



assigned file number 020742839.<sup>1</sup> The Office accepted the claim for right hand neuritis. Appellant accepted a light-duty position on March 3, 1999. On December 4, 2001 the Office issued a loss of wage-earning capacity decision and adjusted her wage loss accordingly.

On April 29, 2003 the Office issued a notice of proposed termination of benefits based upon the opinion of an impartial medical examiner, Dr. David P. Nichols, a Board-certified orthopedic surgeon, who concluded that appellant had no residuals or disability due to her accepted March 3, 1998 employment injury.

By decision dated July 23, 2003, the Office finalized the termination of compensation benefits effective August 9, 2003.<sup>2</sup>

In a letter dated August 27, 2003, appellant, through counsel, requested a hearing which was held on March 31, 2004.

By decision dated June 29, 2004, the Office hearing representative affirmed the termination of appellant's compensation.<sup>3</sup>

A computer-generated compensation payment history dated November 27, 2004 reflected payments to appellant made by automatic deposits for the period August 10, 2003 through November 27, 2004, in the net amount of \$9,420.43. An overpayment calculation worksheet dated January 13, 2005 found that, for the period August 10, 2003 through November 27, 2004, she was paid the net amount of \$9,420.43, when she should not have received any compensation. This resulted in an overpayment for that period in the amount of \$9,420.43.

In a preliminary overpayment determination dated January 13, 2005, the Office found that appellant had received an overpayment of compensation for the period August 10, 2003 through November 27, 2004, due to the fact that she had remained on the rolls, even though her compensation benefits had been terminated effective August 10, 2003. The Office made a preliminary determination of fault in the creation of the overpayment, finding that she accepted payments that she knew or should have known were to be incorrect. The Office advised appellant as to her appeal rights including requesting that the Office issue a final decision based on the written evidence currently of record. It further advised her to complete a Form OWCP-20, and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

On January 18, 2005 appellant requested an oral hearing before an Office hearing representative on the issues of fault and possible waiver. In an overpayment recovery questionnaire dated January 18, 2005, she stated that she believed that the compensation was part

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<sup>1</sup> Appellant filed a claim alleging that on May 3, 1996 she sustained a burn on her right hand. This claim was assigned file number 02-0728091.

<sup>2</sup> On April 29, 2003 appellant filed a recurrence claim beginning April 28, 2003. By decision dated August 4, 2003, the Office denied her recurrence claim. On June 9, 2003 appellant filed a schedule award claim.

<sup>3</sup> The Office hearing representative also affirmed the August 4, 2003 decision denying appellant's recurrence claim.

of her pay as she was still on light duty. Appellant listed her monthly income as \$1,828.00 and her expenses as approximately \$3,171.74.<sup>4</sup>

A hearing was held on June 27, 2006 at which appellant testified regarding her income and expenses. She testified that she was unaware that compensation payments should have ceased as a result of the Office's termination decision. Appellant also testified that she believed that the compensation represented night differential as she had been working evenings at the time of her injury and was currently working days. She also testified that she relied upon the Office to make proper decisions regarding her compensation.

By decision dated August 25, 2006, the Office found that appellant was at fault in the creation of the overpayment and not entitled to waiver of the overpayment of \$9,420.43. The Office further determined that she should repay the amount at the rate of \$400.00 per month.

### **LEGAL PRECEDENT**

Section 8129(b) of the Federal Employees' Compensation Act<sup>5</sup> provides that 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 subchapter or would be against equity and good conscience. Section 10.433 of the Office's implementing regulation<sup>6</sup> 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.”

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.<sup>7</sup>

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<sup>4</sup> This is the total of the expenses listed on the form. The monthly expenses included: \$825.00 for rent or mortgage; \$200.00 for food; \$200.00 for clothing; \$487.75 for utilities; \$872.00 for other expenses; \$349.16 for Chase Automotive Finance; \$54.83 for car insurance; \$48.00 for Sedonia Holistic Medical Center; \$100.00 for Capitol One; and \$35.00 for life insurance.

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> 20 C.F.R. § 10.433.

<sup>7</sup> 20 C.F.R. § 10.433(b).

## ANALYSIS

The Office found that appellant was at fault in the creation of the overpayment based on the third standard, that she accepted payments which she knew or should have known to be incorrect. In order for it to establish that she was at fault in creating the overpayment, the Office must show that, at the time appellant received the compensation in question, she knew or should have known that the payments were incorrect.<sup>8</sup>

Appellant was notified by decision dated July 23, 2004 that her benefits were being terminated effective August 9, 2003 as her work-related injury had ceased. The Office hearing representative affirmed this decision on June 29, 2004. Appellant acknowledged during her hearing that she accepted compensation payments during the period August 10 to November 27, 2003. She believed that she was entitled to continuing compensation pending her appeal of the termination of her compensation. The Board finds that the Office's July 23, 2003 decision terminating appellant's compensation benefits is clear and unambiguous in informing her that her entitlement to further compensation was terminated as of August 9, 2003. There was no indication by the Office that compensation would be continued pending any appeal. The Board finds that, based on the circumstances of this case, appellant knew or should have known she was not entitled to continuing compensation. Appellant accepted payments known to be incorrect. Therefore, she is not without fault in the creation of the overpayment and waiver of the recovery of the overpayment is not warranted.

On appeal, appellant argues that she was without fault in creating the overpayment and the Office made the error. However, the Board has held that the fact that the Office may have been negligent in continuing to issue payment for temporary total disability after termination of wage-loss benefits, does not excuse her acceptance of such payment, which she knew or should have been expected to know should be returned to the Office.<sup>9</sup>

Regarding recovery of the overpayment, the Board notes that it has no jurisdiction over this issue as appellant is not in receipt of continuing compensation benefits.<sup>10</sup>

## CONCLUSION

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment and therefore is not entitled to waiver.

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<sup>8</sup> See *Tammy Craven*, 57 ECAB \_\_\_\_ (Docket No. 05-249, issued July 24, 2006). See also *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>9</sup> *Ricky Greenwood*, 57 ECAB \_\_\_\_ (Docket No. 05-1739, issued March 10, 2006).

<sup>10</sup> *Joan Ross*, 57 ECAB \_\_\_\_ (Docket No. 06-887, issued July 24, 2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 25, 2006 is affirmed.

Issued: April 5, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board