

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS V. BAYLES and DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION, Bangor, ME

*Docket No. 00-1887; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether an overpayment in the amount of \$7,544.44 occurred when appellant concurrently received compensation for temporary total disability and Office of Personnel Management (OPM) benefits for the period April 7 through November 12, 1994; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating the overpayment and that, therefore, the overpayment was not subject to waiver.

The Office accepted that appellant, then a 43-year-old cartographic technician, sustained a soft tissue injury to her right elbow on September 21, 1992. Right tennis elbow release surgery, performed on December 14, 1993, was also authorized by the Office. Appellant stopped working in November 1992 and did not return. Compensation benefits for temporary total disability were paid as of February 1, 1993. Appellant underwent rehabilitation efforts until she accepted an employing establishment buyout in April 1994 in the amount of \$22,056.00.

In a letter dated February 15, 1995, the Office noted that appellant's voluntary incentive "buyout" offer from her employing establishment in the amount of \$22,056.00 was for the period April 6, 1994 through April 5, 1995. The Office advised that appellant was scheduled to receive wage-loss workers' compensation benefits for total disability during this same period. The Office advised appellant that this was a prohibited dual benefit under 5 U.S.C. § 8116 as an individual was not allowed to receive both total disability workers' compensation and a buyout offer for the same period of time. The Office stated that the incentive buyout which appellant received is considered prohibited remuneration for the period in which she was in receipt of workers' compensation for total disability. Appellant was advised that the Office was halting appellant's compensation payments for wages lost due to total disability effective April 6, 1994. She was further advised that any compensation which had been paid for wages lost during the prohibited period would be declared an overpayment.

On February 23, 1996 the Office issued a preliminary finding that appellant received an overpayment of compensation in the amount of \$9,329.36 that arose because she received compensation for temporary total disability and severance pay through a buyout from her employer from April 6 through November 12, 1994. The Office found that these were dual benefits, that appellant was not entitled to both and that she was with fault in the creation of the overpayment as appellant was aware or should reasonably have been aware that she could not receive compensation for total disability for a period in which she also received a buyout payment. The Office allotted appellant 30 days to request a telephone conference, final decision on the written record or precoupment hearing; and advised her that to waive the overpayment she needed to submit the Office's form detailing her income and expenses.

In a letter dated February 28, 1996, appellant's attorney requested an oral hearing. In a subsequent letter of March 15, 1996, appellant's attorney advised that appellant acted upon erroneous information from her employer when she elected a "buyout." A copy of an April 5, 1994 memorandum from the employing establishment's personnel office to appellant on the subject "Continuance of OWCP claim if she resigns with buyout option" was attached.¹ Appellant's attorney stated that the Office stopped appellant's compensation benefits in November 1994, appellant has been without any income since that time and argued that any overpayment was through no fault of the employee and repayment would result in severe financial hardship due to appellant's lack of income. Appellant's attorney further reiterated his request for a telephone conference with the Office. In a letter dated January 27, 1997, appellant's attorney inquired about the status of a telephone conference concerning the issues of fault and waiver of overpayment. No financial information was received.

By letter dated October 13, 1999, appellant was informed that her case was being assigned for a finalization of the preliminary finding and to pursue overpayment recovery. The Office noted that a review of the file indicated that appellant's attorney had requested a telephone conference in 1996, but no such conference was conducted. The Office advised that if appellant was still interested in a telephone conference, to complete the enclosed Form OWCP-20 (overpayment recovery questionnaire) and return it to the Office by October 29, 1999. Appellant was advised that if the form was not received by that date, a final action to recover the overpayment based on the evidence in file would be made. No further information was submitted.

On January 3, 2000 the Office issued a preliminary finding that appellant received an overpayment of compensation in the amount of \$7,544.44 that arose because she received compensation for temporary total disability and OPM benefits from April 7 through November 12, 1994. The Office noted that appellant had paid back retirement contributions, but received OPM benefits from April 7 through November 12, 1994. The Office noted that since it no longer had to deduct health and life insurance premiums from April 3, 1994, these premiums in the amount of \$879.20 was subtracted from \$8,423.64 which resulted in the overpayment amount of \$7,544.44. The Office referenced its previous letter of February 23, 1996 wherein it

¹ The April 5, 1994 memorandum noted that "Barbara" read the information she had concerning the buyout and said that "nowhere does it state that if an employee on extended leave without pay (LWOP) for an OWCP case resigns during this buyout option, will their benefits from OWCP stop."

had advised appellant of the overpayment of \$9,329.36 from April 6 through November 12, 1994. The Office noted that it had been informed by OPM that appellant had received refund of retirement contributions not buyout money. After appellant paid back retirement contributions, OPM benefits commenced April 7, 1994. The Office found that appellant was aware or should reasonably have been aware that she could not receive compensation for wage loss for a period in which she also received OPM benefits. Appellant had been advised by letters CA-1032 to report OPM benefits. The Office found that appellant was at fault in creating an overpayment of \$7,544.44 when she accepted OPM benefits commencing April 7, 1994 after having received compensation benefits through November 12, 1994. The Office also noted that if a final decision is made that appellant was at fault in creating an overpayment, waiver of recovery of the overpayment was not an option. The Office also noted that pursuant to 20 C.F.R. § 10.438 waiver would be denied if appellant failed to furnish the information requested on the enclosed Form OWCP-20 within 30 days. Appellant did not respond to this notice.

By decision dated February 18, 2000, the Office finalized its preliminary overpayment determination. The Office referenced a telephone call conversation wherein appellant indicated that she knew she could not receive both compensation under the Federal Employees' Compensation Act and OPM benefits, but had related that she did not receive compensation under the Act as the Office had stopped payment. The Office noted that the record supports that compensation under the Act was paid through November 12, 1994 and OPM benefits commenced April 7, 1994. The Office found that appellant was at fault in creation of the overpayment as she accepted payment she knew or should have known to be incorrect. The Office advised appellant to forward a check in the amount of \$7,544.44 within 30 days or, if she was unable to refund the entire overpayment, to contact the Office within 30 days so appropriate arrangements for recovery could be made.

The Board finds that appellant received a \$7,544.44 overpayment of compensation for the period April 7 through November 12, 1994.

Appellant accepted a buyout from her employer in the amount of \$22,056.00 and received severance pay effective April 6, 1994. The record indicates that appellant paid back retirement contributions. The record further indicates that appellant received total disability compensation for the period April 6 to November 12, 1994. OPM benefits commenced April 7, 1994 despite the fact that she also received total disability compensation for the period April 6 to November 12, 1994. The record contains evidence which shows that appellant received \$7,544.44 in compensation from OPM for the period April 7 to November 12, 1994 but she was not entitled to receive this amount because she had also received total disability compensation pay for this period. Therefore, the Office properly determined that she received a \$7,544.44 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129 of the Act² 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.”³ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁴ In determining whether an individual is with fault, section 10.433 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).”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Thus, 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.⁵

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.”

In this case, the record contains evidence that shows appellant knew or should have known that she could not concurrently receive total disability compensation from the Office and OPM benefits. The file indicates that OPM benefits commenced April 7, 1994 and total disability compensation was paid through November 12, 1994. Although appellant could understandably be confused given the situation which occurred with her severance pay, the record indicates that appellant was aware or should reasonably have been aware that she could

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129.

⁴ 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).

⁵ See *Robin O. Porter*, 40 ECAB 421 (1989).

not receive both compensation under the Act and OPM benefits by the letters CA-1032 which advised that appellant was to report OPM benefits during the period in question. By virtue of appellant's signature, she indicated that she knew or should have know that she was not entitled to dual benefits.

Even though the Office may have been negligent in continuing to issue appellant checks for total disability while she also received OPM benefits and severance pay from the employing establishment, this does not excuse appellant's acceptance of such checks which she knew or should have been expected to know was incorrect and should have been returned to the Office.⁶ For the above reasons, appellant knew or should have known she received \$7,544.44 in compensation to which she was not entitled and therefore the Office properly found that she was at fault in its creation.

The decision of the Office of Workers' Compensation Programs dated February 18, 2000 is affirmed.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁶ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).