

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERYL L. GLEASON and U.S. POSTAL SERVICE,
ANAHEIM HILLS STATION, Anaheim, CA

*Docket No. 99-2371; Submitted on the Record;
Issued May 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant was at fault in the creation of an overpayment of compensation from July 22 through August 17, 1996.

On May 15, 1993 appellant, then a 46-year-old letter carrier, injured her back when she misstepped and fell out of her delivery vehicle. The Office of Workers' Compensation Programs accepted her claim for lumbosacral strain with sciatica and paid compensation for temporary total disability on the periodic compensation rolls.

Appellant returned to limited duty on July 22, 1996 but continued to receive compensation checks for temporary total disability. She returned all the checks except the one covering the period ending August 17, 1996.

On April 22, 1997 the Office issued a preliminary determination that an overpayment of \$1,763.15 occurred when appellant received both regular pay and compensation from July 22 through August 17, 1996. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because the dates of compensation were shown on the check and she should have reasonably been aware that she was not entitled to the check.¹

In a letter dated May 1, 1997, appellant explained as follows: "When I first received the check I called Angela C. at the disability office in Santa Ana. She told me to be safe, I should just put the check in my account until you requested it be returned."² Appellant stated that she did not feel she should have to repay the overpayment because she lost enough income while she was off work and receiving compensation.

¹ The Office indicated that appellant was entitled to compensation for only one day covered by the check, January 21, 1996.

² The record indicates that "Angela C." is a human resources associate at the employing establishment.

She requested waiver and a prerecoument hearing. At the hearing, which was held on January 25, 1999, appellant explained the reason she was not at fault:

“Well, because part of the check was mine and I called them immediately to see what I should do. And I was told to go ahead and put it in the bank and when they decided what was overdue, they would, you know, let me know.

“Q. [Hearing Representative] Now I see you called someone, who -- do you know -- is this Office of Workers’ Compensation Programs Workers’ Compensation?”

“A. Yes.

“Q. Was it a claims examiner that you know you spoke with?”

“A. You know, I talked to several people. I talked to somebody in the Santa Ana office, I talked to people in San Francisco. This whole thing was a fiasco because I’d been off for seven months....”

Appellant testified that it was a horrendous time in her life. She did not know what she owed, whom she owed or what to do. She stated that she ended up spending the money because she needed it.

Appellant submitted a statement that this was an extremely stressful time and she did make some unwise decisions “such as spending that check” but that she truly did make the effort to return it and followed the instructions she was given. She explained, however, that it just became necessary to use the money.

Appellant completed an overpayment recovery questionnaire indicating her monthly income and expenses.

In a decision dated March 26, 1999, the Office finalized its preliminary determinations. The Office found that appellant was at fault in the creation of the overpayment that occurred from July 22 through August 17, 1996 because she received compensation payments that she knew or reasonably should have known she was not entitled to. The hearing representative noted that, while it was commendable for appellant to give notification that she received a check to which she was not entitled, her honesty did not make her without fault in the creation of the overpayment. The hearing representative reviewed appellant’s overpayment questionnaire and determined that appellant had approximately \$160.00 excess monthly income and was capable of paying \$100.00 per month to satisfy the overpayment.

In a letter dated April 15, 1999, appellant requested reconsideration. She argued that the Office was at fault. She added that since the hearing she had purchased a new car. Appellant stated that between the car payment and the increase of \$800.00 a year in car insurance she would now be paying an extra \$550.00 to \$600.00 a month in expenses, not to mention the increase of \$0.50 a gallon in the cost of gasoline. She submitted insurance policy statements and her new car purchasing agreement.

In a decision dated May 11, 1999, the Office reviewed the merits of appellant's claim and found that the evidence in support of the application for review was insufficient to warrant modification of the prior decision. The Office found that appellant's argument pertaining to the issue of fault was repetitious of the argument she made at the hearing. The Office noted that, while appellant argued at the hearing that she could not afford to repay \$100.00 a month, she subsequently purchased a new car and incurred an additional monthly payment in excess of \$650.00. The Office further noted that there was no evidence appellant's old car needed replacing. Because appellant managed voluntarily to increase her monthly expenditures by at least \$650.00 with full knowledge of her overpayment debt, the Office found that appellant had failed to establish that she was incapable of repaying her debt at \$100.00 per month.

The Board finds that appellant was at fault in the creation of an overpayment of compensation from July 22 through August 17, 1996.

An overpayment of compensation occurred in the present case when appellant returned to work on July 22, 1996 but continued to receive compensation for total disability through August 17, 1996. The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measure to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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 (this provision applies only to the overpaid individual).³

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.⁴

Appellant made clear in this case that she knew she was not entitled to all of the compensation she received through August 17, 1996. This is shown not only by her sworn testimony at the January 25, 1999 hearing but also by her May 1, 1997 letter, wherein she explained that when she first received the check she called the human resources specialist at the employing establishment, who advised her to put the check in her bank account.⁵ Appellant put the check in her account and eventually spent the money. While her call to the employing establishment shows good faith, the evidence supports the Office's finding that appellant

³ 20 C.F.R. § 10.433(a).

⁴ *Id.* § 10.433(b).

⁵ In this earliest account of her actions, appellant did not state that she discussed the matter with anyone at the Office. Further, the record shows no Office report of telephone contact with appellant on the matter.

accepted a check that she knew or should have known to be incorrect. She is, therefore, at fault in the creation of the overpayment and waiver is precluded.⁶

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁷ However, the Office may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because: (1) The individual relied on misinformation given in writing by the Office (or by another government agency which he or she had reason to believe was connected with the administration of benefits) at the interpretation of a pertinent provision of the Act or its regulations; or (2) The Office erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.⁸

Thus, though the human resources specialist at the employing establishment appears to have advised appellant to place the check in her bank account and though appellant indicated that she also might have talked with someone at the Office about the matter, there is no evidence that appellant relied on misinformation given in writing. The Board will affirm the Office's finding of fault.

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments to which the individual is entitled.⁹ Because collection of the overpayment in this case cannot be made by adjusting later payments (as appellant returned to work and is no longer entitled to compensation for disability) but must be recovered by other means, the Board lacks jurisdiction to review the amount of recovery determined by the hearing representative to be appropriate.

As a final matter, the Board notes that the only review of a final decision concerning an overpayment is to this Board. The provisions of 5 U.S.C. § 8124(b) concerning hearings and 5 U.S.C. § 8128(a) concerning reconsiderations do not apply to such a decision.¹⁰ Accordingly, the Office's May 11, 1999 decision, granting appellant's request for reconsideration but denying modification of its prior decision is null and void. Federal regulations contemplate additional requests for waiver,¹¹ but as noted earlier the Office may consider waiving an overpayment only

⁶ The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual is entitled; *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because collection of the overpayment in this case cannot be made by adjusting later payments (appellant is no longer entitled to receive monetary compensation for disability under the Federal Employees' Compensation Act) but must be recovered by other means, the Board lacks jurisdiction to review the Office's recovery of the overpayment.

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* § 10.435.

⁹ *Levon H. Knight*, *supra* note 6.

¹⁰ 20 C.F.R. § 10.440(b).

¹¹ *See id.* § 10.438(b).

if the individual to whom it was made was not at fault in accepting or creating the overpayment. In its March 26, 1999 decision, the Office found appellant to be at fault and, therefore, had no jurisdiction either to review the matter on appellant's application for review or to waive the overpayment.

The March 26, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 24, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member