

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALISON M. O'DONNELL and U.S. POSTAL SERVICE,
POST OFFICE. Pawtucket, RI

*Docket No. 03-940; Submitted on the Record;
Issued June 6, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment of \$5,111.85, thus precluding waiver of the overpayment

In this case, on March 9, 2001 the Office accepted that appellant, then a 36-year-old letter carrier, developed a left foot bunion, bilateral plantar fasciitis and bilateral heel spurs, with associated surgeries, in the course of her federal employment duties. She was paid appropriate wage-loss compensation for intermittent periods of disability. By letter dated June 4, 2001, 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 return 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 June 15, 2001 appellant certified by her signature that she fully understood the terms of her compensation, as set forth in the Office's June 4, 2001 letter.

Appellant returned to work full time on August 6, 2001. She stated that she notified both the employing establishment's injury compensation specialist and John Perry, the Office occupational rehabilitation nurse assigned to her claim, of her return to work. In a note dated August 17, 2001, Mr. Perry indicated that he had spoken with the employing establishment, confirming appellant's return to work and that the employing establishment had advised him that the Office had been notified. Nevertheless, appellant's compensation payments were not terminated until October 6, 2001. Therefore, she received checks for compensation for total disability for a period for which she also received pay checks from the employing establishment. On October 11, 2001 the Office informed appellant that it had made a preliminary determination that an overpayment of compensation in the amount of \$5,111.85 had occurred and that she was at fault in the creation of the overpayment. The Office informed appellant of her rights of appeal, including the right to request a hearing. She requested a written decision and submitted a narrative statement dated October 26, 2001, in which she stated that she did not contest either the fact or the amount of the overpayment, but contested the finding that she was at fault in its

creation. In a decision dated November 21, 2002, the Office finalized its preliminary determination and found the overpayment of \$5,111.85 due and payable by monthly installments.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of \$5,111.85, thus precluding waiver of the overpayment.

An overpayment of \$5,111.85 was made, in the present case, when appellant returned to work on August 6, 2001 with no wage loss but continued to receive compensation for total disability through October 6, 2001. Section 8129 of the Federal Employees' Compensation Act provides, however, that the Office may not adjust later compensation or recover an overpayment unless an "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."¹ Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.433 of the implementing federal regulations provides that a recipient who has done any of the following will be found to be at fault with respect to creating the 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 was incorrect. (This provision applies only to the overpaid individual)."²

The regulations further provide that whether or not the Office determines that an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care to be expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.³

On October 11, 2001 the Office made a preliminary determination that appellant was at fault in the matter of the overpayment under the third criterion above because she should have been aware that she was not entitled to the compensation checks she continued to receive after returning to work on August 6, 2001 with no loss of wages. In her narrative statement dated October 26, 2001, appellant stated that, when she first received a check from the Office, after her return to work, she was not surprised because her checks had not started until some time after she had stopped work. However, she further stated that "[b]ecause of the dates listed on the letter accompanying the check" she "questioned the validity of the check" and called the employing establishment's injury compensation specialist to inquire what she should do with it. Appellant

¹ 5 U.S.C. § 8129(b).

² 20 C.F.R. § 10.433(a).

³ 20 C.F.R. § 10.433(b).

asserted that the injury compensation specialist advised her that because she was entitled to a portion of the check, she should cash it and wait for the Office to bill her for the overpayment. Appellant stated that she followed this advice with each check she received subsequent to her return to work. The record shows, however, that when the Office placed appellant on the periodic rolls, it advised her that she would be paid regular compensation until she returned to duty.

The Office specifically advised appellant as follows: “To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this Office even if you have already advised the Office that you are working.” (Emphasis in the original.) Appellant acknowledged these instructions by her signature on June 15, 2001 and further acknowledged in her narrative statement that she questioned the validity of the checks she received after her return to work. Therefore, the Board finds that this evidence supports that appellant knew or should have known that the payment she accepted after returning to work on August 6, 2001 was incorrect. In addition, while the Office may have been remiss in continuing to issue appellant checks for disability after the Office was notified that she had returned to full-time work, this did not excuse appellant’s acceptance of the checks which she knew or should have known should have been returned to the Office.⁴

With respect to the issue of waiver, because the evidence supports the Office’s finding that appellant was at fault in the creation of the overpayment that occurred in this case, the Office may not waive recovery of the overpayment.⁵

Finally, with respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.⁶ As appellant was no longer receiving compensation, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment.

⁴ *Larry D. Strickland*, 48 ECAB 669 (1997).

⁵ *See Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

⁶ *Lewis George*, 45 ECAB 144 (1993).

The decision of the Office of Workers' Compensation Programs dated November 21, 2002 is affirmed.

Dated, Washington, DC
June 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member