

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE THOMAS and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, Estill, SC

*Docket No. 01-229; Submitted on the Record;
Issued August 31, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether an overpayment of compensation in the amount of \$1,420.21 was created; (2) whether appellant was entitled to a waiver of the recovery of \$1,420.21; and (3) whether \$75.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office of Workers' Compensation Programs accepted appellant's claim for a lumbar strain and subsequent central L5-S1 disc herniation. Appellant has not returned to work since December 7, 1998 and has been receiving appropriate compensation benefits.

In a preliminary determination dated July 18, 2000, the Office found that appellant received an overpayment of \$1,420.21 because she was paid twice for the same period of disability from July 22 through August 23, 1999. The Office stated that a check in the amount of \$2,000.81 was issued to appellant on December 24, 1999 and that another check, in the same amount, was issued to her on December 31, 1999. The Office discovered the duplicate payment while it was processing an adjustment to appellant's pay rate for the period from July 22, 1999 to February 26, 2000 based on a weekly salary of \$729.70. The Office stated that appellant would have been entitled to an additional \$836.32 in compensation for the period from July 22, 1999 to February 26, 2000 but since appellant was paid twice for the period from July 22 to August 23, 1999, she was overpaid in the amount of \$1,420.21 (\$2,256.53 gross compensation minus \$836.32 adjustment).

The Office found that appellant was without fault in the creation of the overpayment as it could not determine why the second \$2,000.81 check was issued. The Office stated that the check was paid by the national Office and bore the dates July 22 to December 31, 1999. The Office stated that even though the two checks were for the same amounts and issued one week apart, appellant might not have known that she had been paid twice for the same period. The Office noted that the checks represented appellant's first compensation payments. The Office informed appellant that she should provide information regarding her income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of

Federal Employees' Compensation Act to recover the overpayment. The Office requested appellant to complete the enclosed overpayment recovery questionnaire, Form OWCP-20.

By decision dated September 22, 2000, the Office affirmed the preliminary determination that appellant received an overpayment of \$1,420.21 and that she was without fault in the creation of the overpayment. The Office found that appellant was not entitled to waiver of the recovery of the overpayment as she had not requested waiver and had failed to respond to the overpayment notification or submit any financial information to support a request for waiver. The Office stated that it would withhold the sum of \$75.00 from appellant's continuing compensation payments until the overpayment was recovered.

On appeal to the Board, appellant stated that she was first informed that there had been an overpayment when she received the September 22, 2000 decision. Appellant stated that she should be entitled to waiver of the recovery because she could not tell from looking at the checks that they were duplicates and she did not have the opportunity to respond prior to the issuance of the September 22, 2000 decision.

The Board finds that appellant received an overpayment in the amount of \$1,420.21.

The record contains a copy of the December 29, 1999 check that was issued in the amount of \$2,000.81. By letter dated December 23, 1999, the Office informed appellant that she would shortly receive a check in the amount of \$2,000.81 for wages she lost during the period from July 22 through August 23, 1999. On a worksheet, the Office showed how it calculated the overpayment of \$1,420.21. The Office's calculation and reasoning is proper. Moreover, appellant does not refute the fact of an overpayment and there is no evidence to the contrary.

Section 8129(a) of the Act¹ provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when incorrect payments 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."²

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.³ The Office must exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.434 to 10.437 of the implementing federal regulations.

¹ 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8129(b).

³ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

Section 10.436 of the Office's regulations⁴ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) [t]he beneficiary from whom the Office seeks recovery needs substantially all of his or her current income including compensation benefits to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. Section 10.437⁵ states that recovery of an overpayment is also considered to be against good conscience if the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

Section 20 C.F.R. § 10.438 states:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

In this case, the Office determined that an overpayment in the amount of \$1,420.21 occurred because appellant received two checks covering compensation for the period from July 22 through August 23, 1999. Although appellant was provided with the opportunity, she submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Her contention that she did not receive the preliminary overpayment determination is without merit because, in the absence of evidence to the contrary, there is a presumption that a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.⁶ The July 18, 2000 decision letter had appellant's proper address, there is no evidence to show it was not properly mailed and therefore it is presumed it reached appellant's mailing address. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.⁷ Further, appellant has not shown that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received while working. Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

⁴ 20 C.F.R. § 10.436.

⁵ 20 C.F.R. § 10.437.

⁶ *Marlon G. Massey*, 49 ECAB 650, 652 n.9 (1998).

⁷ *Robert B. Hutchins*, 52 ECAB ____ (Docket No. 99-2273, issued April 11, 2001); *Marlon G. Massey*, *supra* note 6.

Section 10.441⁸ provides if an overpayment of compensation has been made to an individual entitled to further payments, and no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.

Since appellant did not submit any financial data, there is no sufficient information for the Board to perform an analysis of the reasonableness of the monthly recovery rate of \$75.00. Appellant has therefore not shown that the Office abused its discretion in withholding \$75.00 from appellant's monthly compensation payments.

The decision of the Office of Workers' Compensation Programs dated September 22, 2000 is hereby affirmed.

Dated, Washington, DC
August 31, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁸ 20 C.F.R. § 10.441.