

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA JOYCE JOHNSON and DEPARTMENT OF THE NAVY,
NAVAL HOSPITAL, Oakland, CA

*Docket No. 00-2651; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$714.84 overpayment of compensation from January 4, 1998 to August 14, 1999; (2) whether the Office properly determined that appellant was at fault in creating the overpayment, which was, therefore, not subject to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$25.00 from appellant's compensation every four weeks.

On July 7, 1989 appellant, then a 39-year-old medical clerk, filed a claim alleging that her bunionectomy, ligament removal from her ankle, and subsequent left foot fracture were caused by her employment.¹ The Office accepted appellant's left foot metatarsalgia and hammertoe as work related, authorized a left ankle bunionectomy and paid appropriate wage-loss benefits.

By decision dated May 27, 1993, the Office awarded appellant a nine percent permanent impairment of the left lower extremity.

On September 2, 1997 the Office notified appellant that her claim had been accepted for an aggravation to her bunionectomy, and that compensation would be paid from August 1 to 16, 1997 on a gross weekly pay of \$343.38, and subsequent payments on a gross pay of \$1,289.00 which included a health benefits deduction of \$85.54 and a post retirement life insurance premium deduction of \$16.38.

On January 23, 1998 the Office notified appellant that her compensation from January 4 to 31, 1998 would include a health benefits deduction of \$85.44 and a zero deduction for life insurance.

¹ Appellant stated that her left foot fracture occurred during surgery.

On September 22, 1999 the Office notified appellant that compensation from September 12 to October 9, 1999 on a gross pay amount of \$1,329.00 and include a health benefits deduction of \$95.84 and a \$39.48 deduction for post retirement basic life insurance.²

In a letter dated September 23, 1999, the Office advised appellant that a preliminary determination had been made that she had been overpaid \$714.84 because post retirement basic life insurance deductions were not made from January 4, 1998 to August 14, 1999. The Office found that appellant was not without fault because she knew or should have known that her premiums for basic life insurance should have been deducted from her compensation. The Office noted that such premiums had been deducted since August 16, 1996, and were described to her in a notice dated September 2, 1997. It noted further that a similar overpayment occurred in a prior claim and appellant had notified the Office when her compensation benefits were reduced. The Office advised appellant of her right to submit evidence or arguments if she disagreed that an overpayment occurred, if she disagreed with the amount of the overpayment, if she believed the overpayment occurred through no fault of her own, or if she felt that recovery of the overpayment should be waived.

On October 12, 1999 appellant elected to have the Office decide the issues of overpayment and fault based on the written evidence. On October 15, 1999 appellant filed an overpayment recovery questionnaire and by letter dated October 21, 1999 she requested an oral hearing.

A hearing was held on March 1, 2000, and the hearing representative, in a decision dated May 26, 2000 and finalized on June 1, 2000, affirmed the Office's September 23, 1999 decision, finding that appellant was at fault in the creation of the overpayment and ordered that the Office deduct \$25.00 from each subsequent compensation payment.

The Board 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.

In this case, appellant was notified on September 2, 1997 that her compensation benefits would include a post retirement life insurance premium deduction of \$16.38, and on September 22, 1999, that her compensation from September 12, 1999 would also include a \$39.48 deduction for post retirement basic life insurance. However, the Office on January 23, 1998 notified appellant that her compensation from January 4, 1998 would include a zero deduction for optional life insurance. Thus, the Office failed to deduct life insurance premiums from January 4, 1998 to August 14, 1999, resulting in an overpayment of \$714.84.

Since appellant was notified that basic life insurance premiums would be deducted from her compensation benefits and that she was subsequently notified that the premiums would not be deducted, appellant knew or should have known that an overpayment occurred in her compensation benefits from January 4, 1998 to August 14, 1999, and that therefore she was not without fault in the creation of the overpayment. It is noted that a similar overpayment situation

² The record includes a September 14, 1999 Office worksheet that notes that appellant's August 15, 1999 compensation would include a basic life insurance deduction.

concerning appellant occurred in an earlier claim. The hearing representative noted that her prior experience should have alerted her to the same error.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$25.00 from appellant's compensation payments every four weeks.

Section 10.441(a) provides that, if an overpayment of compensation has been made to one entitled to future payments, "The Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship."

At the time of the May 26, 2000 decision, appellant received \$1,193.00 in compensation every four weeks. Based on appellant's testimony and the questionnaire she submitted to the Office, appellant's sole monthly income is \$1,193.00 with expenses totaling more than \$2,100.00, which would indicate that appellant needed all her income to meet her expenses.³ The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case and acted within its discretion in determining that repayment of the overpayment could be accomplished by withholding a minimal of \$25.00 every four weeks from appellant's compensation.

The decision dated May 26, 2000 and finalized June 1, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 25, 2002

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

³ Appellant's nephew lived with her but his \$643.00 monthly income was to be used for his expenses only. She had three children under 18 living with her and a 19-year-old, none of whom contributed to the household. Appellant's expenses included \$630.00 a month for rent, \$250.00 for food, approximately \$190.00 for utilities and \$100.00 for clothes. She also has a \$219.00 car payment, \$201.00 car insurance, \$31.00 to Mastercard, \$46.00 to Visa, \$188.00 to JC Penny's, \$100.00 to a second Mastercard and \$127.00 to Target Stores.