

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANE DEVLIN and DEPARTMENT OF AGRICULTURE,
SAN BERNARDINO NATIONAL FORREST, BIG BEAR RANGE STATION,
San Bernardino, CA

*Docket No. 02-305; Submitted on the Record;
Issued October 15, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment in the amount of \$6,182.39 for the period of January 18, 1994 through August 1, 1996; and (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of the overpayment.

Appellant, a 51-year-old forestry aide, filed a notice of traumatic injury on June 25, 1992 alleging on that date she was hit on the head by a beam. The Office accepted her claim for a herniated disc at C5-6 on November 23, 1992. The Office entered appellant on the periodic rolls on November 27, 1992 at the augmented rate.

On May 21, 1994 appellant completed a Form CA-1032 and indicated that she was neither employed nor self-employed during the 15-month period covered by the form. On June 22, 1994 she stated that her sons would graduate from high school on June 7, 1995. Appellant completed a Form CA-1032 on February 10, 1995 and stated that she worked from January 18 to March 8, 1994 at Big Sky Tile and Marble and earned \$735.78. She further stated that she was self-employed from November 1994 to January 1995 and earned \$500.00 during that 2-month period. In a Form CA-1032 dated January 21, 1996 appellant stated that she no longer had any dependants. She stated that she worked at Big Bear Lodge in September 1995 and earned \$425.00 per month.

On February 22, 1996 the Office reduced appellant's compensation to reflect her lack of dependants and requested further information regarding her employment. She submitted her wage and tax statement which indicated that she earned \$1,414.04 from B-Y Ranch Associates in 1995. On her 1994 tax return, appellant reported total earnings of \$1,731.00. The Social Security Administration indicated that in 1994 appellant received \$1,730.77 from Big Sky Tile and Marble Works, that in 1995 she received \$1,626.54 from B-Y Ranch and that in 1996 she received \$5,235.16 from B-Y Ranch Associates.

Appellant returned to work in March 1998. By decision dated August 14, 1998, the Office reduced her compensation benefits to zero based on her earnings.

In a preliminary decision dated August 25, 1999, the Office found that appellant had received an overpayment in the amount of \$6,182.39 as she had actual earnings during the period of January 18, 1994 through August 1, 1996 but continued to receive compensation for total disability. The Office found that appellant was at fault in the creation of this overpayment as she knew that she was not entitled to receive compensation for total disability while working.

Appellant requested a prerecoupment hearing. In an August 31, 2001 decision, the Office hearing representative found that appellant was at fault in the creation of the \$6,182.39 overpayment and she was therefore, not entitled to a waiver. The hearing representative found that appellant could repay the overpayment at the rate of \$50.00 per month and that the \$531.91 of the overpayment should be compromised resulting in a total overpayment of \$5,650.48.

The Board finds that appellant received an overpayment of \$6,182.39 for the period of January 18, 1994 through August 1, 1996.

Appellant submitted a Form CA-1032 on May 21, 1994 and stated that she was neither employed nor self-employed during the 15-month period covered by the form. On February 10, 1995 she completed a Form CA-1032 and indicated that she worked from January 18 to March 8, 1994 and earned \$735.00 working for Big Sky Tile & Marble. Appellant further stated that she was self-employed from November 1994 to January 1995 and that she earned \$500.00 during this period. On January 21, 1996 she completed a Form CA-1032 and indicated that she began working in September 1995 earning \$425.00 per month. Appellant stated that she began work at B-Y Ranch Associates in September 1995 and stopped work August 1996.

In a letter dated February 22, 1996, the Office requested that appellant provide her tax returns and wage and tax statements from 1994 and 1995. Her wage and tax statement for 1995 demonstrated that she earned \$1,414.04 from B-Y Ranch Associates in 1995. Appellant's tax form indicated that she earned \$1,731.00 in 1994. The Social Security Administration (SSA) stated that she earned \$1,730.77 from Big Sky Tile & Marbleworks in 1994 and that she earned \$1,626.54 in 1995 and \$5,235.16 in 1996 working for B-Y Ranch Associates. The Office totaled the earnings reported by the SSA and appellant's reported earnings from self-employment of \$500.00 to reach total earnings of \$9,092.47 for the period of January 18, 1994 to August 1, 1996.

The Office determined that appellant had earnings of a sporadic nature which did not fairly and reasonably represent her wage-earning capacity. The Office's procedure manual provides that when the Office learns of actual earnings which span a lengthy period of time, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate and applying the *Shadrick* formula which involves comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings.¹ The Office averaged appellant's reach total earnings of

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.d(3) and (4) (June 1996).

\$9,092.47 for the period January 18, 1994 to August 1, 1996, a total of 132.43 weeks, to reach \$68.66 per week. The Office determined that appellant's date-of-injury position currently paid \$359.20 per week. The Office divided appellant's earnings by her current pay rate to reach a wage-earning capacity of 19 percent. The Office then multiplied her wage-earning percentage by her pay rate when injured of \$332.80, to reach \$63.23, which the Office subtracted from her pay rate when injured, to reach \$269.57, her loss of wage-earning capacity. The Office determined that appellant was entitled to receive compensation at the augmented rate from January 18, 1994 until June 7, 1995 in the amount of \$15,028.58, that she received compensation in the amount of \$18,572.62 during this period resulting an overpayment in the amount of \$3,484.04.² The Office further determined that appellant was entitled to receive compensation at the standard rate from June 8, 1995 to August 1, 1996 in the amount of \$11,486.54 and that she received \$14,184.89 for an overpayment of \$2,698.35. The Office determined that appellant received a total overpayment in the amount of \$6,182.39.³

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

Section 8129(a) of the Federal Employees' Act⁴ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment 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."⁵ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation⁶ 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

² The Board notes that the correct amount of the overpayment for this period is \$3,544.04.

³ The hearing representative compromised \$531.91 of the overpayment resulting in an overpayment in the amount of \$5,650.48.

⁴ 5 U.S.C. §§ 8101-8193, 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433(a).

(3) Accepted a payment which he or she knew or should have known was 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. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.⁷ The Office’s regulations provide that as determination of fault depends on the circumstances surrounding the overpayment and that the degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.⁸

Appellant received letters on November 27, 1992, November 4, 1993 and June 22, 1994 which informed her to return any compensation payments which coincided with any period of employment to avoid overpayment. The latter letters also informed appellant that the period of time covered would be shown on the compensation checks and that she was responsible for any overpayment resulting from a return to duty. She received ample direction from the Office of her obligation to provide notification of employment and to return any checks received after a return to work. Appellant properly notified the Office of her sporadic attempts at employment, but failed to take any steps to prevent the resulting overpayments. Given appellant’s demonstrated capacity to inform the Office of her employment, she knew or should have known that she accepted payments for total disability while working and that such amount was incorrect.⁹ Her compensation benefits did not vary until February 22, 1996, so she was aware from 1994 through 1996 that she was receiving compensation for total disability. Based on the information received from the Office, appellant should have known that an overpayment would result when she accepted compensation for total disability while earning wages in the workplace. Therefore, the Board finds that appellant was at fault in the creation of the overpayment.

With respect to recovery of the overpayment, the Board’s jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.¹⁰ She is no longer receiving compensation based on the August 14, 1998 decision finding that after her return to work she no longer had a loss of wage-earning capacity. Therefore, the Board does not have jurisdiction to review the issue of recovery of the overpayment.

⁷ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

⁸ 20 C.F.R. § 10.433(b).

⁹ *See Edwin C. Whitlock*, 50 ECAB 384 (1999).

¹⁰ *See Lewis George*, 45 ECAB 144, 154 (1993).

The August 31, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 15, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member