

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSEMARY A. KAYES and U.S. POSTAL SERVICE,  
POST OFFICE, Phoenix, AZ

*Docket No. 02-1397; Submitted on the Record;  
Issued January 23, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$1,905.43 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

The Office accepted that, beginning January 1986, appellant, then a 23-year-old postal clerk, developed an adjustment disorder with mixed emotional features while in the performance of her federal employment duties. Appellant thereafter received wage loss for total disability and medical benefits.<sup>1</sup>

On March 11, 2002 the Office made a preliminary finding that an overpayment of compensation benefits in the amount of \$1,905.43 occurred because appellant had received dual benefits. The Office determined that appellant was at fault in the creation of the overpayment as she knew or should have known that she was not eligible to receive dual benefits. By decision dated March 18, 2002, the Office finalized its determination.

The Board finds that appellant received a \$1,905.43 overpayment of compensation.

The record reveals that, on January 26, 2002, the Office mailed appellant a \$2,052.00 compensation check covering the period December 30, 2001 through January 26, 2002. However, appellant was not entitled to this check because, effective January 1, 2002, she elected to receive Civil Service Retirement System benefits from the Office of Personnel Management (OPM) in preference to any benefits that she might have been entitled to under the Federal Employees' Compensation Act. The Office determined that appellant received an overpayment

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<sup>1</sup> The Board notes that on November 19, 1999 the Office terminated appellant's benefits for obstruction of a medical examination. On January 22, 2000 an Office hearing representative reversed the termination decision finding that the record did not support evidence that appellant received proper notice of the examination or warning of the potential penalty.

in the amount of \$1,905.43 by multiplying \$2,052.00, the total amount issued by 26/28, for the 28-day period stated above. For these reasons, the Office properly determined that appellant received a \$1,905.43 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 Act<sup>2</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>3</sup> The only exception to this requirement is a situation which meets the tests 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 this subchapter or would be against equity and good conscience.”<sup>4</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>5</sup>

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.”

In this case, the Office applied the third standard -- acceptance of a payment, which the recipient either knew or should have known was incorrect -- in finding appellant at fault in creating the overpayment.

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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> See *Barbara L. Kanter*, 46 ECAB 165, 171 (1994).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."<sup>6</sup>

The record reflects that appellant signed a Form CA-1105 on October 29, 2001 on which she elected to receive OPM benefits in preference to workers' compensation benefits under the Act. The effective date of her election was January 1, 2002. Appellant understood upon election of OPM benefits that she was, as of January 1, 2002, not entitled to receive federal workers' compensation benefits and OPM benefits concurrently. The record clearly reflects that appellant cashed a \$2,052.00 check mailed by the Office on January 26, 2002 despite knowing that she was not entitled to such funds. Appellant did not adequately explain why she proceeded to cash the January 26, 2002 \$2,052.00 check after having requested a transfer in benefits from workers' compensation to OPM benefits on October 29, 2001.

On appeal, appellant argues that she requested a transfer from workers' compensation benefits under the Act to OPM benefits on October 29, 2001, with an effective date of January 1, 2002, which provided the Office two months' notice for the transfer of benefits. The record reflects that appellant's October 29, 2001 letter requesting a transfer of benefits was date stamped by the Office on March 18, 2002, the date a final determination was made in this case. Nevertheless, the Office acknowledged that it was notified of appellant's election beforehand, on February 5, 2002 and the check for the period December 30, 2001 through January 26, 2002 had already been issued.

Even though the Office may have been negligent in sending appellant the \$2,052.00 check after notice that she had elected OPM benefits, this does not excuse appellant's acceptance of this check which she knew or should have known had to be returned to the Office.<sup>7</sup> For these reasons, the Office properly determined that appellant was at fault in creating the \$1,905.43 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

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<sup>6</sup> 20 C.F.R. § 10.433(c).

<sup>7</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

The March 18, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.<sup>8</sup>

Dated, Washington, DC  
January 23, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).