



accepted the claim for a lumbosacral strain and herniated nucleus pulposus L5-S1. Appellant received wage-loss compensation until she returned to work in April 1992.

On September 17, 1996 appellant filed a traumatic injury claim (Form CA-1) for a back injury as a result of assisting a patient. The reverse of the claim form indicated that appellant did not stop working. On February 28, 1998 appellant filed a notice of recurrence of disability (Form CA-2a) commencing January 24, 1998. The Office accepted that appellant sustained a low back strain and aggravation of lumbar radiculitis.

Appellant received compensation for intermittent periods of wage loss. The record indicates that appellant stopped working in June 2000 and received compensation for temporary total disability. For example, there is a daily compensation log reporting a "check date" of September 8, 2000 for \$4,817.62 covering the period from June 4 to July 15, 2000. Continuing compensation payments were issued approximately every four weeks.

The employing establishment offered appellant a modified position as a utilization review assistant; appellant accepted the position and began working on January 19, 2001. On January 25, 2001 appellant telephoned the Office to report that she had not received a compensation payment for December 2000. According to the evidence of record, a payment, dated January 19, 2001, was issued for the period December 3 to 30, 2000; a payment, dated January 27, 2001, was issued for the period December 31, 2000 to January 27, 2001.

The Office advised appellant, by letter dated September 21, 2001, that a review of her case indicated that compensation payments had continued through August 11, 2001, thereby creating an overpayment of compensation. The Office also noted that appellant had retired from federal employment in March 2001.

By letter dated May 15, 2002, the Office advised appellant that it had made a preliminary determination that an overpayment of \$23,576.92 had been created. The Office also made a preliminary finding that appellant was at fault in creating the overpayment; appellant was directed to see the attached memorandum for further explanation. The record does not contain a memorandum associated with the May 15, 2002 preliminary determination. The Office did include a "daily computation log for general compensation data" reporting a "check date" of May 17, 2002, for a net compensation payment of \$22,530.34 (gross compensation of \$23,576.92) for the period January 19 to August 11, 2001.

Appellant requested a hearing with the Branch of Hearings and Review on the issues of fault and waiver of the overpayment. By decision dated December 5, 2002, a hearing representative found the case was not in posture for a hearing on the overpayment issues. The hearing representative noted that the record did not contain a memorandum as referenced in May 15, 2002 preliminary determination and the Office had failed to explain the basis for the overpayment or the finding of fault. The Office was directed to issue a notice of overpayment with explanation as to cause and fault.

In a letter dated December 18, 2002, the Office made a preliminary finding that an overpayment of \$23,576.92 had occurred and that appellant was at fault in creating the

overpayment. By memorandum dated December 18, 2002, the Office stated that appellant had returned to work on January 19, 2001 but continued to receive compensation for temporary total disability through August 11, 2001. The Office found that appellant had been paid \$23,576.92 in compensation from January 19 to August 11, 2001. On the issue of fault the Office found that appellant had accepted payments she knew or should have known were incorrect. The Office noted that appellant contacted the Office on January 25, 2001 but did not mention that she returned to work.

In a decision dated April 7, 2003, the Office finalized its determination that an overpayment of \$23,576.92 was created and that appellant was at fault in creating the overpayment.

### **LEGAL PRECEDENT**

Section 8129(b) of the Federal Employees' Compensation Act<sup>1</sup> provides:

“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 the Act or would be against equity and good conscience.”<sup>2</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>3</sup>

On the issue of fault 20 C.F.R. § 10.320(b) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact, which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

### **ANALYSIS**

In order for the Board to properly review the overpayment decision on appeal, the record must contain the relevant evidence and the Office must make appropriate findings based on the relevant evidence. The Office determined that an overpayment of \$23,576.92 was created because appellant received compensation from January 19 to August 11, 2001, although she had returned to full-time work. In order to confirm the continuing compensation payments, the record should establish the specific payments that were made, the date issued and the compensation period covered by the specific payments. For the period January 19 to August 11, 2001, the record establishes that a payment was issued on January 27, 2001 for the period

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

December 31, 2000 to January 27, 2001. There is no other evidence with respect to the individual payments issued during the relevant time period. The “daily computation log” that accompanied the initial preliminary determination is of little probative value as it appears to indicate that gross compensation of \$23,576.92 was issued in a single payment on May 17, 2002. This is clearly inconsistent with the Office’s finding that appellant continued to receive compensation payments every four weeks after her return to work.

The evidence with respect to the individual payments issued is also critical to the determination of fault in this case. The Office refers to appellant’s contact with the Office on January 25, 2001, but this was with respect to compensation for December 2000. The Office must make findings with regard to fault based on appellant’s receipt of specific payments, commencing with the payment issued on January 27, 2001 that covered a period after appellant had returned to work. In addition, the Office should make findings with respect to receipt of payments issued after appellant had retired from federal employment.

### **CONCLUSION**

The case will be remanded to the Office for further development. The case record should include all relevant evidence with respect to compensation payments covering a period after appellant had returned to work on January 19, 2001. After such further development as the Office deems necessary, it should issue a decision that makes proper findings with respect to the amount of the overpayment and fault.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 7, 2003 be set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: April 9, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member