

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERRA A. ROBINSON and DEPARTMENT OF ENERGY,
FORESTAL BUILDING, Washington, DC

*Docket No. 01-625; Submitted on the Record;
Issued March 14, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,024.64 during the period April 3 to April 22, 2000; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery.

On June 18, 1997 appellant, then a 52-year-old Equal Employment Opportunity specialist/investigator, filed a traumatic injury claim alleging that on June 10, 1997 she sustained a dislocated disc while bending and moving boxes. The Office accepted the claim for lumbar and cervical strains and subluxation, lumbar spine and paid appropriate compensation. Appellant stopped work on June 10, 1997 and was placed on the automatic rolls for temporary total disability by letter dated November 28, 1997.

By letter dated November 28, 1997, the Office explained the terms under which appellant was entitled to receive compensation and instructed her that, to avoid an overpayment of compensation, she should notify the Office immediately when she returned to work and that if she worked for any portion of the period for which a payment was made, she must return that compensation check to the Office.

Appellant returned to light-duty work for four hours per day working four days a week on April 3, 2000.

In a report of a telephone call dated April 19, 2000, the Office called to verify appellant's work status and notified her that the periodic rolls payment for the period March 26 through April 22, 2000 had already gone out and thus, an overpayment might occur.

By letter dated July 19, 2000, the Office informed appellant that it had made a preliminary determination that she had received an overpayment in compensation in the amount of \$1,024.64 for the period April 3 to April 22, 2000. The Office stated that it had found appellant at fault in the creation of the overpayment because she should have known that she was

not entitled to compensation for total disability for a period when she was earning wages. Appellant did not respond to the Office's letter. By decision dated December 11, 2000, the Office finalized the overpayment decision. The instant appeal follows with appellant contending that she never received the July 19, 2000 preliminary determination advising her that an overpayment had occurred.

The Board has reviewed the record and finds that an overpayment of \$1,024.64 was created from April 3 to April 22, 2000.

As noted above, appellant returned to a light-duty position on April 3, 2000. The Office paid compensation for temporary total disability through April 22, 2000, thereby creating an overpayment of compensation. The Office determined that the compensation paid for wage loss during this period was \$1,024.64. Thus, the Office properly found that an overpayment in the amount of \$1,024.64 existed.

The Board also finds that the Office properly determined that appellant was not without fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act¹ provides that the Office may not adjust later compensation or recover an overpayment unless an "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." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.433 of the implementing federal regulations provides that a recipient who has done any of the following will be found to be at fault in creating the 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

"(3) Accepted a payment which he or she knew or should have known was incorrect. (This provision applies only to the overpaid individual)."²

The regulations further provide that whether or not the Office determines that an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care to be expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.³

¹ 5 U.S.C. § 8101, 8129(b).

² 20 C.F.R. § 10.433(a).

³ 20 C.F.R. § 10.433(b).

On July 19, 2000 the Office made a preliminary determination that appellant was at fault in creating the overpayment under the third criterion because she should have been aware that she was not entitled to the compensation she received after returning to work on April 3, 2000 working part time. The record shows that the Office advised appellant that she would be paid regular compensation until she returned to duty. The Office specifically stated: “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result.” (Emphasis in the original.)

The Board finds that this evidence supports that appellant knew or should have known that the payment she accepted after returning to work on April 3, 2000 was incorrect. While the Office may have been remiss in issuing a check for disability after being notified that appellant had returned to full-time work, this error did not excuse appellant’s acceptance of the checks which she knew or should have known should have been returned to the Office.⁴

Appellant asserted that she did not receive the Office’s July 19, 2000 preliminary determination. The Board has held that it is presumed, absent evidence to the contrary, that an item mailed to an individual in the ordinary course of business was received by that individual.⁵ This presumption, commonly referred to as the “mailbox” rule, arises when it appears from the record that the item was properly addressed and duly mailed.⁶

The Office’s finding of fault in this case rests on the strength of this presumption. The record reflects that the July 19, 2000 preliminary notice from the Office was sent to appellant’s address of record, the same address to which all the previous benefits checks and the Office’s December 11, 2000 decision were sent, all of which were duly received by appellant. Therefore, because the record contains no evidence which rebuts the presumption of receipt raised by the “mailbox” rule, the Office’s December 11, 2000 decision finding appellant at fault in the creation of the overpayment was proper.

Because the evidence supports the Office’s finding that appellant was at fault in the creation of the overpayment, the Office may not waive recovery of the overpayment.⁷

⁴ *Larry D. Strickland*, 48 ECAB 669 (1997).

⁵ *George F. Gidicsin*, 36 ECAB 175 (1984).

⁶ *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁷ *See Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

The decision of the Office of Workers' Compensation Programs dated December 11, 2000 is hereby affirmed.

Dated, Washington, DC
March 14, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member