return such payments after returning to work for the employing establishment; these documents included a July 20, 1988 Form CA-1653, an April 6, 1992 Form CA-1049 and periodic Forms CA-1032.

¹ Docket No. 96-1962.

² On March 19, 1987 appellant sustained an employment-related low back strain, neck muscle spasm, and bulging disc at L4-5. Appellant returned to light-duty work for the employing establishment and, on May 2, 1995 she stopped work alleging that she sustained an employment-related recurrence of disability.

³ The Office noted that appellant was not entitled to compensation after returning to work on April 17, 1995.

By decision dated September 9, 1998, the Office finalized its preliminary determination with respect to the amount of overpayment and the finding of fault. The Office determined that because appellant was at fault in the creation of the \$10,860.34 overpayment she was not entitled to receive a waiver of the overpayment.⁴

The Board finds that appellant received a \$10,860.34 overpayment of compensation for the period April 17 to September 16, 1995.

In the present case, the Office determined that appellant received \$10,860.34 in compensation for the period April 17 to September 16, 1995 despite the fact that she was not entitled to compensation for this period. The record contains evidence, which shows that appellant received \$10,860.34 in compensation for this period. The record further reveals that appellant was not entitled to receive Office compensation for the period April 17 to May 1, 1995 because she returned to work in a light-duty job at the employing establishment for this period and was not entitled to receive both her salary and wage-loss compensation payments. Appellant was not entitled to receive Office compensation for the period May 2 to September 16, 1995 because, as found in several Office decisions and the Board's August 3, 1998 decision, appellant did not meet her burden of proof to establish that she sustained an employment-related recurrence of disability on or after May 2, 1995 due to her March 19, 1987 employment injury. Therefore, the Office properly determined that appellant received a \$10,860.34 overpayment for the period April 17 to September 16, 1995.

The Board finds, however, that the Office improperly determined that appellant was at fault in the creation of the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act⁵ 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.⁶ 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 this subchapter or would be against equity and good conscience."⁷

⁴ The Office also appears to have determined that the \$10,860.34 overpayment should be recovered in a lump-sum payment. However, as recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320(b) of Title 20 of the Code of Federal 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
- (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”⁸

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

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 affecting payments, knowledge of the occurrence of 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).”⁹

The Board finds that the Office did not sufficiently support its determination that appellant was at fault in the creation of the \$10,860.34 overpayment. In its fault determination, the Office suggested that appellant returned to work for the entire period April 17 to September 16, 1995 and, therefore, should have known that she was not entitled to compensation for this period. However, appellant only returned to work for the brief period April 17 to May 1, 1995 and filed a claim alleging that she was entitled to compensation on and after May 2, 1995 due to an employment-related recurrence of disability. Appellant did not learn that her recurrence claim had been denied until the Office issued its decision on September 26, 1995, *i.e.*, a date after the period April 17 to September 16, 1995.

⁸ 20 C.F.R. § 10.320(b).

⁹ 20 C.F.R. § 10.320(c).

The Office indicated that several forms including a July 20, 1988 Form CA-1653 and an April 6, 1992 Form CA-1049, advised appellant that she could not accept Office compensation payments for the period April 17 to September 16, 1995. Although the forms indicated that appellant should return Office payments intended for periods she worked after returning to the employing establishment, the generalized statements contained in the forms do not show, without additional evidence, that appellant reasonably should have known that she received improper payments. Given the brief period appellant returned to work and her belief that she was entitled to disability compensation on and after May 2, 1995, appellant could have reasonably believe that she was entitled to receive the Office payments for the period in question.¹⁰

For these reasons, the Office improperly determined that appellant was at fault in the creation of the overpayment of compensation. Therefore, the Office's final determination on fault will be set aside and the case remanded to the Office for evaluation of appellant's waiver claim in accordance with the relevant standards for an overpayment, which was not created through fault of the recipient.¹¹ After such development as deemed necessary, the Office should issue an appropriate decision.

¹⁰ It should also be noted that the record does not contain copies of the Office compensation checks received by appellant, which show the periods for which they provided compensation.

¹¹ When a recipient of an overpayment is without fault in its creation, then, in accordance with section 8129(b) of the Act, the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience; *see* 20 C.F.R. §§ 10.322 and 10.323 for the relevant standards.

The decision of the Office of Workers' Compensation Programs dated September 9, 1998 is affirmed with respect to the overpayment amount. The September 9, 1998 decision is reversed with respect to the fault issue and set aside with respect to the waiver issue and the case remanded to the Office for further development with respect to the waiver issue in accordance with this decision of the Board.

Dated, Washington, D.C.
June 23, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member