

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOTTIE M. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Tulsa, OK

*Docket No. 01-431; Submitted on the Record;
Issued March 25, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,593.94; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment.

The Office accepted appellant's claim for temporary aggravation of preexisting carpal tunnel syndrome and aggravation of thoracic outlet syndrome. On November 23, 1998 appellant returned to work part time as a modified distribution clerk. By decision dated April 28, 1999, the Office informed appellant that it was adjusting her compensation to reflect her wage-earning capacity in the position of part-time modified distribution clerk. In its calculation of the proper compensation rate, the Office determined that appellant had a weekly pay rate of \$541.48 and a weekly compensation rate of \$184.10.

On April 22, 1999 the Office made a preliminary determination that appellant was overpaid \$3,593.94 because she received compensation for total disability through March 27, 1999 after she had returned to light duty for four hours on November 23, 1998. The Office found that appellant was at fault in the creation of the overpayment because she accepted compensation she knew, or reasonably should have known, to be incorrect. The Office stated that appellant was advised by letter in 1987 to return any periodic roll checks she received after she returned to work, that she should have realized that she was only due compensation for four hours a day and that the current amount she was receiving was the amount she received prior to her return to work for four hours a day.

By decision dated June 17, 1999, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$3,593.94 and that appellant was at fault in the creation of the overpayment.

By letter dated March 21, 2000, appellant requested an oral hearing before an Office hearing representative which was held on March 21, 2000. At the hearing, appellant objected to the Office's determination of the amount of her wage-earning capacity, stating that the

employing establishment brought her back at a level 6 clerk but the Office based her wage-earning capacity on the level 5 clerk which was the level she had bid on. She disputed the amount she was paid for sick days she took off when actually she “was off” those days and she later repurchased the sick leave. Appellant stated that she was currently receiving \$323.20 per week. Regarding the overpayment, she said when the Office restarted her checks, they indicated that there was no overpayment on the checks and she spent the money putting a fence up around her house and doing other work around her house. Appellant also described some of the bills she had to pay for her car, credit cards and medical treatment. She stated that she did not try to defraud the government and in fact notified the Office by certified mail on November 10, 1998 that she was returning to work.

Appellant submitted copies of bills and a leave request dated February 7, 1994.

By decision dated July 13, 2000, the Office hearing representative finalized its determination that appellant received an overpayment of compensation in the amount of \$3,593.94 and found that appellant was at fault in the creation of the overpayment. She stated that there was an outstanding issue regarding premium pay which could result in additional compensation owed to appellant. The Office hearing representative stated that, before any underpayment was made to appellant, the overpayment of \$3,593.94 and any interest accrued should be absorbed. She further stated that if it was determined that no compensation was due appellant because of the premium pay issue or if the amount was not sufficient to meet the overpayment, the Office should address the issue of a repayment schedule as based on the financial obligation of appellant.

The Board finds that appellant received an overpayment of \$3,593.94.

The Office calculated appellant’s overpayment by adding the net compensation appellant received for total disability rather than partial disability for the period November 23, 1998 through March 27, 1999 which totaled \$7,984.37. The Office determined that the total amount appellant should have received for the relevant time period was \$4,390.43. The Office subtracted \$4,390.42 from \$7,984.37 to obtain \$3,593.94. Documents of record support the Office’s computation. Moreover, appellant does not dispute the amount of the overpayment.

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

Section 8129(b) of Federal Employees’ Compensation Act¹ 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.”² Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.³

¹ 5 U.S.C. § 8129(b).

² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *Diana L. Booth*, 52 ECAB _____ (Docket No. 99-1760, issued May 10, 2000); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation provides in relevant part that a claimant is with fault in the creation of an overpayment when he or she: (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 should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, 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 On December 24, 1986 the Office informed appellant that she should notify the Office when she returned to work and return any compensation check she received after her return to work. By letter dated April 23, 1987, the Office informed appellant that because she was returning to part-time work, her temporary total disability benefits were terminated April 11, 1987 and that she would receive compensation benefits on a 28-day cycle, reflecting payment for 20 hours of lost wages each week. When appellant returned to work on November 23, 1998, she received an amount that was the same as she received prior to her return to part-time work. Although appellant testified at the hearing, that the compensation check she received from the Office after her return to work said "no overpayment" on it, she knew or should have known she was not entitled to compensation at the same rate of pay as when she was performing full-time work. The Board has held that misinformation from the Office does not excuse appellant from accepting additional compensation she knew or should have known to be incorrect.⁶ Appellant is therefore at fault in the creation of the overpayment.⁷

⁴ 20 C.F.R. § 10.433(a) (1999).

⁵ *Diana L. Booth*, *supra* note 3.

⁶ *See John L. Wolf*, 48 ECAB 148, 157 (1996); *Russell E. Wageneck*, 46 ECAB 653, 661 (1995); *Dennis W. Simpson*, 43 ECAB 1004, 1010 (1992).

⁷ The Board need not address the issue of repayment since the Office has not yet resolved the issue of appellant's entitlement to premium pay and the correct amount of her wage-earning capacity. *See Thomas W. Stevens*, 50 ECAB 288, 289 n. 2 (1999).

The July 13, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 25, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member