

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE M. DeANGELIS and DEPARTMENT OF TRANSPORTATION,
COAST GUARD, Norfolk, VA

*Docket No. 00-1994; Submitted on the Record;
Issued July 13, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,522.71 for November 29, 1999 through January 1, 2000; and (2) whether the Office properly found that appellant was with fault in the creation of the overpayment, thus precluding waiver of the overpayment.

On April 14, 1998 appellant, then a 52-year-old administrative secretary, filed an occupational disease claim alleging that on September 29, 1997 she sustained an impingement to her left rotator cuff during the performance of her federal duties.¹

The Office accepted appellant's claim for a left rotator cuff tear and authorized two surgeries on November 25, 1997 and February 1, 1998 and physical therapy treatments. A subsequent right rotator cuff repair secondary to overuse was also approved. Appropriate compensation was paid and appellant was placed on the periodic rolls.

Appellant returned to part-time work at the employing establishment in the position of modified administrative assistant for four hours per day, three days a week on November 29, 1999. She continued to be paid temporary total disability until January 1, 2000.

In a letter of February 3, 2000, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$1,522.71, from November 29, 1999 through January 1, 2000 because appellant was not entitled to receive compensation for wage loss after she returned to work. The Office advised appellant that the fact that she returned to a lower paying position had been calculated in the overpayment and that she was at fault in the creation of the overpayment because she accepted payments that she had good reason to know were incorrect.

¹ Under claim number 250488056, the Office had approved a left shoulder strain for an injury of May 13, 1996. This case was combined into the current case in May 1998.

In a letter dated February 23, 2000, appellant disagreed with the amount of the overpayment and argued that, if there were an overpayment, it was through no fault of hers. Copies of 1999 tax returns, bills and medical expenses were also submitted.

By decision dated March 7, 2000, the Office finalized its preliminary overpayment determination and finding of fault.

By decision dated May 22, 2000, the Office reduced appellant's compensation effective May 21, 2000 based on its determination that appellant's actual earnings in the position of modified administrative assistant fairly and reasonably represented her wage-earning capacity pursuant to 5 U.S.C. § 8115.

In a letter dated April 18, 2000, which the Board received on May 23, 2000, appellant indicated that she wished to appeal the overpayment determination of the Office. In her application for review form signed September 7, 2000, appellant reiterated that she wished to appeal the overpayment determination of the Office. Because appellant did not appeal the May 22, 2000 loss of wage-earning capacity decision, the Board will limit its review to the March 7, 2000 overpayment determination of the Office.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$1,522.71 from November 29, 1999 through January 1, 2000 because appellant was not entitled to receive compensation for wage loss after she returned to work.

The record reveals that appellant received \$2,248.85 in compensation for total wage loss from November 29, 1999 through January 1, 2000, while she was working part time for the employing establishment in the position of modified administrative assistant. This was based on appellant's date-of-injury weekly pay of \$681.71, which was paid at a 2/3 compensation rate. Her modified administrative assistant position weekly pay rate was \$463.00, which amounted to \$726.14 for the amount of time appellant worked during the period in question. The Office properly subtracted the amount appellant made during the time period (\$726.14) from the amount of compensation received for temporary total disability (\$2,248.85) in determining that an overpayment was created in the amount of \$1,522.71.

Additionally, the Board finds that the Office properly found that appellant was with fault in the creation of the overpayment in the amount of \$1,522.71.

Section 8129(a) of the Act 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.² The only exception to this requirement is a situation, which meets the test set forth as follows in section 8129(b): "[A]djustment 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 the Act or

² 5 U.S.C. § 8129.

would be against equity and good conscience.”³ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁴ In evaluation of whether appellant is without fault, the Office will consider whether appellant’s receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency, which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.⁵

In determining whether an individual is at fault, section 10.433(a) 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 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
- (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”⁶

In this case, the Office applied the third standard -- appellant accepted payments, which she knew or should have been expected to know were incorrect. The Board finds that the Office was correct in determining that appellant knew or should have been expected to know she accepted incorrect payments inasmuch as appellant received temporary total disability compensation during the period November 29, 1999 through January 1, 2000, while she worked part time in the position of modified administrative assistant. The record shows that, when the Office placed appellant on the periodic rolls, it advised her in a letter dated September 25, 1998 that she would be paid regular compensation until she returned to duty. The Office specifically advised appellant 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 go back to work.” (Emphasis in the original.) By her signature of October 6, 1998 appellant indicated her understanding.

The Board finds that this evidence supports that appellant knew or should have been expected to know that the payments she accepted after returning to work on November 29, 1999 were incorrect. In addition, while the Office may have been negligent in continuing to issue appellant checks for disability after the Office was notified that appellant had returned to full-time work, this did not excuse appellant’s acceptance of the checks, which she knew or should

³ 5 U.S.C. § 8129(b).

⁴ *Harold W. Steele*, 38 ECAB 245 (1986).

⁵ 20 C.F.R. § 10.435(b)(1) (revised April 1, 1999).

⁶ 20 C.F.R. § 10.433(a).

have known should have been returned to the Office.⁷ Therefore, the Office properly found that appellant was at fault in the creation of the overpayment in this case.

With respect to the issue of waiver, because the evidence supports the Office's finding that appellant was at fault in the creation of the overpayment that occurred in this case, the Office may not waive recovery of the overpayment.⁸

The decision of the Office of Workers' Compensation Programs dated March 7, 2000 is hereby affirmed.

Dated, Washington, DC
July 13, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁷ *Larry D. Strickland*, 48 ECAB 669 (1997).

⁸ *See Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).