

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA E. CANFIELD and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Poughkeepsie, NY

*Docket No. 01-989; Submitted on the Record;
Issued January 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$4,411.59 overpayment in compensation; and (2) whether appellant was at fault in the creation of the overpayment.

On January 29, 1998 appellant, then a 32-year-old revenue officer, was driving on official business when her motor vehicle was struck in the rear by another automobile. She filed a claim for neck and back injury, whiplash, muscle strain and headache. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain and cervical instability. Appellant underwent surgery on April 20, 2000 for cervical discectomy at C4-5 and C4-5 fusion.

In a September 8, 2000 letter, the Office informed appellant that it would begin payment of temporary total disability effective retroactively to August 15, 2000. The Office warned appellant to notify it when she returned to work to avoid an overpayment in compensation. The Office noted that each compensation check would contain the dates for which compensation was paid. It instructed appellant that if she worked for any part of the period covered by the check, she was to return the check to the Office. Appellant returned to work, four hours a day, on October 2, 2000.

In a December 7, 2000 letter, the Office informed appellant of its preliminary determination that she had received a \$4,411.59 overpayment in compensation because she returned to work part time on October 2, 2000 but continued to receive temporary total disability compensation through December 2, 2000. The Office calculated that appellant was entitled to \$4,100.85 in compensation for the period September 10 through November 8, 2000 but received \$8,512.44 for the period September 10 through December 2, 2000. It therefore determined that the amount of the overpayment was \$4,411.59. The Office further found that appellant was at fault in the creation of the overpayment because she was aware or reasonably should have been aware that she was not entitled to compensation benefits for total disability after she returned to work on a part-time basis. Appellant was given 30 days to respond to the Office's letter.

In a January 17, 2001 decision, the Office found that appellant had received a \$4,411.59 overpayment in compensation because she continued to receive temporary total disability

compensation after she returned to part-time work. The Office further found that appellant was at fault in the creation of the overpayment.

The Board finds that appellant received an overpayment in compensation.

Appellant began receiving temporary total disability compensation as of August 15, 2000. She returned to work part-time on October 2, 2000 but continued to receive temporary total disability compensation. As appellant was not entitled to temporary total disability compensation after she returned to work, she received an overpayment in compensation.

The amount of the overpayment, however, must be recalculated. The Office calculated that amount of compensation that appellant was entitled to receive for the period September 10 through November 8, 2000, taking into account that she was working four hours a day after October 2, 2000. However, the Office's calculation then assumed that appellant was not entitled to any compensation after November 10, 2000. The evidence of record shows that appellant continued to work four hours a day until January 16, 2001 when she began working six hours a day. Appellant, therefore, would be entitled to compensation for four hours a day through December 2, 2000. The case must therefore be remanded for recalculation of the amount of the overpayment, taking into account that amount of compensation to which appellant was entitled for the period November 8 through December 2, 2001.

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

Section 8129(a) of the Federal Employees' Compensation Act provides: "Adjustment of 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 Act or would be against equity and good conscience."¹ 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 regulations² 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 payments 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 provide information which he or she knew or should have known to be material; or

¹ 5 U.S.C. § 8129(b).

² 20 C.F.R. § 10.433(a).

(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. As she accepted a payment she knew or should have known to be incorrect.

The Office, in notifying appellant that she would be paid temporary total disability compensation, instructed appellant to return any compensation received that included any period after the date she returned to work. The evidence shows that the Office was informed by the latter part of October 2000 that appellant had returned to work. The Office continued to make compensation payments until December 2, 2000. However, appellant did not return the compensation checks she received after she returned to work as she had been instructed. She therefore received compensation payments to which she knew or should have known were incorrect. Where a claimant is at fault, the overpayment must be recovered even though the overpayment resulted from negligence by the employees of the government. Therefore, even though the Office failed to promptly stop payment of temporary total disability compensation, appellant, by keeping compensation payments which she knew or reasonably should have known were incorrect, was at fault in the creation of the overpayment.³

The decision of the Office of Workers’ Compensation Programs dated January 17, 2001 is hereby affirmed insofar as it finds that appellant received an overpayment in compensation and was at fault in the creation of the overpayment. The decision on the amount of the overpayment is set aside and the case remanded for recalculation of the amount of the overpayment.

Dated, Washington, DC
January 17, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³ See *Larry D. Strickland*, 48 ECAB 669 (1997).