

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMONA L. VERDEGAN and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, McNARY DAM, Walla Walla, WA

*Docket No. 00-2481; Submitted on the Record;
Issued May 21, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating an overpayment in compensation in the amount of \$50,637.93 and that, therefore, she was not entitled to waiver; and (2) whether the Office properly required repayment of the overpayment by withholding \$1,000.00 every four weeks from her continuing compensation.

In 1991 appellant, then a 34-year-old power plant electrician, filed an occupational disease claim, alleging that factors of employment caused an emotional condition. By decision dated April 22, 1993, the Office denied the claim. Appellant, through counsel, requested a hearing. She retired effective April 11, 1994. In a court order dated May 4, 1994, appellant was awarded both front and back pay for the period November 1, 1992 to October 31, 1995 pursuant to a settlement agreement for a claim filed under Title VII of the Civil Rights Act. In a decision finalized on November 22, 1994, an Office hearing representative remanded appellant's case for further development. On March 27, 1995 the Office accepted that appellant sustained employment-related depression. The accepted conditions were later expanded to include ulcers and esophagitis. Appellant received wage-loss compensation for the period April 11, 1994 and continuing.

By decision dated September 21, 1998, the Office found that appellant was not eligible for wage-loss compensation for the period April 11, 1994 to October 31, 1995 because no wage loss had occurred since, by order of the U.S. District Court of the Eastern District of Washington, she had received pay covering that period.¹ In a letter dated September 22, 1998, the Office informed appellant that it had made a preliminary determination that she had received an overpayment in compensation in the amount of \$50,637.93 for the period April 11, 1994 to

¹ The Office further found that appellant was entitled to wage-loss compensation for the period October 15 to 31, 1992 and was not entitled to wage-loss compensation for the period November 1, 1992 to April 11, 1994 as she had been compensated for that period under the aforementioned court order.

October 31, 1995. The Office stated that it had found appellant at fault in the creation of the overpayment because she knew or should have known that she was not entitled to wage-loss compensation because the employing establishment had paid wages for the period in question pursuant to a court order.² Appellant, through counsel, requested a hearing that was held on March 29, 1999.

At the hearing appellant testified that she had been awarded a total of \$206,000.00 for the civil rights claim³ and was then receiving wage-loss compensation from the Office. She stated that, after receiving the back wage-loss compensation from the Office, she took out a loan and put an addition on her house. Her attorney argued that she relied on the stipulation in the court order that she was entitled to benefits under the Federal Employees' Compensation Act and, if an overpayment was found to exist, that she was without fault in the creation of the overpayment in compensation. By decision dated September 3, 1999, an Office hearing representative finalized the overpayment determination, finding appellant at fault. The hearing representative further noted that appellant's monthly income was \$4,659.00 and claimed expenses were \$4,775.00 but found that her claimed expense of \$1,191.00 per month for the care of horses was not a necessary and reasonable living expense and, thus, \$1,000.00 would be withheld from her continuing compensation each payment period. The instant appeal follows.

The Board finds that appellant received an overpayment in compensation in the amount of \$50,637.93 for the period April 11, 1994 to October 31, 1995.

The record in this case shows that the Office paid appellant compensation totaling \$50,637.93 for the period April 11, 1994 to October 31, 1995. Section 8116 of the Act,⁴ which places limitations on the right to receive compensation states, in pertinent part:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States....”

Section 8116 continues with exceptions to the above, none of which are present in the instant case.⁵ The May 4, 1994 court order states that “this agreement is not intended to affect the allowance or disallowance of plaintiff's claim now pending under the Act and it is agreed this settlement shall not prejudice or interfere with the allowance of said claim.” In the settlement agreement dated October 14, 1993, the presiding magistrate stated that “because plaintiff has not

² The record indicates that the Office found in May 1997 that appellant received overpayments in compensation in the amounts of \$3,209.93 and \$248.87. The \$3,209.93 overpayment was repaid and the \$248.87 overpayment was waived.

³ Appellant received a total of \$206,120.50, which consisted of compensatory damages, front pay, back pay, past and future medications and past and future medical expenses.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ The exceptions include in return for service actually performed, military pension, veteran's benefits and certain other military pay; *see* 5 U.S.C. § 8116(a)(1-4)

yet received any worker's compensation benefits ... the issue of offset need not be addressed." As appellant received front and back pay through the court order, she was not entitled to wage-loss compensation under the Act for the same period inasmuch as she incurred no wage loss. The Board, therefore, finds that the wage-loss compensation she received for that period is an overpayment in compensation.

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

Section 8129 of the Act provides that an overpayment in 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."⁶

Section 10.433(a) of the Office's regulation provides:

"[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 OWCP 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 in 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
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."⁷

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. The Office has the burden of proof in establishing that appellant was at fault in helping to create the overpayment.⁸ In determining whether a claimant is at fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.⁹ Factors to be weighed are the individual's

⁶ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

⁷ 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB ____ (Docket No. 00-607, issued January 23, 2001); *see also* 20 C.F.R. § 10.430.

⁸ *Danny L. Paul*, 46 ECAB 282 (1994).

⁹ *Stephen A. Hund*, 47 ECAB 432 (1996).

understanding of reporting requirements and the obligation to return payments, which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported and ability, efforts and opportunities to comply with reporting requirements.¹⁰ Thus, an individual will be found to be at fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances, which may affect entitlement to, or the amount of, benefits.¹¹ The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he or she knew or should have expected to know he or she was not entitled.¹²

In this case, the Board finds that appellant should have been aware that she was not entitled to receive wage-loss compensation when she had already received back and front wages under a federal court order. On appeal, appellant contends that she relied on the stipulation in the court order, which she felt entitled her to wage-loss compensation under the Act in addition to the wages ordered by the court. The court order, however, merely stipulates that the settlement would not “prejudice or interfere with allowance” of a claim under the Act. In this case, appellant had already received wages for the same period, for which she then received wage-loss compensation under the Act. As stated above, the Office accepted that appellant sustained an employment-related emotional condition, and she continues to receive compensation benefits for this condition.

The Board finds that under the circumstances of this case the Office properly found that appellant reasonably knew or should have known that she was not entitled to receive compensation for this period. Appellant was, therefore, at fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$50,637.93 is not subject to waiver.¹³

Lastly, the Board finds that the Office properly required repayment by withholding \$1,000.00 from appellant’s continuing compensation.

With regard to the amount withheld from appellant’s continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate

¹⁰ *Henry P. Gilmore*, 46 ECAB 709 (1995).

¹¹ *Id.*

¹² *See Russell E. Wageneck*, 46 ECAB 653 (1995).

¹³ *See John L. Wolf*, 48 ECAB 148 (1996).

of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁴

In this case, appellant indicated on the overpayment questionnaire form that her monthly expenses exceeded her monthly income by \$86.00. She, however, indicated that she expended \$1,191.00 per month on the care of her horses. Furthermore, appellant indicated that she had horses valued at \$15,000.00 to \$20,000.00. Hence, the Board finds that the Office gave due regard to appellant’s financial circumstances in determining the rate of repayment in this case and, thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$1,000.00 every four weeks from appellant’s compensation.

The September 3, 1999 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 21, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁴ 20 C.F.R. § 10.441(a) (1999).