

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA A. MYERS and DEPARTMENT OF HOUSING & URBAN  
DEVELOPMENT, NATIONAL OFFICE, COMMUNITY PLANNING DIVISION,  
Washington, DC

*Docket No. 02-1078; Submitted on the Record;  
Issued April 16, 2003*

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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 found an overpayment of \$3,320.64, on the grounds that she received compensation for temporary total disability while working part-time from November 6, 2000 through February 25, 2001; (2) whether the Office properly found appellant at fault in creation of the \$3,320.64 overpayment and that therefore the overpayment was not subject to waiver; and (3) whether the Office properly denied appellant's August 16, 2001 request for a precoupment hearing on the grounds that it was untimely filed.

The Office accepted that on October 28, 1999 appellant, then a 54-year-old public trust officer, sustained a left medial meniscal tear when she tripped and fell on a table leg while on a temporary-duty assignment. The Office authorized arthroscopic surgery, performed on June 6, 2000. Appellant submitted periodic medical reports demonstrating total disability for work from June 6 to November 5, 2000.

Appellant returned to work on November 6, 2000 for four hours a day.<sup>1</sup> She filed claims for wage loss from November 6 to December 30, 2000.

In November 6 and 28, 2000 and January 24, 2001 letters, the employing establishment advised the Office that, although appellant returned to work for four hours per day beginning November 6, 2000, she "received a full check for the period November 5 to December 2, 2000, creating an overpayment. Also, as of January 8, 2001, [appellant] returned to work at six hours per day ... thus creating another overpayment for the period December 31, 2000 to January 27, 2001."

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<sup>1</sup> Dr. Manfreds Munters, an attending Board-certified orthopedic surgeon, released appellant to return to work for four hours per day as of November 6, 2000.

In a March 5, 2001 affidavit of earnings and employment (Form EN1032), appellant advised the Office that she had “returned to work part time, November 6, 2000 to January 6, 2001, four hours per day,” and from “January 6, 2001 to present, six hours per day.”

In a March 14, 2001 letter, the Office advised appellant that her monetary compensation benefits were being reduced effective January 8, 2001 based on her actual earnings of \$1,063.68 every 4 weeks as a public trust officer working 6 hours per day (30 hours per week). Appellant’s new compensation rate was \$911.32 every four weeks.

In a May 31, 2001 letter, appellant stated that she increased her work schedule to eight hours per day beginning May 21, 2001 and resumed her compressed work schedule of nine hours per day beginning May 28, 2001.<sup>2</sup>

In a July 5, 2001 periodic rolls payment worksheet, the Office noted that from November 6, 2000 to January 7, 2001, appellant was paid \$4,098.33 in compensation and \$1,558.29 from January 8 to February 5, 2001, for a total of \$5,656.22. The Office noted that appellant was paid for four hours wage loss beginning December 2, 2000 when appellant began working four hours per day and for two hours wage loss per day beginning January 8, 2001 when appellant increased her work schedule to six hours per day. The Office stated that appellant was entitled to the amount of total temporary disability compensation, minus her actual earnings for four hours per day effective November 6, 2000 of \$683.05, and actual earnings for six hours per day effective January 8, 2001 of \$1,025.22. This resulted in an overpayment of \$3,320.64.

In a July 12, 2001 periodic rolls payment log, the Office noted that for the period November 5, 2000 to February 25, 2001, appellant received the following checks for temporary total disability: December 2, 2000 \$3,582.84; December 30, 2000 \$1,821.48; January 27, 2001 \$1,821.48; February 24, 2001 \$1,821.48. Each of these checks covered the four weeks prior to the date on the check.

By notice dated July 16, 2001, the Office advised appellant of its preliminary determination that a \$3,320.64 overpayment of compensation had occurred in her case. The Office explained that appellant “returned to work half time [on] November 6, 2000 but kept receiving the same amount of compensation as for total disability through December 2, 2000.” Appellant increased her schedule to six hours per day beginning January 8, 2001, “but kept receiving the same amount as for four hours loss through January 27, 2001.” The Office afforded appellant the opportunity to submit evidence and argument regarding these preliminary findings. The Office advised appellant that, within 30 days of the July 16, 2001 letter, appellant could request a telephone conference with the Office, request that the Office issue a final decision based on the evidence of record or “[r]equest a prerecoupment hearing before a representative of the Branch of Hearings and Review,” regarding the fact or amount of the overpayment and whether it was subject to waiver. The Office noted that if appellant did not elect one of these alternatives or provide new evidence within 30 days, that a decision would be issued based on the record.

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<sup>2</sup> Dr. Munters released appellant to full duty as of June 11, 2001.

In a letter dated and postmarked August 16, 2001, appellant requested a prerecoumment hearing before a representative of the Office's Branch of Hearings and Review. She explained that she had been previously unable to obtain income tax documents needed to complete her overpayment recovery questionnaire and that she was confused as to where to mail her request. Appellant submitted an overpayment recovery questionnaire dated August 13, 2001 with supporting documentation, demonstrating \$3,124.00 in expenses per month for food, clothing, mortgage payments and utilities, and \$4,069.05 in monthly loan repayments. She stated that she had no cash, bank accounts, stocks, bonds or valuable personalty. Appellant asserted that she was not at fault in creation of the overpayment as she notified the Office each time her work hours increased, and the employing establishment sent the Office confirming electronic mail messages.<sup>3</sup> Appellant also asserted that her minor granddaughter, who had lived with her since birth, was an eligible dependent such that she should receive compensation at the augmented rate.<sup>4</sup>

By decision dated October 16, 2001, the Office finalized the preliminary determination of overpayment, finding a \$3,320.64 overpayment of compensation. The Office found that appellant was at fault in creation of the overpayment, as she accepted payments which she knew or should have known were incorrect. The Office noted that appellant did not contest the Office's preliminary finding of fault. The Office further found that, as appellant failed to "accept the offered opportunity to provide information which would enable the [Office] to set a recovery rate adapted to [her] specific needs," the Office would require repayment of the entire amount of the overpayment within 30 days.

By decision dated December 5, 2001, the Office's Branch of Hearings and Review denied appellant's August 16, 2001 request for an oral prerecoumment hearing on the grounds that it was untimely filed. The Office found that the August 16, 2001 request was made more than 30 days following the issuance of the July 16, 2001 decision, and was therefore untimely. Appellant's request was postmarked on the 31 day after the July 16, 2001 decision. The Office conducted a limited review of the evidence submitted and further denied the request on the grounds that the issue involved could be addressed equally well by submitting new, relevant evidence accompanying a valid request for reconsideration.

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<sup>3</sup> In June 4 and 13 and July 13, 2001 letters, the employing establishment advised the Office that appellant had returned to full duty for eight hours per day on May 28, 2001, but continued to receive compensation for temporary total disability on the periodic rolls from May 28 to July 14, 2001. The employing establishment calculated that the amount of the overpayment from May 20 to June 16, 2001 was \$649.20. The employing establishment requested that the Office find an overpayment of compensation for the period May 28 to July 14, 2001. By notice dated October 9, 2001, the Office advised appellant of its preliminary finding that an overpayment of \$1,947.56 had occurred in her case as she returned to work eight hours per day on May 28, 2001, but continued to receive compensation for temporary total disability through August 11, 2001. There is no final decision of record regarding the \$1,947.56 overpayment. Therefore, this issue is not before the Board on the present appeal.

<sup>4</sup> There is no evidence of record that appellant is her granddaughter's legal guardian or custodian or that appellant adopted her granddaughter.

Appellant filed her appeal with the Board on March 21, 2002.<sup>5</sup>

The Board finds that the Office properly found an overpayment of \$3,320.64 occurred in appellant's case as she received compensation for temporary total disability from November 6, 2000 through February 25, 2001 while working.

The record demonstrates that from November 6, 2000 to January 6, 2001, appellant worked for four hours per day. However, a July 12, 2001 compensation log worksheet indicates that appellant was issued a compensation check on December 2, 2000 at the total disability rate of \$3,582.84 for the period November 5 to December 2, 2000. For the period December 3 to 30, the Office reduced appellant's compensation check by 50 percent to \$1,821.48, to reflect that she was working for 4 hours per day.

From January 6 to 27, 2001, appellant worked for six hours per day. However, for the period December 31, 2000 to January 27, 2001, the Office issued appellant a check for \$1,821.48, reflecting a four hour per day schedule and not the six-hour schedule that appellant actually worked. Appellant also received \$1,821.48 in compensation for four hours wage loss per day from January 28 to February 24, 2001, while also working six hours per day.

Thus, for the period November 6 to December 2, 2000, appellant received total disability compensation equivalent to an eight hour per day schedule, although she was working four hours per day. Appellant received compensation at the correct rate from December 3, 2000 to January 5, 2001 at the four hour per day rate. From January 6 to February 25, 2001, appellant received compensation for four hours per day of wage loss, but was only entitled to receive compensation for two hours per day of wage loss as she was working for six hours per day.

The Office calculated that appellant was entitled to receive only \$5,656.62 in compensation for the period November 6, 2000 to February 25, 2001, whereas she received \$8,977.26, a difference of \$3,320.64. The Board has reviewed the Office's calculations and found them correct. Also, appellant does not contest the accuracy of these calculations or the amount of the overpayment. Thus, the finding of a \$3,320.64 overpayment of compensation was proper.

The Board further finds that the Office properly found appellant at fault in creation of the \$3,320.64 overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

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<sup>5</sup> Appellant originally filed her appeal with the Board on March 21, 2002, but failed to specify the date or dates of the decision(s) being appealed. The Board advised appellant in an April 3, 2002 letter to provide the dates of the decisions being appealed within 30 days or her appeal would be dismissed. After the 30 days elapsed and appellant had not responded, on May 29, 2002, the Board issued an Order Dismissing Appeal. In a June 15, 2002 letter postmarked June 24, 2002, appellant filed a petition for reconsideration, enclosing a certified return receipt which she asserted demonstrated that she did respond to the Board's April 3, 2002 letter within 30 days. On July 24, 2002 the Clerk of the Board served the Director with appellant's petition for reconsideration. The Director filed an answer on August 8, 2002, requesting that appellant's petition be denied on the grounds that it cited no error of law or fact. The Clerk of the Board served appellant with a copy of the Director's answer on August 9, 2002. Appellant responded by August 21, 2002 letter. On October 28, 2002 the Board issued an order vacating prior Board order and reinstating appeal, finding that appellant had replied to the Board's April 3, 2002 letter within 30 days.

Section 8129(a) of the Federal Employees' Compensation Act<sup>6</sup> 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.<sup>7</sup> 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 this subchapter or would be against equity and good conscience."<sup>8</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 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 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."<sup>9</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Section 10.433(a) of Title 20 of the Code of Federal Regulations, finding that appellant accepted a payment which he "knew or should have known to be incorrect."

Section 10.433(c) of the Office's regulations provides: "Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. 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."<sup>10</sup>

On March 5, 2001 appellant signed a Form CA-1032 affidavit of earnings and employment, indicating her understanding that she "must immediately report to [the Office] ... any employment." She stated in this form that she had returned to work for four hours per day effective November 6, 2000 and six hours per day effective January 6, 2001. Appellant also

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> 20 C.F.R. § 10.433(c).

informed the employing establishment's compensation managers of these changes, resulting in November 6 and 28, 2000 and January 24, 2001 letters advising the Office that appellant had returned to work and of increases in her work schedule.

The Form CA-1032 and appellant's communications with the employing establishment demonstrate her knowledge that an increase in work hours would affect the amount of her compensation benefits. Thus, the Office's finding of fault was correct under the facts of this case.

The Board notes that it does not have jurisdiction over the issue of recovery of the overpayment, as appellant is no longer receiving continuing compensation payments. The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act.<sup>11</sup>

Regarding the third issue, the Board finds that the Office properly denied appellant's August 16, 2001 request for a prerecoument hearing as untimely.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>12</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely made after the 30-day period established for requesting a hearing, or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>13</sup>

In this case, the Office made a preliminary determination in a July 16, 2001 notice that there was an overpayment of compensation in appellant's case. Appellant was afforded 30 days in which to request a telephone conference, prerecoument hearing or a decision on the written record. She did not request a prerecoument hearing until 31 days after the July 16, 2001 notice, in a letter dated and postmarked August 16, 2001. Thus, appellant's request for a prerecoument hearing is untimely, as it was received by the Office more than 30 days following the July 16, 2001 notice.

The Board has held that failure to exercise the right to a prerecoument hearing within 30 days of the date of the notice of overpayment shall constitute a waiver of that right and appropriate collection action implemented.<sup>14</sup> Thus, as appellant did not exercise her right to a prerecoument hearing within 30 days of the July 16, 2001 notice of overpayment, the Branch of

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<sup>11</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> *Henry Moreno*, 39 ECAB 475 (1988).

<sup>14</sup> *Jan K. Fitzgerald*, 51 ECAB 659 (2000).

Hearings and Review did not act improperly and the December 5, 2001 decision is correct under the law and facts of this case.<sup>15</sup>

The decisions of the Office of Workers' Compensation Programs dated December 5 and October 16, 2001 are hereby affirmed.

Dated, Washington, DC  
April 16, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> The Board notes that, in the December 5, 2001 decision, the Office erroneously advised appellant that she could pursue the recoupment issue equally well by filing a request for reconsideration. This is in error because appellant waived her right to a prerecoupment hearing by failing to file her request within 30 days of the July 16, 2001 notice. Thus, appellant may not request reconsideration on this issue. The Board finds, however, that the Office's remarks regarding reconsideration are harmless, nondispositive error, as appellant waived her right to a prerecoupment hearing and no further procedural remedies were available to her.