

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALISA V. HAMMERS and U.S. POSTAL SERVICE,  
POST OFFICE, Omaha, NE

*Docket No. 02-462; Submitted on the Record;  
Issued August 22, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issues are: (1) whether appellant received a \$22,068.36 overpayment in compensation; and (2) whether appellant was at fault in the creation of the overpayment.

On March 12, 1990 appellant, then a 31-year-old distribution clerk, was lifting a mail pouch when she developed back pain. She stopped working for approximately six weeks, returned to work but stopped again by September 30, 1991. The Office of Workers' Compensation Programs accepted appellant's claim for low back strain, herniated L5-S1 disc and radiculopathy. Appellant began receiving temporary total disability compensation.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Mark A. Pinter to resolve a conflict in the medical evidence on her ability to work. In an August 5, 1998 report, Dr. Pinter diagnosed minimal degenerative disc disease at L4-5 and L5-S1, L5 disc herniation and S1 radiculitis. He commented that he saw no evidence of radiculopathy or myelopathy. Dr. Pinter indicated that there was ample evidence in the written record and his examination that appellant's complaints were exaggerated and not in line with her medical findings. He concluded that appellant could return to at least sedentary work. Dr. Pinter limited appellant to occasional bending at the waist, squatting, stooping and lifting more than 20 pounds more than a foot away from the body. He stated that appellant had no restrictions on standing, walking or the number of hours worked. Dr. Pinter suggested that appellant be allowed to sit upright no more than 30 minutes at a time without the freedom to stand and move about.

Based on Dr. Pinter's report, the employing establishment, in a September 11, 1998 letter offered appellant a modified distribution clerk position. In a September 22, 1998 letter, appellant refused the position, stating that it was beyond her work capacity. In an October 19, 1998 letter, the Office informed appellant that it found the offered job to be suitable. The Office gave appellant 30 days to accept the offered position or provide her reasons for refusing the position. The Office indicated that, if appellant refused the position and her reasons for doing so were found not to be justified, her compensation might be terminated. In a separate letter dated October 19, 1998, the Office gave appellant 15 days to accept the position, stating that it would

not consider further reasons for her refusal to accept the position. The Office stated that, if appellant did not accept the position within that time, it would terminate her compensation. In a November 23, 1998 letter, the Office indicated that the second October 19, 1998 letter should have been dated November 19, 1998. The Office repeated that appellant had 15 days to accept the position or her compensation would be terminated. In a January 8, 1999 decision, the Office terminated appellant's compensation effective January 30, 1999 for refusal to accept suitable work.

In a January 13, 1999 letter, appellant requested a hearing before an Office hearing representative, which was conducted on August 23, 1999. In a November 10, 1999 decision, the Office hearing representative affirmed the Office's decision to terminate appellant's compensation for refusal to accept suitable work.

In an August 24, 2000 letter, the Office informed appellant that it had made a preliminary determination that she had received a \$22,068.36 overpayment in compensation. The Office stated that appellant received compensation from January 31 to December 1, 1999 after she had received a formal decision which terminated her compensation effective January 30, 1999. The Office further found that appellant was at fault in the creation of the overpayment because she was aware that she was no longer due compensation but continued to accept the payments and did not notify the Office. The Office informed appellant of her right to seek a preresumption hearing before an Office hearing representative. The Office also indicated that appellant had the right to submit evidence or arguments if she disagreed that an overpayment occurred, disagreed with the amount of the overpayment, believed that the overpayment occurred through no fault of her own or that the Office should waive recovery of the overpayment. Appellant requested a hearing before an Office hearing representative, which was held on July 30, 2001. In an October 18, 2001 decision, the Office hearing representative found that appellant had received a \$22,068.36 overpayment in compensation and was at fault in accepting compensation that she knew or should have known she was not entitled.

The Board finds that appellant received a \$22,068.36 overpayment in compensation.

The Office found in a January 8, 1999 decision that appellant had refused suitable employment that had been offered by her employing establishment. The Office therefore terminated appellant's compensation under section 8106(c) effective January 30, 1999.<sup>1</sup> Appellant, however, continued to receive compensation after January 30, 1999 until it was finally terminated on December 1, 1999. As the Office had ordered appellant's compensation terminated as of January 30, 1999, she was not entitled to any additional compensation after that time. Appellant therefore received an overpayment in compensation because she continued to receive compensation to which she was not entitled.

The Board further finds that appellant is at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides, "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 of recovery would defeat the purpose of the

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<sup>1</sup> 5 U.S.C. § 8106(c).

Act or would be against equity and good conscience.”<sup>2</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Section 10.433(a) of the Office’s implementing regulations<sup>3</sup> provides as follows:

“[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 measures to ensure that payment he or she receives 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 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 furnish 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 been expected to know was incorrect. (This provision applies to the overpaid individual only.)”<sup>4</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment as she accepted payments of compensation which she knew or should have known were incorrect.

The Office notified appellant in the January 8, 1999 decision that her compensation would be terminated as of January 30, 1999 for refusal to accept suitable work. Appellant therefore was put on notice that she was not entitled to any compensation payments after that date. Appellant, however, continued to accept compensation payments through December 1, 1999, when the Office finally stopped compensation payments. Appellant contended at the July 20, 2001 hearing that she had appealed the termination of her compensation to an Office hearing representative and was awaiting her hearing, which was conducted August 23, 1999. Appellant stated that she assumed that she was entitled to compensation while her case was on appeal. But the record shows that appellant was clearly informed that her compensation benefits were being terminated effective January 30, 1999. She therefore should have known that she was not entitled to the payments she received after January 30, 1999. Even though the Office erred in continuing to pay her compensation payments after the January 30, 1999 termination date, appellant is not excused from fault in the creation of

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<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.433(a).

<sup>4</sup> *Id.*

the overpayment.<sup>5</sup> The Office therefore properly found that appellant received an overpayment and was at fault in the creation of the overpayment.

The decision of the Office of Workers' Compensation Programs dated October 18, 2001 is hereby affirmed.

Dated, Washington, DC  
August 22, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>5</sup> 20 C.F.R. § 10.435.