

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANN HARGROVE and DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, New York, NY

*Docket No. 01-689; Submitted on the Record;
Issued October 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, 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 of \$1,077.34, thus precluding waiver of recovery of the overpayment

The Office accepted that on July 7, 1998, appellant, then a 48-year-old clerk typist, sustained a contusion and sprain of her right shoulder in the course of her federal employment duties. Appellant stopped work on July 8, 1998 and was paid appropriate wage-loss compensation.

By letter dated January 25, 1999, the Office explained the terms under which appellant was entitled to receive compensation and instructed her that, to avoid an overpayment of compensation, she should notify the Office immediately when she returned to work and that if she worked for any portion of the period for which a payment was made, she must return that compensation check to the Office.

Appellant returned to work full time, at her usual wage, on March 29, 1999.¹ The employing establishment notified the Office of appellant's return to work but her compensation payments were not terminated until April 25, 1999. Therefore, appellant received a check for compensation for total disability for a period for which she also received a paycheck from the employing establishment.

On October 20, 1999 the Office made a preliminary determination that an overpayment of compensation in the amount of \$1,077.34 had occurred and that she was at fault in the creation of the overpayment. The Office found that appellant had been paid \$1,117.24 compensation benefits for March 29 to April 25, 1999, but was entitled to only one day's

¹ In a decision dated April 19, 1999, the Office found that appellant's accepted conditions had resolved and, therefore, terminated appellant's entitlement to compensation benefits.

compensation for this period, or \$39.90 and thus had been overpaid \$1,077.34. The Office informed appellant of her rights of appeal, including the right to request a hearing, but appellant did not respond. In a decision dated June 5, 2000, the Office finalized its preliminary determination and found the overpayment of \$1,077.34 due and payable in full.

By letter dated June 14, 2000, appellant disagreed with the Office's findings and requested an oral hearing. She asserted that she had received neither the check for March 29 through April 25, 1999, nor the Office's October 20, 1999 preliminary notice of overpayment. By telephone message on September 15, 2000 and by letter dated January 3, 2001 the Office responded, explaining that the benefits check had been properly issued and that the October 20, 1999 preliminary notice had been sent to the correct address.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of \$1,077.34, thus precluding waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides, that the Office may not adjust later compensation or recover an overpayment unless an "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." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.433 of the implementing federal regulations provides that a recipient who has done any of the following will be found to be at fault in to creating the 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 was incorrect. (This provision applies only to the overpaid individual.)"³

The regulations further provide that whether or not the Office determines that an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care to be expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁴

On October 20, 1999 the Office made a preliminary determination that appellant was at fault in creating the overpayment under the third criterion because she should have been aware that she was not entitled to the compensation she received after returning to work on March 29,

² 5 U.S.C. § 8101, 8129(b).

³ 20 C.F.R. § 10.433(a).

⁴ 20 C.F.R. § 10.433(b).

1999 with no loss of wages. The record shows that the Office advised appellant that she would be paid regular compensation until she returned to duty. The Office specifically stated: “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result.” (Emphasis in the original.)

The Board finds that this evidence supports that appellant knew or should have known that the payment she accepted after returning to work on March 29, 1999 was incorrect. While the Office may have been remiss in issuing a check for disability after being notified that appellant had returned to full-time work, this error did not excuse appellant’s acceptance of the checks which she knew or should have known should have been returned to the Office.⁵

Appellant asserted that she received neither the benefits check nor the Office’s October 20, 1999 preliminary determination. The Board has held that it is presumed, absent evidence to the contrary, that an item mailed to an individual in the ordinary course of business was received by that individual.⁶ This presumption, commonly referred to as the “mailbox” rule, arises when it appears from the record that the item was properly addressed and duly mailed.⁷

The Office’s finding of fault in this case rests on the strength of this presumption. The record reflects that the October 20, 1999 preliminary notice from the Office and the benefits check were sent to appellant’s address of record, the same address to which all the previous benefits checks and the Office’s June 5, 2000 decision were sent, all of which were duly received by appellant.⁸ Therefore, because the record contains no evidence which rebuts the presumption of receipt raised by the “mailbox” rule, the Office’s June 5, 2000 decision finding appellant at fault in the creation of the overpayment was proper.

Because the evidence supports the Office’s finding that appellant was at fault in the creation of the overpayment, the Office may not waive recovery of the overpayment.⁹

The Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.¹⁰ Appellant returned to work with no wage loss and was not in receipt of continuing compensation at the time the final decision

⁵ *Larry D. Strickland*, 48 ECAB 669 (1997).

⁶ *George F. Gidicsin*, 36 ECAB 175 (1984).

⁷ *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁸ Although by letter dated February 12, 1999, appellant informed the Office that she had not received her benefit check for January 3 to January 30, 1999 and requested that a tracer be put on this check, appellant subsequently received the check in question and cancelled her request for a tracer.

⁹ See *Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

¹⁰ *Lewis George*, 45 ECAB 144 (1993).

was entered in this matter. Therefore, the Board lacks jurisdiction to review recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs dated June 5, 2000 is affirmed.

Dated, Washington, DC
October 29, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member