

On October 20, 2003 the Office granted appellant a schedule award for a 16 percent impairment of the right upper extremity for the period from May 5, 1993 to April 17, 1994, for a total of 49.92 weeks of compensation.

On October 20, 2003 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$11,788.87 for the period April 18, 1994 through January 7, 1995, because she had been receiving compensation to which she was not entitled. The Office found that appellant was at fault in the matter because she should have been aware that the payments she had been receiving were incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised appellant that when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the October 20, 2003 letter. Appellant did not respond to this letter within 30 days.

In a decision dated December 2, 2003, the Office finalized the preliminary determination regarding the overpayment of \$11,788.87. The Office noted that appellant had been advised, by letter dated October 20, 2003, that a preliminary finding had been made that an overpayment had occurred, but she had not responded within 30 days. Therefore, the Office found that appellant was at fault and not entitled to consideration of waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act provides that an employee who receives continuing compensation or has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, may not receive salary, pay or remuneration of any type from the United States.¹

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$11,788.87 for the period April 18, 1994 through January 7, 1995. The record shows that appellant received an overpayment during the period in question because she continued to receive checks for temporary total disability compensation after returning to full-time work on May 3, 1993. The Office calculated the \$11,788.87 overpayment by totaling the amount of temporary total disability compensation appellant

¹ 5 U.S.C. § 8116.

received during the period from April 18, 1994² through January 15, 1995, \$12,956.61³ and subtracting \$1,031.77 for health benefits and \$135.97 for optional life insurance during the period of the schedule award. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁴ 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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁵

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

“A recipient who 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 the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual 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.⁶”

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected to know she was not entitled.⁷ Because appellant returned to work on May 3, 1993 and was, therefore, no

² The Office did not calculate an overpayment from May 3, 1993 through April 17, 1994, as this period covered the period when she would have been receiving a schedule award.

³ The Office payroll records indicated that appellant was receiving \$1,270.44 in monthly compensation checks as of April 18, 1994, when the overpayment began. The Office prorated by half the amount of overpayment for the initial month, which totaled \$635.61 and added that to \$12,321.00, the amount approximately equal to 9 months of checks at the rate of \$1,369.00.

⁴ 5 U.S.C. § 8129(a)(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁶ 20 C.F.R. § 10.433(a).

⁷ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

longer totally disabled, she knew or should have known that she was no longer entitled to the amount of monthly compensation she had been receiving. Upon her receipt of the check for payment of total disability compensation following her return to work, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate or return the check issued for total disability because she had returned to work during the period covered by the check. Instead, appellant accepted and did not question the receipt of this check and of subsequent checks totaling \$11,788.87.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office from May 5, 1993 through January 7, 1995, which contained an overpayment in the amount of \$11,788.87, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$11,788.87, may not be waived. Thus, the Office's December 2, 2003 decision is affirmed.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$11,788.87 for the period from April 18, 1994 through January 7, 1995. The Board finds that the Office properly found that appellant was at fault in creating the overpayment

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2003 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member