

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SHEILA M. MARSH and DEPARTMENT OF DEFENSE,  
DEFENSE ELECTRONICS SUPPLY CENTER, Dayton, OH

*Docket No. 00-999; Submitted on the Record;  
Issued February 27, 2001*

---

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment in the amount of \$9,506.60, thus precluding waiver of recovery of the overpayment.

On April 11, 1995 appellant, then a 43-year-old industrial specialist, sustained bilateral carpal tunnel syndrome in the performance of duty.

By letter dated November 24, 1997, the Office advised appellant that she had been placed on the periodic compensation rolls, effective August 18, 1997, to receive benefits for temporary total disability. The Office advised appellant that to avoid an overpayment of compensation she should return any checks covering a period in which she had worked.

On June 1, 1998 appellant began working full time as a parts replenishment clerk for a private employer.

By letter dated July 27, 1999, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$9,506.60 because she returned to work in private industry on June 1, 1998 with a loss in wage-earning capacity but continued to receive compensation for total wage loss until November 9, 1998. The Office made a preliminary determination that she was at fault in the creation of the overpayment because she should have known that she was not entitled to receive compensation for total wage loss after her return to work on June 1, 1998.

By letter dated August 23, 1999, appellant stated that she did not dispute the overpayment but she was not at fault and requested waiver of recover. Appellant related that she notified the Office of her return to work on June 1, 1998 and that she reasonably believed that the checks she received from June 1 to November 9, 1998 were payment for a schedule award for permanent impairment to her upper extremities.

By decision dated December 8, 1999, the Office determined that appellant was at fault in the creation of the overpayment of compensation because she should have known that she was not entitled to receive compensation for total wage loss after her return to work on June 1, 1998 and, therefore, accepted payments which she knew or should have known were incorrect. The Office noted that its November 24, 1997 letter to appellant advised that if she worked for any period for which she received a compensation check, she should return the check to the Office.

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation in the amount of \$9,506.60, thus precluding waiver of recovery of the overpayment.<sup>1</sup>

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>5</sup>

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 that 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 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."<sup>6</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. The record shows that on June 1, 1998 appellant began

---

<sup>1</sup> Appellant does not dispute the fact or the amount of the overpayment.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> *Bonnye Matthews*, 45 ECAB 657, 667 (1994).

<sup>6</sup> 20 C.F.R. § 10.433(a) (1999).

working for a private employer but continued to accept compensation checks for temporary total disability through November 9, 1998. She stated that she believed that the payments she received from June 1 to November 9, 1998 were payments for a schedule award. However, as the Office noted, appellant was not examined by a physician for an impairment rating until August 30, 1999 and she did not file a claim for a schedule award until September 24, 1999, more than one year after the overpayment occurred. Since she had not filed for or been granted a schedule award at the time of the creation of the overpayment, June 1 through November 9, 1998, her belief that the compensation checks received for that period were payment for a schedule award is not reasonable.

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 action 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.<sup>7</sup>

The Board finds that because appellant accepted payments which she knew or should have known she was not entitled to receive she is with fault in the creation of the overpayment and is, therefore, not entitled to waiver of recovery of the overpayment.

---

<sup>7</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

The December 8, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 27, 2001

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member