

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET S. ROHN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Fresno, CA

*Docket No. 03-452; Submitted on the Record;
Issued July 18, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$1,170.00; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and that, therefore, she was not entitled to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$30.00 every 28 days from appellant's continuing compensation.

On May 16, 1994 appellant, then a 32-year-old tax examiner, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that she sustained carpal tunnel syndrome as a result of her federal duties. By letter dated June 17, 1994, the Office accepted her claim for carpal tunnel syndrome in both hands. Although appellant was released to perform work that did not involve repetitive movements of the hand or wrist since July 18, 1994, her employer could not locate such work and appellant was paid total disability compensation. She underwent a vocational rehabilitation program and on January 5, 1998 and began working as a preschool teacher 30 hours a week and earning \$6.00 an hour.

By decision dated January 30, 1998, the Office noted that effective January 5, 1998, appellant had been reemployed as a preschool teacher with wages of \$180.00 a week. The Office determined that this position fairly and reasonably represented appellant's wage-earning capacity and noted that her compensation would be adjusted accordingly.

On August 29, 2001 appellant called the Office and left a message that there was an unexplained significant increase in the amount of her compensation checks. At that time, the Office discovered that an error had been made in appellant's last two compensation checks. This error was apparently caused when the keying operator, in changing appellant's life insurance codes, neglected to enter the amount of appellant's wage-earning capacity. Therefore, appellant, who had been receiving checks in the amount of \$796.92, received \$1,369.20 and \$1,372.88 for her checks covering the period from June 17 to July 14, 2001 and July 15 to August 11, 2001, respectively. The Office ran new worksheets and determined that appellant's checks, taking into account her wage-earning capacity and appropriate deductions for the period from June 17, 2001

to August 11, 2001, should have been \$1,591.28, whereas she was awarded compensation based on full temporary total disability or \$2,761.28.

By letter dated October 16, 2001, the Office made a preliminary determination that an overpayment of compensation in the amount of \$1,170.00 occurred because appellant received two periodic roll checks for temporary total disability, when she was entitled to checks based on her wage-earning capacity. The Office did not receive a timely response to this determination and on November 27, 2001, the Office issued a decision finding that appellant had received an overpayment of compensation in the amount of \$1,170.00 and made a determination that she was at fault in the creation of the overpayment. The Office determined that effective December 2, 2001, \$35.00 should be withheld from appellant's continuing compensation payments until the overpayment was absorbed.

By letter dated October 25, 2001 and received by the Office on November 29, 2001, appellant argued that the overpayment should be waived. She indicated that in February 2001 she received a letter from the Office indicating that she would be receiving a cost-of-living increase and she initially attributed the increase in her check to an increase in disability compensation. Appellant requested a hearing with regard to this overpayment. She also submitted financial documents indicating that her monthly income was \$1,430.00, which represented \$780.00 from Office and \$650.00 in child support. She noted that she was between jobs. Appellant listed two dependent children. She noted her monthly payments as \$935.00 for rent or mortgage, \$250.00 for food, \$0.00 for clothing, \$180.00 for utilities, \$25.00 for credit card payment and \$50.00 for other expenses.

A hearing was held with regard to the overpayment on July 25, 2002. At the hearing appellant agreed that an overpayment occurred, but argued that she was without fault in the creation of the overpayment because she initially thought that the overpayment represented a cost-of-living increase. The hearing representative reviewed her financial information with her. The financial information remained the same as it was on the form she completed previously, with the exception that she no longer had credit card debt.

By decision dated November 8, 2002, the hearing representative finalized the preliminary determination of overpayment dated October 16, 2001. The hearing representative was not persuaded by appellant's contention that she thought that the checks for the erroneous amount represented a cost-of-living increase as he found that a reasonable person would know that a cost-of-living increase would be much less than \$600.00 over a four-week period. The hearing representative then reviewed appellant's financial information and determined that her monthly income was \$1,444.20, that her monthly expenses were \$1,415.00 and that this left appellant approximately \$30.00 a month of income over expenses. Accordingly, he indicated that the amount would be repaid by deducting \$30.00 a month from appellant's ongoing compensation checks. Finally, the hearing representative found that appellant was not a candidate for compromise. The hearing representative applied the "rule of thumb" test found in the procedure manual and found that appellant had to be eliminated as a candidate for compromise in that the

total debt of \$1,170.00, when divided by the monthly payment of \$30.00 and multiplying it by three percent interest rate resulted in a figure of less than 5.5.¹

The Board finds that appellant received an overpayment in the amount of \$1,170.00.

An overpayment of \$1,170.00 occurred because, when the Office changed appellant's life insurance deduction, it incorrectly paid her based on total disability (\$2,761.28) as opposed to paying her based on her wage-earning capacity (\$1,591.28) for the period June 17 to August 11, 2001. The difference between these two amounts is the amount that appellant was overpaid: \$1,170.00. Accordingly, the Office properly calculated the amount of the overpayment.

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

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."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.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation⁴ provides in relevant part:

"[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to the amount of benefits. A recipient who

¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.5.c (September 1984). ("Some cases may be eliminated as candidates for compromise by applying the following "rule of thumb." Divide the current principal balance (plus any accrued charges) by the monthly payment; multiply the result by the annual interest rate").

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.433.

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 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 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.⁵ She testified that she initially thought that the increase in the amount of the check was due to a cost-of-living increase. However, the checks appellant received prior to the incorrect ones were in the amount of \$762.92. The incorrect checks were in the amounts of \$1,372.88 and \$1,369.20. Accordingly, the checks were for over \$600.00 more per 28 days and a reasonable person should have realized that the checks were in the improper amounts. While the Office may have been negligent in issuing appellant checks in the wrong amount, this does not excuse her acceptance of such checks which she knew (or should have known) should have been returned to the Office.⁶ For these reasons, the Office properly determined that appellant was not without fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.⁷

The Board also finds that the Office properly determined that the debt was not subject to compromise.

Pursuant to the Federal (FECA) Procedure Manual, some cases can be eliminated from compromise by applying the “rule of thumb” test; *i.e.*, “[d]ivide the current principal balance (plus any charges) by the monthly payment; multiply the result by the annual interest rate. If the result is less than 5.5, it is certain that no compromise is necessary.”⁸ As the hearing representative noted, in this case, the principal amount of \$1,170.00 divided by the monthly payment of \$30.00 and then multiplied by the interest rate of three percent equals a number less than 5.5, specifically, \$1.17. Accordingly, no compromise was necessary.

⁵ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

⁶ *See Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

⁷ *See Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

⁸ FECA Manual, Chapter 6.300.5.c.

The Board finds that the Office properly required repayment by withholding \$30.00 from appellant's monthly continuing compensation.

The Office's implementing regulations provide:

"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 upon such individual."⁹

In the instant case, the hearing representative carefully reviewed appellant's financial statements, noted that she had a monthly income of \$1,444.20 and monthly expenses of \$1,415.00 and noted that this resulted in \$30.00 a month of discretionary income. Therefore, the Board finds that the Office did not abuse its discretion in deciding to withhold \$30.00 a month from appellant's continuing compensation in order to facilitate recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs dated November 8, 2002 is hereby affirmed.

Dated, Washington, DC
July 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ 20 C.F.R. § 10.441(a).