

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. WILLIAMS and DEPARTMENT OF JUSTICE,
U.S. PAROLE COMMISSION, Chevy Chase, MD

*Docket No. 98-2390; Submitted on the Record;
Issued November 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
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 \$3,716.00 for the period August 20 through October 20, 1995; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On March 22, 1991 appellant, a 46-year old secretary, filed a claim for benefits, alleging that she was experiencing angina symptoms, hypertension and stress resulting from factors of her federal employment. By decision dated September 25, 1991, the Office denied the claim. In a letter received by the Office on October 31, 1991, appellant requested an oral hearing. By decision dated February 6, 1992, an Office hearing representative, based on a review of the written record, vacated the Office's September 25, 1991 decision and remanded for further development of the medical evidence. By letter dated August 7, 1992, the Office accepted appellant's claim for angina attacks, beginning in November 1990. Appellant was paid compensation for temporary total disability for appropriate periods and was eventually placed on the periodic rolls. She returned to work on June 5, 1992 in a modified-duty position and began receiving compensation for loss of wage-earning capacity as of June 5, 1992.

By letter dated November 14, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$3,716.00, covering the period from August 20 through October 14, 1995. The Office indicated that appellant had been paid compensation for total disability in two checks, each in the amount of \$1,956.00, when she was only entitled to compensation in the amount of \$98.00 based on loss of wage-earning capacity. The Office calculated the amount of overpayment by taking the amount of compensation to which she was actually entitled for loss of wage-earning capacity from August 20 through October 14, 1995 (\$98.00 every 28 days, which equaled \$196.00) and subtracted this figure from the total amount of compensation paid by the Office during this period, \$3,912.00. The Office also stated that she had been informed in a letter dated June 7, 1993 as to the correct amount of compensation to which she was entitled due to loss of wage-earning capacity and that she had been receiving checks at the rate of \$98.00 per week for two

years prior to receiving the incorrect payment checks, which were each \$1,858.00 more than the amount to which she was entitled. The Office found that because appellant had been receiving compensation at the given rate of \$98.00 for a sufficiently long period, she should have known that the payment of \$1,956.00 was incorrect. 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 prerecoument hearing with the Branch of Hearings and Review. The Office also noted that, pursuant to 20 C.F.R. § 10.324,¹ the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment and that no further request for waiver would be considered until the requested information was furnished.

By letter dated December 7, 1995 and received by the Office on December 18, 1995, appellant informed the Office that she had received two direct deposits to her checking account, an account held jointly with her spouse, in the amount of \$3,716.00. Appellant stated that after she traced the source of these payments by calling her bank, the employing establishment and the Office, she informed the Office that she had possession of the second of the two payments but had already spent the first one. She stated that the Office advised her to return the second overpayment and indicated it would arrange to have her repay the first one. Appellant enclosed a check in the amount of \$1,956.00 and indicated her intention to pay the Office the amount of \$10.00 per pay period.

By decision dated December 19, 1995, the Office found that appellant was at fault in creating the overpayment of compensation for the period from August 20 through October 14, 1995, which amounted to a total overpayment of \$3,716.00.

By decision dated April 28, 1998, the Board found that the case was not in posture for decision, noting that the Office had failed to consider new evidence; *i.e.*, appellant's December 7, 1995 letter, which was received prior to the Office's December 19, 1995 decision but was not considered by the Office. The Board remanded for the Office to consider appellant's arguments raised in her letter and any evidence she submitted pertaining to the issue of fault.

By decision dated May 19, 1998, the Office found that appellant was at fault in creating the overpayment of compensation in the amount of \$3,716.00 for the period August 20 through October 14, 1995. The Office stated that appellant had been receiving partial disability compensation for two years before the Office made the incorrect payments and, therefore, knew or should have known that she was not entitled to the payments that were deposited into her checking account. The Office indicated that this knowledge was manifested by appellant's admission that she called the Office and inquired as to whom the additional payments belonged and her admission that she had already spent the overpayment included in the check containing the first overpayment. Based on this knowledge, the Office found that she and her husband should not have spent the additional compensation when they knew it did not belong to them and had not located the rightful owner. Thus, the Office concluded that appellant was at fault in the creation of the overpayment and that, therefore, recovery of the overpayment could not be

¹ 20 C.F.R. § 10.324.

waived. The Office noted that the overpayment had already been recovered through payroll deductions and that the debt had been paid off as of June 24, 1997.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$3,716.00 for the period August 20 through October 14, 1995. The record indicates that appellant received additional compensation in checks dated September 13 and October 13, 1995, by her own admission and that as a result she received an overpayment in the amount of \$3,716.00.

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

Section 8129 of the Federal Employees' Compensation Act² 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." (Emphasis added.) No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.³

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect."⁴

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

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have been expected to know she was not entitled.⁵ The record indicates that appellant had been receiving monthly compensation in the amount of \$98.00 since July 1993, and that she was aware as of September 13, 1995 that she was accepting and spending a payment in the amount of \$1,956.00, which was incorrect and to which she was not entitled. Although appellant did contact the

² 5 U.S.C. § 8129(a)(b).

³ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁴ 20 C.F.R. § 10.433(a).

⁵ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

Office and attempt to locate the person to whom the additional compensation belonged and voluntarily returned the second check containing the \$1,858.00 overpayment, she admitted in her December 7, 1995 letter, that she had already accepted and spent the first check containing overpayment after receiving it through direct deposit.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office from August 20 through October 14, 1995, which contained an overpayment in the amount of \$3,716.00, were in error. As appellant was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$3,716.00 may not be waived. Thus, the Office's May 19, 1998 decision is affirmed.

The decision of the Office of Workers' Compensation Programs dated May 19, 1998 is hereby affirmed.

Dated, Washington, DC
November 16, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member