

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. PINKNEY and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

*Docket No. 98-1196; Submitted on the Record;
Issued May 8, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant was at fault in the matter of the overpayment of \$1,848.21 that occurred from July 23 to August 16, 1997; and if so, (2) whether the Office of Workers' Compensation Programs properly recovered the overpayment by deducting the entire amount from compensation due following a leave buy back.

Appellant, a machine operator, developed tendinitis of the right shoulder, cervical sprain and a right rotator cuff tear while in the performance of her duties. On February 20, 1997 the Office placed appellant on the periodic compensation rolls and advised as follows: "To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work. Also, advise us immediately of any change in address or of any change in the status of your dependents." (Emphasis in the original.)

Appellant returned to limited duty on July 23, 1997. The record shows that on August 16, 1997 the Office issued a compensation check for the preceding 28 days or for the period July 20 to August 16, 1997.

On October 17, 1997 the Office made a preliminary determination that an overpayment occurred beginning July 23, 1997 and that appellant was at fault because she did not return the compensation check she received after she returned to work, as the Office had directed in its February 20, 1997 letter.

Appellant requested that the Office make a decision based on the written evidence. She argued that she was not at fault in the matter of the overpayment because she had informed the Office early on that, she did not understand the forms or the process and that the Office was to direct all correspondence to her representative. Appellant noted that the Office did not direct its February 20, 1997 letter to her representative. She also argued that she honestly and reasonably believed that she was entitled to the check that she cashed. Appellant explained that she had

accumulated numerous hours of leave without pay and that the check she cashed covered her period of absence. She noted that the check covered a period in which she was eligible for benefits and was issued in an amount that was less than she had received in the past. Appellant also noted that there had been numerous months in which she went without compensation. She further argued that the employing establishment had always taken the responsibility of notifying the Office of appellant's return to duty. Appellant stated that she acted in good faith.

In a decision dated November 21, 1997, the Office finalized its preliminary determination of fault. The Office noted that appellant was aware by letter dated February 20, 1997 that an overpayment would result if she returned to work and received wages while in receipt of compensation. The Office found that after appellant returned to work she should have reasonably been aware that she would be overpaid if she received compensation checks. The Office advised appellant that she should forward a check in the amount of \$50.00 each month until the overpayment was repaid.

Appellant applied for reinstatement of leave for various periods in 1995 and 1996. On December 10, 1997 the Office approved appellant's application and deducted the entire amount of the overpayment from compensation due. The Office noted that 20 C.F.R. § 10.321 allowed decreasing subsequent payments of compensation giving due regard to one's financial situation.

The Board finds that appellant was at fault in the matter of the overpayment of \$1,848.21 that occurred from July 23 to August 16, 1997.

An overpayment of \$1,848.21 occurred in the present case when appellant returned to work on July 23, 1997 with no wage loss and later received a compensation check for the period July 20 to August 16, 1997. Section 8129 of the Federal Employees' Compensation Act provides that the adjustment or recovery "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."¹ Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is at fault.

Section 10.320 of the implementing federal regulations provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. 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

¹ 5 U.S.C. § 8129(b).

(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

Appellant is at fault under the third standard. On February 20, 1997 the Office advised her to return any compensation check received after she returned to work in order to avoid an overpayment of compensation. Appellant returned to work on July 23, 1997 but did not return the compensation check issued on August 16, 1997. She knew or should have been expected to know that the payment she accepted after returning to work on July 23, 1997 was incorrect and for this reason she was at fault in the creation of the overpayment. It is immaterial whether the Office was also at fault in issuing the August 16, 1997 check³ or in failing to direct its February 20, 1997 letter to appellant’s representative, or whether the employing establishment was at fault in failing to advise the Office more promptly of appellant’s return to work. Appellant did receive the Office’s February 20, 1997 letter and was free to consult with her representative if she did not understand the Office’s warning to return any compensation check she received after returning to work. The record shows that the August 16, 1997 check was issued in the same amount as the checks issued before it and covered a period during which appellant was entitled to no more than three days of compensation. Under the circumstances, the Board is not persuaded by appellant’s argument that she believed the check covered subsequent leave without pay or somehow made up for compensation not previously paid. As the evidence supports the Office’s finding of fault, section 8129 of the Act does not preclude recovery by the Office.

The Board also finds that the Office properly recovered the overpayment in its entirety from compensation due following a leave buy back.

Section 10.321(a) of Title 20 of the Code of Federal Regulations provides as follows:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”⁴

Following her return to work on July 23, 1997, the Office approved appellant’s application to buy back leave for periods in 1995 and 1996. She was thereby entitled to a further payment of compensation for the resulting leave without pay. The Office made an adjustment by decreasing this subsequent payment of compensation by the full amount of the overpayment.

² 20 C.F.R. § 10.320(b).

³ See *Larry D. Strickland*, 48 ECAB 669 (1997) (while the Office may have been negligent in continuing to issue checks for disability, this did not excuse the claimant’s acceptance of such checks, which he knew or should have been expected to know should have been returned to the Office).

⁴ 20 C.F.R. § 10.321(a).

Although the Office has authority to recovery the entire debt from accrued compensation,⁵ the Office must give due regard to the relevant factors cited in section 10.321(a).

In its December 12, 1997 decision, the Office noted that section 10.321 allowed decreasing subsequent payments of compensation after giving due regard to the claimant's financial situation. The Office noted that appellant was working and thereby considered, at least implicitly, that she would not rely on the compensation due as income to pay living expenses. Indeed, the Office paid the compensation due in this case, less the amount of the overpayment, directly to the employing establishment to effect the repurchase of a commensurate amount of leave. Appellant suffered no real out-of-pocket loss in the exchange. The only hardship that appellant might face would be obtaining \$1,848.21 to repurchase the remainder of the leave for which she sought reinstatement. This would, of course, be a purely voluntary decision on appellant's part, with consequences that appear to affect only the final balance of her leave. Under the circumstances, the Board finds that the Office has given due regard to the relevant factors cited in section 10.321(a) and therefore did not abuse its discretion in recovering the overpayment.⁶

The December 12 and November 21, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 8, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Debt Liquidation*, Chapter 6.300.7.8 (September 1994).

⁶ See *Robert C. Schenck*, 38 ECAB 531 (1987).