

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SUSAN H. COOMBS and U.S. POSTAL SERVICE,  
POST OFFICE, Wilmington, DE

*Docket No. 97-1243; Submitted on the Record;  
Issued March 6, 2000*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on or after September 4, 1996 causally related to her accepted July 21, 1980 employment injury; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$2,431.86 for the period February 25, 1995 through February 3, 1996 inasmuch as appellant no longer had any dependents; (3) whether the Office properly found that appellant was with fault in the creation of the overpayment in the amount of \$2,431.86; and (4) whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$200.00 from each of appellant's continuing periodic compensation payments.

On July 21, 1980 appellant, then a 32-year-old "LSM" operator, filed a traumatic injury claim (Form CA-1) alleging that on that date she experienced lower back pain when she lifted a tray of mail from a hamper. Appellant stopped work on July 21, 1980.

The Office accepted appellant's claim for a lumbar strain and low back syndrome and authorized appellant's subsequent back surgeries.

In a June 21, 1996 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$2,431.86 during the period February 25, 1995 through February 3, 1996 because appellant continued to receive compensation at the three-fourths pay rate after her daughter turned 18 years old on February 24, 1995. The Office advised appellant that she was at fault in the creation of the overpayment because she should have been aware that she continued to receive compensation at the incorrect pay rate after she no longer had a qualifying dependent after February 24, 1995. In addition, the Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment, if she believed that the overpayment occurred through no fault of her own and if

she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

On September 11, 1996 appellant filed a claim (Form CA-2a) alleging that on September 4, 1996 she sustained a sprained right ankle and experienced weakness and pain in both of her legs. On October 2, 1996 appellant filed a Form CA-2a alleging that on September 29, 1996 she sustained a recurrence of disability when she sprained her right ankle.<sup>1</sup> Appellant indicated in both Forms CA-2a that she was performing light-duty work on the dates of her alleged recurrence of disability.

By letter dated October 24, 1996, the Office advised appellant to submit factual and medical evidence supportive of her recurrence claims.

By decision dated January 7, 1997, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on or after September 4, 1996 causally related to her accepted July 21, 1980 employment injury.

By decision dated February 6, 1997, the Office finalized its preliminary overpayment decision and finding of fault. In addition, the Office determined that \$200.00 would be withheld from appellant's continuing compensation payments.<sup>2</sup>

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of disability on or after September 4, 1996 causally related to her accepted July 21, 1980 employment injury.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.<sup>3</sup> As part of her burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.<sup>4</sup>

In the present case, appellant has neither shown a change in the nature and extent of her injury-related condition or a change in the nature and extent of the light-duty requirements. The

---

<sup>1</sup> Previously, on July 24, 1996 appellant filed a Form CA-1 alleging that on that date she experienced severe back and leg pain while lifting a case of mail. On September 4, 1996 appellant filed a Form CA-1 alleging that she sustained a sprained right ankle on that date while in a parking lot. The Office determined that these claims should be considered claims for a recurrence of disability of the July 21, 1980 accepted employment injury and consolidated these claims into the present claim.

<sup>2</sup> The Board notes that subsequent to its January 7 and February 6, 1997 decisions, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).

<sup>3</sup> *Terry R. Hedman*, 38 ECA 222, 227 (1986).

<sup>4</sup> *Daniel Deparini*, 44 ECAB 657, 659 (1993).

record shows that following the July 21, 1980 employment-related lumbar strain and low back syndrome, appellant returned to work in a light-duty capacity with certain work restrictions on May 29, 1996. The record does not establish, nor does appellant allege, that the claimed recurrence of total disability was caused by a change in the nature or extent of the light-duty job requirements.

In support of her recurrence claims, appellant submitted the progress notes of Dr. Peter B. Bandera, a Board-certified physiatrist, covering the period June 17 through December 2, 1996. These progress notes indicated Dr. Bandera's findings on physical examination and diagnoses which included, status post L4-5 fusion, low back syndrome with diffuse strain and cervical strain pattern, status postexacerbation in July 1996, exacerbation of degenerative joint disease of the lumbosacral spine, a history of chronic pain and status post multiple ankle strains secondary to leg weakness. These progress notes also indicated appellant's work restrictions and medical treatment. Dr. Bandera's progress notes are insufficient to establish appellant's burden inasmuch as they failed to address whether appellant's conditions were causally related to her accepted July 21, 1980 employment injury.

In further support of her recurrence claims, appellant submitted a September 4, 1996 disability certificate of Dr. James L. Longmore, a Board-certified family practitioner, revealing that she was off work from September 4 through 8, 1996 and that she could return to work on Monday, September 9, 1996. His disability certificate is insufficient to establish appellant's burden because it failed to indicate a diagnosis and to discuss whether or how the diagnosed condition was caused by appellant's accepted July 21, 1980 employment-related injury.<sup>5</sup>

Appellant also submitted Dr. Longmore's September 4, 1996 discharge instructions regarding her sprained right ankle. These discharge instructions failed to address a causal relationship between appellant's right ankle condition and her July 21, 1980 employment injury. Therefore, they are insufficient to establish appellant's burden.

Additionally, appellant submitted Dr. Bandera's September 30, 1996 disability certificate indicating that she could not work from September 30 through October 1, 1996 secondary to her right ankle sprain. His disability certificate also indicated that appellant could return to work on October 2, 1996. Dr. Bandera's October 14, 1996 disability certificate revealed that appellant could not work on October 10 and 11, 1996 due to her back pain. His disability certificates are insufficient to establish appellant's burden because they failed to discuss whether or how the diagnosed conditions were caused by appellant's July 21, 1980 employment-related injury.<sup>6</sup>

Because there is no medical evidence of record establishing that appellant sustained a recurrence of disability on or after September 4, 1996 that was causally related to her accepted July 21, 1980 employment injury, the Board finds that appellant has failed to satisfy her burden of proof.

---

<sup>5</sup> *Id.*

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

The Board further finds that the Office properly determined that appellant received an overpayment in the amount of \$2,431.86 for the period February 25, 1995 through February 3, 1996 inasmuch as appellant no longer had any dependents.

In this case, the record reveals that appellant's daughter turned 18 years old on February 24, 1995. Further, the record reveals that appellant changed her health benefits from family to self-coverage on August 7, 1995. In addition, a January 1, 1996 Form CA-1032 indicated that appellant no longer had any dependents. The Office calculated that appellant actually received compensation at the three-fourths pay rate for dependents in the amount of \$21,960.14 and subtracted \$19,528.28, the amount appellant should have received at the two-thirds pay rate during period February 25, 1995 through February 3, 1996. Therefore, the Office properly found that an overpayment existed in the amount of \$2,431.86.

The Board, however, finds that the Office improperly found that appellant was with fault in the creation of the overpayment in the amount \$2,431.86.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>7</sup> The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."<sup>8</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>9</sup> In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because she relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.<sup>10</sup>

---

<sup>7</sup> 5 U.S.C. § 8129.

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> *Harold W. Steele*, 38 ECAB 245 (1986).

<sup>10</sup> 20 C.F.R. § 10.320(c)(1).

In determining whether an individual is at 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.”<sup>11</sup>

In this case, the Office applied the third standard -- appellant accepted payments which she knew or should have known were incorrect -- in finding appellant to be at fault in the creation of the overpayment in the amount of \$2,431.86. After consideration of all the particular circumstances surrounding the overpayment, the Board finds that the facts of this case do not establish that appellant knew or should have been expected to know that she accepted incorrect compensation payments in the amount of \$2,431.86. In response to the Office's June 21, 1996 preliminary determination letter regarding her fault in the creation of the overpayment, appellant submitted a July 15, 1996 letter. In this letter, appellant stated that during the period in question her daughter was still a full-time high school student, although she was 18 years old. She also stated that her daughter was married on August 1, 1995 and that she informed David Grubb, an employing establishment workers' compensation specialist, about the marriage. Appellant then stated that Mr. Grubb told her that he would inform the Office about the change in her dependency status and that she located a letter that Mr. Grubb wrote to the Office concerning this change. She further stated that she was unaware that she continued to receive benefits based on her dependency status since she had dropped her daughter from her health benefits plan. Appellant noted that changes had been made in her payments and stated that, since she did not receive an explanation from the Office about the changes, she assumed they were based on the change in her health insurance premium and dependency status. She then requested that the Office provide an explanation for the changes in her compensation checks. Although the record establishes that appellant knew she was not entitled to augmented benefits, there is no evidence of record establishing that appellant knew she accepted incorrect payments in light of the changes that occurred in her compensation payments after she notified the Office about the change in her dependency status. Because there is no evidence in the record establishing that appellant knew or should have known that she accepted incorrect payments, the Board finds that appellant was without fault in the creation of the overpayment.

Inasmuch as it has been determined that appellant was without fault in the creation of the overpayment in the amount of \$2,431.86, the Office may only recover the overpayment in

---

<sup>11</sup> 20 C.F.R. § 10.320(b).

accordance with section 8129(b) of the Act,<sup>12</sup> if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.<sup>13</sup> Therefore, the case should be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the overpayment under 20 C.F.R. §§ 10.322, 10.323.

The February 6, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed in part with respect to the fact and amount of the overpayment of compensation, and set aside in part with respect to the finding that appellant was with fault in the creation of the overpayment. The case is remanded to the Office for further proceedings consistent with this decision of the Board to be followed by an appropriate decision. The Office's January 7, 1997 decision denying appellant's recurrence claims is hereby affirmed.

Dated, Washington, D.C.  
March 6, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

---

<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.322, 10.323.