

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAIL P. MILES and U.S. POSTAL SERVICE,
POST OFFICE, Chillum, MD

*Docket No. 00-1319; Oral Argument Held July 24, 2001;
Issued August 23, 2001*

Appearances: *Gail P. Miles, pro se; Julia Mankata, for the Director,
Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$12,343.54 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

In May 1998 appellant, then 44-year-old customer service supervisor, filed an occupational disease claim alleging that she sustained a work-related upper extremity condition. The Office accepted that appellant sustained left ulnar nerve compromise with neuropathy and right wrist tendinitis. Appellant began to receive compensation for periods of total disability.¹ On June 8, 1999 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$12,343.54 for the period December 10, 1998 to May 22, 1999. The Office also made a preliminary determination that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. By decision dated December 1, 1999, an Office hearing representative finalized the Office's preliminary determinations.

The Board finds that appellant received a \$12,343.54 overpayment of compensation.

In the present case, appellant received total disability compensation for the period December 10, 1998 to May 22, 1999 despite the fact that she was not entitled to compensation after she returned to her regular duty on December 10, 1998. The record contains evidence which shows that appellant received \$12,343.54 in compensation for the period December 10,

¹ Appellant stopped work on May 29, 1998 and then returned to her regular work on December 10, 1998.

1998 to May 22, 1999 which she was not entitled to receive. Therefore, the Office properly determined that appellant received a \$12,343.54 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act² 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.³ 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."⁴ 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 10.433(a) 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 he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she 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...."⁵

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

Section 10.433(c) of the Office's regulations provides:

"Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."⁶

The record reveals that appellant accepted checks that she knew or should have known to be incorrect. In a letter dated November 12, 1998, the Office advised appellant that she should immediately inform the Office when she returned to work, but she failed to so advise the Office when she returned to work on December 10, 1998. The Office further advised appellant in this letter that she could not continue to receive total disability compensation after she returned to work.

Appellant alleged that she thought that the checks she received between January and May 1999 were for leave buyback that she claimed for annual and sick leave she used between May and August 1998. However, the combined amount of the checks appellant received far exceeded the amount she would have received for leave buyback. Moreover, the checks clearly indicated on their faces the periods for which they were intended to provide compensation and these periods did not correspond to the periods of claimed leave buyback. Even though the Office may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed she had returned to work, this does not excuse appellant's acceptance of such checks which she knew or should have been expected to know should have been returned to the Office.⁷

For these reasons, the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

The December 1, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 23, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁶ 20 C.F.R. § 10.433(c).

⁷ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985). The record contains a January 16, 1999 letter in which an attending nurse indicated that appellant had been returned to work effective December 9, 1999.