

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH R. WARNER and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 01-1155; Submitted on the Record;
Issued May 10, 2002*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$5,443.87 was created in 1997; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment, thus precluding waiver or recovery of the overpayment; and (3) whether the Office abused its discretion by ordering repayment at the rate of \$75.00 per month.

On September 11, 1995 appellant, then a 39-year-old material expediter, filed a traumatic injury claim alleging that on August 30, 1995 she strained her back and experienced stiffness in her shoulders while lifting fuel controls. Appellant stopped work on September 19, 1995 and she has not returned to work.¹

The Office accepted appellant's claim for lumbar, cervical and thoracic strains. Appellant received appropriate compensation for temporary total disability and wage loss.

By letter dated March 13, 1997, the Office referred appellant to a vocational rehabilitation counselor.

In an August 1, 1997 decision, the Office reduced appellant's compensation on the grounds that she failed, without good cause, to undergo vocational rehabilitation counseling. The Office reinstated appellant's compensation and sent appellant a check dated August 16, 1997.

On November 19, 1997 the Office issued a notice of proposed termination of compensation on the basis that the medical evidence established that appellant had no continuing disability as a result of her August 30, 1995 employment injury. Appellant was given 30 days to submit additional evidence from her physician if she disagreed with the proposed action.

¹ The record indicates that appellant was terminated by the employing establishment on October 20, 1995 due to her inability to maintain an acceptable attendance record.

By decision dated December 30, 1997, the Office terminated appellant's compensation effective January 4, 1998. In a January 26, 1998 letter, appellant requested reconsideration of the Office's decision.

In an April 30, 1998 decision, the Office denied modification of the December 30, 1997 decision following a merit review of the claim. In an August 1, 1998 letter, appellant, through her congressman, requested reconsideration of the Office's decision.

By decision dated September 16, 1998, the Office denied appellant's request for a review of the merits of her claim on the grounds that it neither raised substantive legal arguments nor included new and relevant evidence.

In a May 11, 2000 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$6,388.02 because appellant received compensation in 1996, 1997 and 1998 while she received earnings from employment. Specifically, the Office determined that an overpayment had occurred in the amount of \$855.68 for 1996, \$5,443.87 for 1997 and \$88.47 for 1998. The Office advised appellant that she was found at fault in the creation of the overpayment. The Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment, if she believed that the overpayment occurred through no fault of her own and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

On June 8, 2000 appellant requested an oral hearing.

By decision dated February 8, 2001, the hearing representative modified the amount of the overpayment for 1996. The hearing representative found that appellant was not at fault in the creation of the overpayment and recovery was waived. Further, the hearing representative reversed the Office's finding that an overpayment was created in 1998. The hearing representative finalized the Office's preliminary determination that an overpayment was created in 1997 and finding of fault. The hearing representative ordered appellant to repay the overpayment in the amount of \$75.00 per month.

The Board finds that the Office properly determined that an overpayment in the amount of \$5,443.87 was created in 1997.

The record reveals that appellant submitted a signed Form EN-1032 on January 5, 1998 instructing her to report any employment, including self-employment in the 15-month period prior to the date of the form. On this form, appellant indicated that she worked as a legal assistant from January through May 1997, she worked at Bexar County Opportunities from May through August 1997 and at Trinity Temporaries from December 10 through 23 1997. An investigative report indicated that appellant worked for Mendelson and Jackson PC during the first quarter of 1997. The report also indicated that appellant worked for Bexar County Opportunities and Mendelson and Jackson during the second quarter of 1997. Appellant worked

for Bexar County Opportunities during the third quarter of 1997. She worked for Kelly Services, Inc. and Trinity Staffing Services, Inc. during the fourth quarter of 1997.

The Office calculated that appellant received temporary total disability compensation in the amount of \$11,007.20 and subtracted \$5,563.33, the amount appellant should have received for partial disability in 1997. Thus, the record clearly reflects that an overpayment was created in the amount of \$5,443.87 for 1997.

The Board also finds that the Office properly found that appellant was with fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees Compensation Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.² The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): “[a]djustment or 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 or recovery would defeat the purpose of the Act or would be against equity and good conscience.”³ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁴

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁵ However, the Office may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because: (1) The individual relied on misinformation given in writing by the Office (or by another government agency which he or she had reason to believe was connected with the administration of benefits) at the interpretation of a pertinent provision of the Act or its regulations; or (2) The Office erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.⁶

² 5 U.S.C. § 8129.

³ 5 U.S.C. § 8129(b).

⁴ *Harold W. Steele*, 38 ECAB 245 (1986).

⁵ 20 C.F.R. § 10.435(a).

⁶ *Id.* at § 10.435(b).

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (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 furnish 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 been expected to know was incorrect.”⁷

In this case, the Office hearing representative applied the third standard -- appellant accepted a payment, which she knew or should have been expected to know was incorrect. The record contains a December 26, 1995 letter, wherein the Office advised appellant that her first compensation payment would cover the period October 25 through December 9, 1995 and that her regular compensation payment would cover the period December 10, 1995 through January 6, 1996. The Office further advised appellant that “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you go back to work.” The Office stated “Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition.”

Appellant filed a signed Form EN-1032 dated January 5, 1998, revealing that she had worked for Bexar County Opportunities and Trinity Temporaries in 1997.

The Board finds that the Office’s December 26, 1995 letter, together with the signed Form CA-1032, indicate that appellant accepted a payment of total disability compensation which she knew or should have known to be incorrect.

Appellant testified at the hearing that she believed she had the right to continue to receive disability compensation while working based on her conversation with an Office claims examiner who stated that she could earn up to 75 percent of her wage-earning capacity without affecting her compensation. Appellant also testified that she believed her compensation would not be affected by her employment as she was told by an Office claims examiner that she could continue her internship at Mendelson and Jackson. Although appellant indicated that she talked with someone at the Office about the matter, there is no evidence that appellant relied on misinformation given in writing.

After consideration of all the particular circumstances surrounding the overpayment, the Board finds that the facts of this case establish that appellant should have been expected to know that she accepted incorrect payments in the amount of \$5,443.87 and, therefore, she was at fault in the creation of the overpayment in 1997.

⁷ *Id.* at § 10.433(a).

Finally, the Board finds that it does not have jurisdiction over the method of recovery in this case.

In this case, the Office is not seeking recovery from continuing benefits inasmuch as the Office terminated appellant's compensation effective January 4, 1998. The Board notes that it does not have jurisdiction under the Debt Collection Act⁸ to consider the matter of recovery of an overpayment against assets of the salary of an employee.⁹ The Board's jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Act.¹⁰

The February 8, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 10, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ 5 U.S.C. § 5511 *et seq.*

⁹ *See Levon H. Knight*, 40 ECAB 658 (1989).

¹⁰ *See Beverly E. Labbe*, 50 ECAB 440 (1999).