

cervical strain, temporary aggravation of cervical spondylosis and carpal tunnel syndrome. Appellant stopped work for various periods and then began working in a limited-duty position with the employing establishment for 30 hours per week. She received compensation from the Office for the loss of wage-earning capacity she experienced for the other 10 hours of the work week.

Appellant later filed a claim alleging that she sustained an employment-related emotional condition and on October 3, 1991 the Office accepted, under File No. 25-366000, that she sustained an aggravation of somatizing disorder with dysthymia. She stopped work on October 8, 1991 due to her employment-related emotional condition and the Office paid her disability compensation based on the 30 hours per week she was working when she stopped work. The Office indicated that her compensation pay rate would be based on her weekly pay of \$466.66 for 30 hours of work per week, the amount she earned for the 30 hours of work at the time her disability began.¹ The Office noted that it continued to pay her compensation for the other 10 hours of disability per week under File No. 25-268952, *i.e.*, the case file pertaining to her employment-related physical injuries.

In letters dated June 17, 1998 and May 7, 1999, the Office advised appellant that she was receiving compensation under File No. 25-366000 based on a pay rate of \$622.21 per week.

By letter dated December 17, 1999, the Office advised appellant of its preliminary determination that she received a \$21,255.29 overpayment of compensation during the period March 14, 1997 to November 6, 1999. The Office noted that during this period appellant was only entitled to receive compensation for her employment-related emotional condition (File No. 25-366000) based on the weekly pay of \$466.66 for 30 hours of work per week because she was also receiving compensation for 10 hours of lost wage-earning capacity per week for her employment-related physical injuries (File No. 25-268952). It indicated that therefore appellant was not entitled to receive the difference between the compensation based on the weekly pay of \$466.66 for 30 hours of work per week and the compensation she actually received (under File No. 25-366000) based on the weekly pay of \$622.21 for 40 hours of work. The Office further determined that appellant was at fault in the creation of the overpayment because she knew or should have known that the “seemingly unexplained increase” in her compensation on March 14, 1997 was incorrect and she failed to alert the Office that she was receiving incorrect payments.

The record contains documents which show that under File No. 25-366000 appellant received \$69,640.17 in compensation during the period March 14, 1997 to November 6, 1999 based on the compensation rate of 2/3 of the weekly pay of \$622.21 for 40 hours of work per week. The calculations show that if appellant had received the proper compensation rate of 2/3 of the weekly pay of \$466.66 for 30 hours of work per week, she would have received \$48,384.88 for the period March 14, 1997 to November 6, 1999. The Office noted that the difference between these two figures would be the overpayment of \$21,255.29.

Appellant requested waiver of the overpayment and submitted a completed financial questionnaire. In a document memorializing a December 30, 1999 telephone call from appellant,

¹ It stated that appellant earned \$622.21 for 40 hours of work per week when she stopped work.

an Office official noted that appellant stated that “she was aware that she was being overpaid” and had “kept a lot of the money.”

By decision dated April 5, 2004, the Office finalized its preliminary determination that appellant received a \$21,255.29 overpayment of compensation during the period March 14, 1997 to November 6, 1999 and that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.²

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.³ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of her monthly pay, which is known as her basic compensation for total disability.⁴ If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between her monthly pay and her monthly wage-earning capacity after the beginning of the partial disability, which is known as her basic compensation for partial disability.⁵ 20 C.F.R. § 10.500 provides that “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”⁶

ANALYSIS -- ISSUE 1

On April 27, 1985 appellant sustained an employment-related cervical strain, temporary aggravation of cervical spondylosis and carpal tunnel syndrome. She began working in a limited-duty position with the employing establishment for 30 hours per week and received compensation from the Office for the loss of wage-earning capacity she experienced for the other 10 hours of the work week. The Office later accepted that appellant’s work stoppage on October 3, 1991 was due to an employment-related aggravation of somatizing disorder with dysthymia. The Office then paid her disability compensation under her emotional condition

² The Office also indicated that appellant should send a \$21,255.29 check to the Office within 30 days or, if she was unable to refund the entire overpayment, to contact the Office within 30 days to make arrangements to effectuate the recovery, such as through installment payments. The Office did not, however, make any final determination regarding the method of recovery of the overpayment and, therefore, this matter is not presently before the Board. See 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8105(a).

⁵ 5 U.S.C. § 8106(a). A disabled employee with one or more dependents is entitled to have her basic compensation for total disability augmented at the rate of 8 1/3 of her monthly pay or to have her basic compensation for partial disability augmented at the rate of 8 1/3 of the difference between her monthly pay and her monthly wage-earning capacity. 5 U.S.C. § 8110(b).

⁶ 20 C.F.R. § 10.500.

claim based on her weekly pay of \$466.66 for 30 hours of work per week, *i.e.*, the amount she earned for the 30 hours she worked per week at the time her disability began,⁷ and continued to pay her compensation for 10 hours of loss of wage-earning capacity per week under the claim pertaining to her employment-related physical injuries.

During the period March 14, 1997 to November 6, 1999, appellant received compensation in connection with her emotional condition claim based on the weekly pay of \$622.21 for 40 hours of work per week. During this same period, she continued to receive compensation for 10 hours of loss of wage-earning capacity per week under the claim pertaining to her employment-related physical injuries. Appellant would not be entitled to receive more disability compensation than the monies which would compensate her for the wages she earned before her work-related injury.⁸ Receiving both the compensation based on the weekly pay of \$622.21 for 40 hours of work per week and compensation for 10 hours of loss of wage-earning capacity per week would cause such an impermissible overpayment. After March 14, 1997, appellant should have continued to receive compensation based on her weekly pay of \$466.66 for 30 hours of work per week. Therefore, the amount of the overpayment for the period March 14, 1997 to November 6, 1999 would be the difference of the amount actually received during this period (based on the weekly pay of \$622.21 for 40 hours of work) and the amount she should have received for this period (based on the weekly pay of \$466.66 for 30 hours of work per week). The Office properly calculated the amount of this difference to be \$21,255.29 and therefore it properly determined that appellant received an overpayment of compensation in this amount.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the 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.¹⁰ 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

⁷ Reference should be made to 5 U.S.C. §§ 8101(4) and 8105(a) regarding the determination of which date should fix the amount of “monthly pay” for properly computing an employee’s pay rate for compensation purposes. There is no evidence that the Office improperly chose the date that appellant’s emotional condition first caused disability, October 8, 1991, for making this determination.

⁸ *See supra* note 6 and accompanying text.

⁹ The record contains documents which show that appellant received \$69,640.17 in compensation under her emotional condition claim during the period March 14, 1997 to November 6, 1999 based on the compensation rate of 2/3 of the weekly pay of \$622.21 for 40 hours of work per week. The calculations further show that if appellant had received the proper compensation rate of 2/3 of the weekly pay of \$466.66 for 30 hours of work per week, she would have received \$48,384.88 for this period. The \$21,255.29 difference between these figures represents the overpayment. Appellant received 2/3 of her weekly pay because she had no dependents as defined by the Act during this period. *See supra* note 5.

¹⁰ 5 U.S.C. § 8129(a).

subchapter or would be against equity and good conscience.”¹¹ 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 not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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....”¹²

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹³

Even though the Office may have been negligent in issuing appellant’s disability checks for improper amounts, this does not excuse appellant’s acceptance of such checks which she knew or should have been expected to know should have been returned to the Office.¹⁴

ANALYSIS -- ISSUE 1

The Office applied the third standard of section 10.433(a) of Title 20 of the Code of Federal Regulations in determining that appellant was at fault in creating the \$21,255.29 overpayment of compensation. This determination was proper as the evidence clearly reveals that, during the period March 14, 1997 to November 6, 1999, appellant accepted payments which she knew or should have known to be incorrect. Appellant explicitly stated to the Office that she knew it was improper to accept these payments. In a document memorializing a December 30, 1999 telephone call from appellant, an Office official noted that appellant stated that “she was aware that she was being overpaid” and had “kept a lot of the money.” In addition, the compensation checks appellant received beginning March 14, 1997, based on the weekly pay of

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433(a).

¹³ 20 C.F.R. § 10.433(c).

¹⁴ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

\$622.21 for 40 hours of work, represented a 33 percent increase in compensation over those that she had previously received, based on the weekly pay of \$466.66 for 30 hours of work per week. Under the circumstances of the present case, the increase in appellant's checks was so great that she should have known the payments were incorrect.¹⁵ Appellant did not advance any reason why she felt the increased compensation checks were correct.¹⁶ There is no evidence that the Office did not properly consider the factors contained in section 10.433(c) of its regulations in determining that appellant was at fault in the creation of the overpayment. Consequently, the Board finds that overpayment is not subject to waiver.¹⁷

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$21,255.29 overpayment of compensation during the period March 14, 1997 to November 6, 1999. The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment and that, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ See *Esther Green*, 39 ECAB 727, 730 (1988). In *Green*, appellant's compensation checks increased from \$164.96 to \$258.96 and the Board found that, given all the circumstances of the case, appellant should have realized that this increase was improper.

¹⁶ Moreover, in letters dated June 17, 1998 and May 7, 1999, the Office advised appellant that she was receiving compensation under her emotional condition claim based on a pay rate of \$622.21 per week, rather than the correct rate of \$466.66 per week.

¹⁷ See *supra* note 11 and accompanying text.