

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. SCANLON and U.S. POSTAL SERVICE,
POST OFFICE, Manchester, NH

*Docket No. 03-2107; Submitted on the Record;
Issued December 15, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$20,551.71 overpayment of compensation for the period March 24 through August 10, 2002; (2) whether the Office properly determined that appellant was not without fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether the Office properly withheld appellant's compensation until the overpayment was recovered.

Appellant, a part-time postal worker, sustained an occupational disease in the performance of her federal duties which the Office accepted in 1998. The Office accepted appellant's claim for left wrist tendinitis and appellant received temporary total disability. At the time she was notified of her accepted condition, she was also told what her compensation would be every four weeks.

The record contains a November 5, 2002 memorandum that says an audit of Office records indicates that a clerical error by the Office caused five compensation checks totaling \$20,551.71 intended for a different claimant were mistakenly deposited in appellant's account in less than five months resulting in an overpayment. In a November 6, 2002 preliminary decision, the Office notified appellant of the overpayment and that appellant was found to be not without fault in creating the overpayment as she knew of should have known that she received an additional \$20,551.71 in her compensation over a four-month period.

In a February 11, 2003 letter, appellant requested a hearing and wrote that the overpayment was not her fault as she attempted to contact the Office several times regarding the overpayment. At the May 14, 2003 hearing, she testified that her expected payment every four weeks was approximately \$850.00 and that she was aware that she received five additional deposits of approximately \$4,000.00 between March and August 2002. Appellant testified that she should not be found at fault for the overpayment because she called the Office at one point regarding the money but, did not hear back from them so she assumed the money was her spouse's paycheck that was mistakenly deposited into her separate account. She also testified

that she assumed the money was intended for her as part of back pay that was due her from the Office and that she did not know where the money came from. Appellant also testified that she did not know how much money her spouse is paid every two weeks, but she assumed it was \$4,000.00. She wrote on a financial questionnaire that her husband was paid \$3,879.00 every two weeks Appellant was asked to submit verification of her spouse's income, but failed to do so.

In a May 14, 2003 decision, the hearing representative found that a \$20,551.71 overpayment occurred, appellant was not without fault in creating the overpayment and, therefore, it could not be waived and that the Office should withhold future compensation benefits until the full amount of the overpayment has been collected. Appellant's testimony was also found to be evasive and less than credible.

The Board finds that appellant received a \$20,551.71 overpayment of compensation for the period March 24 through August 10, 2002.

In the present case, appellant received \$20,551.71 in additional compensation for the period March 24 through August 10, 2002 despite the fact that she was not entitled to this compensation. The record contains evidence which shows that, due to a clerical error, \$20,551.71 was mistakenly deposited in appellant's account for the period March 24 through August 10, 2002. Therefore, the Office properly determined that appellant received a \$20,551.71 overpayment.

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

Section 8129(a) of the Federal Employees' Compensation Act¹ 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 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."³ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

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...”⁴

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.”⁵

In present case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. On this issue the Board finds, as the hearing representative did, that appellant’s testimony was not credible and that she should have known that she was not entitled to the additional money. In less than five months appellant received five checks of \$4,000.00 each between March and August of 2002 when she was only scheduled to receive \$850.00 for every four weeks. That is more than 3,150.00 extra each month. Appellant stated that she did not know where the additional money came from, but assumed it was from her husband’s employer or back pay that she was owed to her by the Office. Appellant said she called the Office one time. The Board finds that \$20,000.00 is a substantial amount of money in such a short time period, especially in light of the fact that she was entitled to receive \$850.00 every four weeks. Appellant should have known greater effort to identify the source of the money.

Appellant was also inconsistent in her testimony, indicating that she did not know how much her spouse was paid, though she assumed it was \$4,000.00 every two weeks while noting on her financial questionnaire that he was paid \$3,879.00 every two weeks. The Board further notes that appellant failed, upon request, to submit corroborating evidence of her spouse’s income further diminishing the credibility of her testimony.

⁴ 20 C.F.R. § 10.433(a).

⁵ 20 C.F.R. § 10.433(c).

The Board further finds that the Office properly required recovery of the overpayment by withholding appellant's compensation benefits until the overpayment is collected. Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the 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 of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁶

The record supports that, in requiring withholding appellant's compensation until the overpayment is collected, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Appellant indicated that her monthly expenses were \$5,379.82 while the monthly after tax income was at least \$7,758.00 and that the family had total savings of at least \$7,000.00. Therefore, the Office properly required repayment of the overpayment by deducting from appellant's compensation payments every four weeks.

The May 14, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 15, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).