

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of YONNIE L. NICKENS and DEPARTMENT OF THE ARMY,  
INFORMATION SYSTEMS SOFTWARE DEVELOPMENT CENTER,  
Fort Lee, VA

*Docket No. 02-994; Submitted on the Record;  
Issued October 7, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, 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 \$1,581.36 during the period September 18 to October 7, 2000; (2) whether the Office properly determined that she was at fault in the creation of the overpayment; (3) whether the Office properly determined that recovery of the overpayment would be made by payment in full; and (4) whether the Office properly denied appellant's request for an oral hearing.

The Board finds that appellant received an overpayment in the amount of \$1,581.36.

In this case, the Office accepted that on October 3, 1997 appellant, then a 49-year-old computer specialist, sustained a lacerated forehead, scalp contusion, aggravation of sinusitis and a right shoulder strain, when she was struck in the head by a falling object in the course of her federal employment duties. The Office further accepted the surgical procedures necessitated by her injuries. Appellant stopped work on October 3, 1997 and was paid appropriate compensation benefits until she returned to work on December 4, 1997. On June 29, 2000 when she again stopped work in order to undergo authorized right shoulder surgery, the Office again began paying appellant appropriate compensation benefits for total disability. By letter dated June 29, 2000, the Office fully explained the terms under which appellant was entitled to receive compensation and specifically instructed her that in order 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. On July 11, 2000 appellant signed and returned a form provided by the Office indicating that she understood the terms of her compensation benefits.

Appellant returned to work at her usual wage, six hours a day, beginning September 19, 2000 and returned to full-time work on October 31, 2000. She suffered no wage loss beginning September 18, 2000, however, as the employing establishment granted her two hours of administrative leave a day for physical therapy. Appellant returned the compensation check for

the period October 8 to November 4, 2000, but did not return the check for the period September 18 to October 7, 2000.

On December 5, 2000 the Office informed appellant that it had made a preliminary determination that an overpayment of compensation in the amount of \$1,581.36 had occurred and that appellant was at fault in the creation of the overpayment. On December 20, 2000 the Office received a copy of a November 26, 2000 letter written by the claimant to her congressman, prior to the issuance of the Office's preliminary overpayment determination. In her letter, appellant explained to her congressman that she had received a clear indication from the Office that an attempt would be made to recover compensation paid to her after she returned to work. Appellant asserted that she was not at fault in the creation of the overpayment, as she had not submitted any Form CA-7 claims, for compensation beyond September 23, 2000. By letter dated February 8, 2001, the Office advised appellant to follow the appeal rights attached to its preliminary determination.

In a decision dated April 5, 2001, after considering the arguments raised by appellant in her letter to her congressman, the Office finalized its preliminary overpayment determination and ordered her to repay the overpayment in full. By letter dated May 1, 2001, appellant requested an oral hearing before an Office representative. In a decision dated December 3, 2001, the Office denied appellant's request for an oral hearing, as it was untimely filed. In an exercise of its discretion, the Office further denied appellant's request for a hearing on the grounds that the Office had issued its final decision on the matter of the overpayment on April 5, 2001 and had provided appellant with additional appeal rights.

As appellant received and cashed a check for compensation for total disability during the period she was regularly receiving pay checks from the employing establishment, the Office properly determined that appellant received an overpayment of compensation.<sup>1</sup>

The Board further finds that appellant was not without fault in the matter of the overpayment of compensation.

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. 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."<sup>2</sup> No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

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<sup>1</sup> *Charles E. Watkins, Jr.*, 33 ECAB 1451 (1982).

<sup>2</sup> 5 U.S.C. § 8129.

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations states in pertinent part:

“A recipient who has done any of the following will be found to be at fault with respect to 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 know 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 provisions applies only to the overpaid individual.)”<sup>3</sup>

In this case, the Office applied the third standard in finding appellant to be at fault in creating the overpayment.

The evidence of record establishes that appellant knew or reasonably should have known that she was not entitled to regular paychecks for work and compensation for total disability simultaneously and that she failed to take any action to resolve the error when she received a full compensation check for the period September 18 to October 7, 2000, for which she had already received paychecks. In its June 29, 2000 letter, the Office outlined the terms under which appellant could receive compensation. As she received this letter and signed a statement indicating that she understood the terms discussed therein, appellant should have known that she was not entitled to receive compensation for total disability for periods after September 18, 2000, when she returned to work. The fact that appellant did not file a claim for compensation for periods after September 23, 2000 and returned the compensation check for the period October 8 to November 4, 2000 does not absolve appellant of fault in the creation of the overpayment.<sup>4</sup> As appellant was aware of the terms under which she was entitled to receive compensation, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the amount of compensation she received for periods between September 18 and October 7, 2000 was in error. Therefore, appellant is at fault in the creation of the overpayment and it is not subject to waiver.

With respect to the recovery of the overpayment, the Board notes that its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. As the record indicates that the Office requested repayment in full, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment under the Debt Collection Act.<sup>5</sup>

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<sup>3</sup> 20 C.F.R. § 10.433(a).

<sup>4</sup> See *Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O’Brien*, 36 ECAB 541 (1985).

<sup>5</sup> *Gregory A. Compton*, 45 ECAB 154 (1993).

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

Here, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its December 3, 2001 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since her request postmarked May 1, 2001 had not been made within 30 days of its December 5, 2000 decision. In an exercise of its discretion, the Office further denied appellant's request for a hearing on the grounds that the Office had issued its final decision on the matter of the overpayment on April 5, 2001 and had provided appellant with additional appeal rights.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>6</sup> In the present case, appellant's right to request a precoupment hearing ran for 30 days after the date of issuance of the Office's preliminary decision dated December 5, 2000. As appellant's request was postmarked May 1, 2001, the Office was, therefore, correct in stating in its December 3, 2001 decision that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 3, 2001 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the matter of the overpayment could further be addressed through an exercise of the appeal rights accompanying the Office's April 4, 2001 final overpayment decision. The Board further finds that section 8124(b)(1) of the Act is unequivocal in setting forth the limitation in requests for hearings. Where, as in the instant case, appellant's request for a precoupment hearing was received more than 30 days after the Office issued its preliminary determination which informed her that she had 30 days to request a hearing, appellant waived her right to a precoupment hearing regarding the overpayment in compensation.<sup>7</sup> The Board further notes that in addition to failing to timely respond to the appeal rights accompanying the preliminary overpayment decision, appellant also did not respond to the Office's February 8, 2001 letter informing her that no further action could be taken on her claim until she exercised her appeal rights accompanying the preliminary determination.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>8</sup> In the present case, the evidence of record does not indicate

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<sup>6</sup> *Henry Moreno*, 39 ECAB 475 (1988).

<sup>7</sup> *See Gregg Manston*, 48 ECAB 226 (1996).

<sup>8</sup> *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated December 3 and April 5, 2001 are affirmed.<sup>9</sup>

Dated, Washington, DC  
October 7, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> The Board notes that on November 14, 2001, the Office issued a schedule award for appellant's permanent facial disfigurement. On appeal to the Board, however, appellant did not contest the Office's schedule award, but rather attached a copy of the Office's December 3, 2001 decision denying her request for a hearing and indicated her dissatisfaction therewith. Therefore, the Board has not addressed the Office's November 14, 2001 schedule award.