

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE R. SIMS and U.S. POSTAL SERVICE,
J. CRAFT STATION, Dallas, TX

*Docket No. 03-1854; Submitted on the Record;
Issued February 4, 2004*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$6,095.53 during the period October 9, 2002 through January 25, 2003; and (2) whether the Office properly determined that appellant was with fault in the creation of the overpayment.

On December 20, 1999 appellant, then a 53-year-old distribution clerk, filed an occupational disease claim alleging that on July 1, 1999 she first became aware of her swollen right wrist and arm. Appellant alleged that she first realized that her condition was caused or aggravated by her federal employment on November 22, 1999. Appellant stated that she experienced tingling and numbness in her wrist and hand that went up into her elbow. Appellant stopped work on November 23, 1999.

On April 28, 2000 the Office accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on June 19, 2000 and a left carpal tunnel release on August 14, 2000.

On November 9, 2000 appellant completed and signed an Office Form CA-1032 indicating that she worked at the employing establishment in November 1999, 11 months prior to her injury. This form advised appellant to "report ALL employment for which you received a salary, wages, income, sales commissions, piecework or payment of any kind." On March 19, 2001 appellant returned to limited-duty work at the employing establishment for eight hours a day.

On March 27, 2001 appellant filed a claim for a schedule award. By decision dated April 27, 2001, the Office granted appellant a schedule award for a 6 percent permanent impairment of the left upper extremity and a 19 percent permanent impairment of the right upper extremity covering the period March 16, 2001 through September 12, 2002.

On July 1, 2002 appellant underwent surgery on her left thumb, which was authorized by the Office. Appellant returned to limited-duty work eight hours a day on October 9, 2002 and she continued to receive compensation for total disability until January 25, 2003. The Office was not notified about appellant's return to full-time work.

On October 18, 2002 the Office issued a letter (Form EN1049) advising appellant to notify the Office immediately upon a return to work and to return to the Office any compensation checks received for any period worked to avoid an overpayment.

By letter dated March 4, 2003, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred in the amount of \$6,095.53. The Office found that, after appellant returned to work on October 9, 2002, she continued to receive compensation for total disability until January 25, 2003. The Office determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only or a precoupment hearing within 30 days if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment, if she believed that the overpayment occurred through no fault of her own or that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire and submit financial documents in support thereof.

In an April 3, 2003 response, appellant stated that she told an Office claims examiner that she required surgery on her finger and the claims examiner responded that her trigger finger injury was a different injury from her accepted carpal tunnel condition. Appellant asked the claims examiner whether she was still entitled to compensation and the claims examiner responded yes. Appellant stated that the claims examiner advised her to submit a claim for compensation (Form CA-7) after she had the surgery. Appellant noted that, after her surgery, she received a letter from the Office stating that she was not entitled to compensation until after September 12, 2002. Appellant stated that when the compensation checks were sent to her "I assumed I was entitle[d] to them for the months I was without pay." Appellant also stated "I did not create this ... overpayment on purpose and I thought I was entitled to them." Appellant's response was accompanied by a completed overpayment questionnaire and her request that the Office make a decision based on the written record.

By decision dated May 20, 2003, the Office finalized the overpayment determination in the amount of \$6,095.53 and the finding of fault.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,095.53 during the period October 9, 2002 through January 25, 2003.

The record shows that appellant returned to limited-duty work at the employing establishment on October 9, 2002 for eight hours a day and she continued to receive compensation for total disability until January 25, 2003. When an employee returns to work and

ceases to have any loss of wages, compensation for wage loss is no longer payable.¹ Therefore, an overpayment occurred in the amount of \$6,095.53

The Board further finds that the Office properly determined that appellant was with fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment must be recovered unless "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." Section 10.433 of the Office's implementing regulation³ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances.

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. (This provision applies only to the overpaid individual)."⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. On November 9, 2000 appellant signed a Form CA-1032, which advised her to notify the Office upon her return to employment. On October 18, 2002 the Office issued a letter (Form EN1049), again advising appellant to notify the Office immediately upon her return to work and to return to the Office any compensation checks received for any period worked to avoid an overpayment. Appellant did not report her return to work on October 9, 2000 as instructed by the Form CA-1032 and Form EN1049 letters nor did she return the compensation checks she received after her return to full-time employment on October 9, 2002.

The Board finds that the signed Form CA-1032, together with the reporting instructions contained in the Form EN1049 letter, establish that appellant knew or should have known that she was not entitled to receive total disability compensation while also receiving compensation for full-time work at the employing establishment. Further, there is no reasonable basis on which to believe further payment by the Office was due as the April 27, 2001 decision indicated that the period of the schedule award expired on September 12, 2002. While the Office may

¹ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

² 5 U.S.C. § 8129(a)(b).

³ 20 C.F.R. § 10.433.

⁴ 20 C.F.R. § 10.433(a).

have been negligent in continuing to issue appellant checks for total disability, this does not excuse her acceptance of payments which she knew or should have known to be incorrect and returned to the Office.⁵

After consideration of all the circumstances surrounding the overpayment, the Board finds that the facts of this case establish that appellant knew or should have been expected to know that she accepted incorrect compensation payments in the amount of \$6,095.53 during the period October 9, 2002 through January 25, 2003 and, therefore, she was at fault in the creation of the overpayment during that period.

Appellant contended that she was not responsible for the creation of the overpayment because an Office claims examiner advised her that she was still entitled to compensation after surgery on her finger and told her to file a Form CA-7 after the surgery. Subsequently, appellant received a letter from the Office stating that she was not entitled to compensation until after September 12, 2002 and when she received the checks, appellant believed that she was entitled to them for the months she was without pay. The Office's regulations provide that an individual may be found not at fault if he or she "relied on misinformation given in writing by the Office (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations."⁶ There is no evidence of record establishing that appellant relied on misinformation given in writing by the claims examiner. Thus, the Board will affirm the Office's finding of fault.

⁵ 20 C.F.R. § 10.435(a) states: "The fact that the Office may have erred in making the overpayment or that the overpayment may have resulted from an error by another Government agency, does not by itself relieve the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment." See *Martin Boroian*, 40 ECAB 1260 (1989).

⁶ 20 C.F.R. § 10.435(b)(1).

The May 20, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 4, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member