

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORA MARTIN and U.S. POSTAL SERVICE,
POST OFFICE, Grosse Ile, MI

*Docket No. 97-1686; Submitted on the Record;
Issued May 11, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$6,361.68 for the period March 2 through August 16, 1996; (2) whether the Office properly determined that appellant was at fault in creation of the overpayment; and (3) whether the Board has jurisdiction to consider the method of recovery of a finalized overpayment.

On September 21, 1988 appellant, a 34-year-old distribution clerk, injured her neck and right shoulder while sorting and lifting mail. She filed a claim for benefits on January 13, 1989, which the Office accepted for a cervical strain. Appellant returned to work in a part-time, limited capacity on February 3, 1989. She was subsequently paid appropriate compensation for intermittent disability by the Office. The Office accepted appellant's February 10, 1992 claim for recurrence of disability, based on the accepted condition of cervical strain with radiculitis. Appellant again stopped working on July 9, 1994 and returned to work for four hours per day on October 18, 1994. The Office paid compensation for partial disability based on the other four hours; it did not find that she was entitled to compensation for total disability.

Appellant filed another claim for recurrence of disability on August 19, 1994, which the Office denied by decision dated December 20, 1994.

Appellant subsequently filed several claims for recurrence of disability, all of which the Office denied in decisions rendered on the following dates: December 20, 1994; March 7, June 16, August 2 and November 15, 1995; May 8 and November 22, 1996; March 7 and September 5, 1997. Appellant returned to work in a part-time capacity for four hours a day.

By letter dated November 7, 1996, the Office informed appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$3,661.68 for the period March 2 through August 17, 1996. The Office found that appellant was at fault in creating the overpayment because, although she had been receiving and was entitled to

compensation based on partial disability for, four-hours per day, the Office erroneously began paying her on calendar days for total disability. The Office found that this resulted in an overpayment of \$3,661.68. The Office further found that appellant was aware that she was not entitled to total disability compensation in light of the numerous Office decisions denying her claims for recurrences of disability. The Office therefore found that appellant had accepted payments which she either knew or reasonably should have been expected to know were incorrect, and was therefore at fault in creating the overpayment of compensation. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review.

By letter dated February 3, 1997, the Office issued a revised preliminary determination that an overpayment of compensation had occurred, and recalculated that the amount of the overpayment for the period March 2 through August 16, 1996 was \$6,361.68. The Office indicated that appellant had been being paid compensation for total disability for this period, when she was only entitled to compensation for partial disability. The Office recalculated the amount of overpayment by taking the amount of compensation to which she was actually entitled for partial disability from March 2 through August 16, 1996 (24 weeks at three fourths of her weekly pay rate of \$579.15, which equalled \$5,212.32), and subtracted this figure from the total amount of compensation paid by the Office during this period, \$11,574.00. The Office also noted that appellant had completed the overpayment questionnaire, and stated that it required additional financial information on the overpayment questionnaire.

Appellant completed and resubmitted the overpayment questionnaire, dated March 10, 1997, indicating that she had a current monthly income of \$2,111.00, including \$1,175.00 in rent payments from a house she owned, and \$2,266.00 in monthly expenses. Appellant claimed that it would constitute a severe financial hardship to repay the debt and that she was not in a position to “attempt to make” such an effort because the Office had recently terminated her entitlement to all forms of compensation. In addition, appellant checked the “no” box in response to the question “Not counting your home, family automobile, or household furnishings, do you or your spouse own any valuable property or real estate?”

By decision dated March 27, 1997, the Office found that appellant was at fault in creating the overpayment of compensation for the period March 2 through August 17, 1996, which amounted to \$6,361.68. The Office found that appellant was not forthcoming in reporting her assets and income in an attempt to evade repayment of the debt. The Office noted that, although appellant had denied in the overpayment questionnaire that she owned any valuable property or real estate, not counting her home, family automobile, or household furnishings, she had submitted copies of utility billings addressed to her for two other addresses which she apparently owned, from which income was presumably derived and which she deliberately failed to include in her questionnaire. The Office concluded that because appellant had tried to conceal assets and income, thus casting doubt on her claims and diminishing her credibility in making financial disclosures, it was appropriate to presume that she actually had more than sufficient assets to repay the entire debt of \$6,361.68. It therefore ordered full and immediate repayment of the \$6,361.68 overpayment.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,361.68 for the period March 2 through August 17, 1996. The record shows that the Office incorrectly issued checks for temporary total disability compensation to appellant covering this period when she was only entitled to compensation for four hours. Therefore an overpayment was created in the amount of \$6,361.68.

The Board further finds that the Office properly determined that appellant was not without fault in creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act¹ provides that an overpayment must be recovered 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.²

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

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

Even if an overpayment results from negligence on the part of the Office, this does not excuse the employee from accepting any payment which she knew or should have been expected to know was incorrect not entitled.⁴ In the instant case, appellant should have been aware that, as of March 2, 1996, when she began receiving compensation based on total disability, that she was not entitled to compensation for eight hours or total disability. Appellant continued to receive such payments until August 17, 1996, creating an overpayment in the amount of \$6,361.68. Because appellant had been receiving compensation for partial disability at four

¹ 5 U.S.C. § 8129(a)-(b).

² *Bonnye Mathews*, 45 ECAB 657 (1994).

³ 20 C.F.R. § 10.320(b).

⁴ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

hours a day and has her claims for recurrence of disability rejected throughout the period of overpayment, she knew or should have known that she was not entitled to compensation for total disability. In keeping such payments, an overpayment was created. Upon her receipt of the first check issued for payment of total disability compensation, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, appellant continued to accept these checks until the Office noted the error and advised her in its November 7, 1996 letter that she had received an overpayment of compensation.

The Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the payments made by the Office from March 2 to August 17, 1996 were incorrect and created an overpayment in the amount of \$6,361.68. As appellant is not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$6,361.68, may not be waived. The Office's finding that appellant was not without fault in the creation of the overpayment is affirmed.

The Board finds that it lacks the jurisdiction to determine the amount to be paid by appellant or the method of payment for the purpose of the recovery of a finalized overpayment.

The Board has held that it lacks jurisdiction to review the method of collection of the overpayment unless it involves offset against continuing compensation benefits.⁵ The Board notes that under *Robert N. Vachon*,⁶ the Board does not have jurisdiction over the amount appellant is required to pay for the purpose of recovery of the overpayment when there is no further entitlement to compensation, and appellant is not in receipt of continuing compensation benefits.⁷ In the present case, the Board lacks jurisdiction over the method of recovery as there is no entitlement to continuing compensation.

⁵ See *Edward O. Hamilton*, 39 ECAB 1131 (1988); *Jesse L. Green*, 39 ECAB 174 (1987).

⁶ 36 ECAB 502 (1985).

⁷ See also *Marshall L. West*, 36 ECAB 490 (1985).

The decision of the Office of Workers' Compensation Programs dated March 27, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 11, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member