

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DIANA L. BOOTH and DEPARTMENT OF AGRICULTURE,  
FSIS MEAT POULTRY INSPECTION SERVICE, Alameda, CA

*Docket No. 99-1760; Submitted on the Record;  
Issued May 10, 2001*

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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 \$1,020.55 overpayment of compensation for the period May 25, 1997 to July 18, 1998; (2) whether the Office properly found that appellant was not without fault in the creation of the overpayment; and (3) whether the Office properly required repayment at the rate of \$150.00 per month from appellant's continuing compensation.

On March 6, 1991 appellant, then a 40-year-old food inspector, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome causally related to factors of her federal employment. She also filed a claim for a traumatic injury occurring on April 11, 1991 in the performance of duty. Appellant stopped work on April 12, 1991 and did not return. The Office accepted the claims, combined into File Number A12-129354, for right and left carpal tunnel syndrome. The Office placed appellant on the periodic rolls effective June 7, 1992. Appellant completed annual Form EN-1032 affidavits of earnings and employment. The form EN-1032 contains, in pertinent part, the following advisement:

"A claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate. A claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. You must answer the questions below to ensure your compensation is paid at the correct rate."

Appellant returned to work as a part-time property manager on August 5, 1996. The Office adjusted appellant's pay rate for compensation purposes using the appropriate wage-earning capacity calculations. By decision dated July 22, 1998, the Office reduced appellant's compensation effective August 5, 1996 based on its finding that her actual earnings

as a part-time trailer court manager fairly and reasonably represented her wage-earning capacity.<sup>1</sup>

In a December 1, 1997 EN-1032 form, appellant informed the Office that she and her husband had divorced in May 1997. She noted on the form that she had sent a letter to the Office regarding her divorce in May 1997. In a report of a telephone call, a claims examiner indicated that appellant stated that her divorce was effective May 25, 1997.

In a letter dated August 10, 1998, the Office informed appellant of its preliminary determination that she had received an overpayment of \$1,020.55 because she received compensation at the augmented rate when she had no dependents. The Office determined that the overpayment occurred during the period May 25, 1997 to July 18, 1998 due to changes in appellant's dependent status offset by its deductions of family health benefits. The Office related:

“Claimant had been receiving compensation via the periodic rolls for a loss of wage-earning capacity (LWEC) at the augmented rate of 3/4 and compensation at that rate continued after her divorce on May 25, 1997. It was not until December 1997 that claimant responded to the CA-1032 advising of her divorce. Health benefits continued to be deducted for Code 452 when deductions should have been made for Code 451.

“Claimant is found with fault in the overpayment for the reasons that a CA-1049 was issued on June 19, 1992 advising that the rate of pay was paid (for one or more dependents) and CA-1032's issued annually advised of the need for reporting dependents. Claimant was divorced for [seven] months before she advised the Office of the change in marital status.

“The overpayment has been calculated for the period May 25, 1997 through July 18, 1998 using a payrate of 2/3 and Health Benefit Code of 451 versus compensation received at the augmented rate of 3/4 and Health Benefit Code 452.”

The Office calculated the overpayment by subtracting the amount of compensation appellant actually received from the amount to which she was entitled had it used the proper payrate and health benefit deductions. The Office notified appellant of its preliminary determination that she was not without fault in the creation of the overpayment and advised her that she had 30 days within which to submit additional evidence or arguments. The Office further requested that appellant submit an enclosed financial questionnaire.

On August 18, 1998 appellant submitted an overpayment recovery questionnaire listing her monthly income as \$1,511.65 and her monthly expenses as \$1,337.00. She challenged the amount of the overpayment on the grounds that her compensation changed to the 2/3 rate in

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<sup>1</sup> Appellant has not appealed the Office's July 22, 1998 wage-earning capacity determination and therefore it is not before the Board at this time.

December 1997 rather than July 1998. Appellant further noted that the Office had overcharged her for family insurance from May to July 1998. She stated:

“I have been with [the Office] for many years as you can tell from my file. I am very well aware of my responsibilities and I have always done what I am supposed to do. I have always reported any change in my status immediately. I feel this error in over compensation was the result of your people not doing their jobs properly.”

Appellant requested that the Office decide her case based on the written evidence.

By decision dated March 5, 1999, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$1,020.55 and that she was not without fault in the creation of the overpayment. The Office found that appellant should repay \$150.00 a month from continuing compensation.

The Board finds that appellant received an overpayment because she received augmented compensation when she had no dependents but that the case is not in posture for decision regarding the amount of the overpayment.

The Office’s computation logs indicate that appellant received augmented benefits from May 25, 1997, the date of her divorce, until December 6, 1997. The Office paid appellant the correct amount of compensation from December 7, 1997 until March 28, 1998. For the period March 31 to April 25, 1998, the Office issued appellant a check at the augmented rate and without including the deduction for her wage-earning capacity. From April 26 to July 18, 1998, the Office paid appellant at the statutory 2/3 rate appropriate for no dependents but withheld health care deductions at the family rate. The Office calculated the amount that appellant received from May 25, 1997 to July 18, 1998, which included the overpayment due to augmented compensation, the incorrect check for the period March 31 to April 25, 1998 and the underpayment due to withholding family health benefits, for a total of \$13,157.21. The Office subtracted the amount that appellant should have received for the period in question, \$12,136.66 from \$13,157.21 and concluded that an overpayment existed in the amount of \$1,020.55.

As appellant received compensation at the augmented rate from May 25 until December 6, 1997 and from March 31 to April 15, 1998 even though she had no dependents, she received an overpayment of compensation. The Office calculated the amount of overpayment, however, by deducting the underpayment appellant received due to the withholding of family health benefits. The Board has held, however, that such an offset circumvents established legal procedures and protections.<sup>2</sup> Such an offset practice precludes the proper consideration of waiver of the entire amount of the overpayment and permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.436. Thus, the Office’s practice of offsetting an overpayment with the amount of any underpayment denies appellant administrative due process rights with respect to the amount

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<sup>2</sup> *Michael A. Grossman*, 51 ECAB \_\_\_\_ (issued September 21, 2000).

offset.<sup>3</sup> The case will, therefore, be remanded for the Office to recalculate the amount of the overpayment of compensation.

The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment for the period May 25 to December 6, 1997.

Section 8129 of the Federal Employees Compensation Act provides that an overpayment of compensation shall be recovered by the Office 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.”<sup>4</sup> Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.<sup>5</sup> 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 he or she knew or should have known to be incorrect;
- (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. (This provision applies only to the overpaid individual.)”<sup>6</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.<sup>7</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> See e.g. *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

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

<sup>7</sup> See *Robin O. Porter*, 40 ECAB 421 (1989).

With respect to whether an individual is at fault, section 10.433(b) provides in pertinent part:

“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 complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>8</sup>

In this case, appellant received compensation for temporary total disability beginning June 1992 and compensation based on her loss of wage-earning capacity beginning August 1996. She completed annual Form EN-1032 affidavits, which advised her of the need to report whether or not she had eligible dependents necessary for the additional compensation. The forms further set forth the Office’s method of calculating a claimant’s compensation rate. Appellant notified the Office on a December 1, 1997 EN-1032 form that she had no further dependents because of her divorce in May 1997. She made no effort to return checks paid to her between the time of her divorce in May 1997 and December 1997. Appellant was either aware or reasonably should have been aware of the Office’s formula in calculating a claimant’s compensation rate on the basis of eligible dependents and that not having legal dependents would lower the amount of her compensation checks as she had been advised by Form EN-1032 on an annual basis. Based on this information, she should have been expected to know that she was not entitled to compensation at the dependent rate following her divorce. While appellant contended that she notified the Office of her divorce in May 1997, the record does not support her contention. Further, the Board notes that even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.<sup>9</sup> Thus, under these circumstances, the evidence supports the Office’s finding that appellant is not without fault in the creation of the overpayment.

The Board finds that the Office improperly found that appellant was at fault in the creation of the overpayment for the period March 31 to April 25, 1998.

In this case, there is no evidence that appellant knew when she accepted the compensation check covering the period March 31 to April 25, 1998 that the check included compensation to which she was not entitled. The record does not contain a copy of the check or documents accompanying it advising appellant of the inclusive period covered by such check, which would have put appellant on notice that she was receiving an overpayment of compensation. The Office determined that appellant was at fault in creating the overpayment because she should have know that she was not entitled to compensation at the augmented rate when she had no dependents; however, the check for the period March 31 to April 25, 1998 includes not only compensation at the augmented rate but also fails to deduct for her wage-earning capacity. The amount of the check, consequently, differs substantially from appellant’s

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<sup>8</sup> 20 C.F.R. § 10.433(b) (1999).

<sup>9</sup> *Russell E. Wageneck*, 46 ECAB 653 (1995).

usual compensation. Appellant could reasonably have believed that the check covered a time period greater than from March 31 to April 25, 1998. The Board finds that there is no evidence that appellant knew or should have known, at the time she received the check including the period March 31 to April 25, 1998, that it was for an incorrect amount. Therefore, on remand, the Office should determine appellant's eligibility for waiver for the period March 31 to April 25, 1998.

The case will be remanded for the Office to reconsider the amount of the overpayment and appellant's eligibility for waiver for the period March 31 to April 25, 1998. It is premature for the Board to address the issue of repayment of the overpayment for appellant's continuing compensation payments.

The decision of the Office of Workers' Compensation Programs dated March 5, 1999 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC  
May 10, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member