

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. PRINCE and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Washington, D.C.

*Docket No. 95-2769; Submitted on the Record;
Issued March 3, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found a \$2,285.47 overpayment in compensation for the periods of April 6 to 20, July 18 to September 30, October 3 to 27 and November 7 to December 30, 1994; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly denied appellant's request for a hearing on the overpayment determination.

On August 13, 1986 appellant, then a 38-year-old clerk typist, filed a traumatic injury claim, alleging that she injured her head and neck on August 4, 1986 when she struck her head on the employing establishment shuttle bus. On November 25, 1986 the Office accepted appellant's claim for scalp contusion and neck strain. Appellant received appropriate compensation until she returned to work on June 22, 1987.¹ On April 21, 1989 appellant filed a claim for recurrence of disability beginning October 29, 1988. Appellant stopped work on November 18, 1988 and did not return to the employing establishment. The Office accepted appellant's claim for recurrence of disability and began payment of compensation effective November 18, 1988. Appellant participated in the Office rehabilitation services program through which she worked as an intern and in varying paid positions from 1993 through 1994. On February 21, 1995 the Office advised appellant that it had made a preliminary determination that she had received and was at fault in the creation of a \$2,285.47 overpayment of compensation. The Office advised appellant to submit additional evidence or argument if she disagreed with the preliminary determination and requested that she complete an overpayment questionnaire. By letter dated March 3, 1995, appellant requested a reevaluation of the Office's preliminary determination that she was at fault and waiver of the overpayment, if she was eligible. By decision dated April 28, 1995, the Office finalized its preliminary determination that appellant was at fault in the creation of a \$2,285.47 overpayment in compensation and,

¹ On July 25, 1987 the Office made a preliminary finding that appellant was at fault in the creation of an overpayment when she failed to return a check for compensation after she returned to work. This determination was finalized on September 4, 1987.

therefore, found that the overpayment was not subject to waiver. By letter decision dated June 19, 1995, the Office denied appellant's request for a hearing on the grounds that she did not request a precoupment hearing until after the preliminary determination of overpayment had been finalized, and there were no provisions for a hearing after the final overpayment decision had been issued.

The Board finds that the Office properly found that there was an overpayment in compensation in the amount of \$2,285.47 due to appellant's acceptance of compensation checks for temporary total disability after she had returned to work.

Section 8129(a) of the Federal Employees' Compensation Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when recovery would defeat the purpose of the Act or would be against equity and good conscience."² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment. Any overpayment resulting from the Office's negligence does not permit an employee to accept compensation to which she knew or should have known she was not entitled.³

In the present case, an Office rehabilitation specialist reported that appellant was engaged in the following employment during 1994: National Teachers' Association from April 6 to 20, 1994 for 20 hours a week at \$7.50 per hour; Community Psychiatric Center from July 18 to September 30 and November 7 to December 30, 1994 for 20 hours per week at \$6.00 per hour and United States Department of Agriculture (USDA) from October 3 to 27, 1994 for 40 hours a weeks at a GS 4 Step 1 level or \$8.21 per hour. On her overpayment questionnaire, appellant indicated that she accepted the checks mailed to her during her employment with USDA because her rehabilitation counselor had advised her that she was eligible for compensation. With respect to her work for the National Teachers' Association and the Community Psychiatric Center, appellant indicated that this work was temporary but did not address why she had accepted checks for temporary total disability when she had started working. Appellant also indicated that she had reported any employment she engaged in on the EN-1032 forms completed during the time period in question. This fact is undisputed. Nonetheless, appellant also cashed checks for temporary disability to which she knew or should have known she was not entitled as she was working during the time periods covered by the checks. Therefore, the Office properly found that there had been an overpayment in compensation during the aforementioned periods of time.

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

² 5 U.S.C. § 8129(b).

³ *Russell E. Wageneck*, 46 ECAB 653 (1995).

In determining whether an individual is with fault section 10.320(b) of the Office's 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 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.”⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Appellant was advised by the Office in a letter dated February 3, 1990 as follows:

“Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of the period, you must return the check to this Office. Otherwise, an overpayment of compensation may result.”

In addition, appellant was previously subjected to an overpayment proceeding for accepting a check for temporary total disability after she returned to work in 1987. Therefore, despite the fact that appellant advised the Office that she was working during the time periods in question and the Office continued to send her compensation checks for temporary total disability, appellant knew or should have known that she was accepting compensation which was incorrect and to which she was not entitled. Thus, the Office properly determined that appellant was at fault in the creation of a \$2,285.47 overpayment in compensation pursuant to section 10.320(b)(3) and therefore is not entitled to waiver of the overpayment.

The Board also finds that the Office properly denied appellant's request for a hearing.

Pursuant to *Califano v. Yamasaki*, 422 U.S.C. § 682 (1979), the Office has established procedures for handling overpayment cases under 5 U.S.C. § 8129, pertaining to the recovery of overpayments. The Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Act and requires an opportunity for a prerecoupment hearing.⁵ Accordingly, federal regulations provide that before adjusting future payments or otherwise seeking to recover an overpayment, the Office

⁴ 20 C.F.R. § 10.320(b)

⁵ *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (noting that the right to a prerecoupment hearing does not arise under the provisions of 5 U.S.C. § 8124(b)).

shall provide the individual with written notice of, among other things, the individual's right to request a prerecoupment hearing within 30 days of the date of written notice of the overpayment for the purpose of challenging the fact or amount of the overpayment, the preliminary finding of fault, or for the purpose of requesting waiver.⁶ Additional evidence must be submitted, or a prerecoupment hearing requested, within 30 days of the Office's written notice to the individual. Failure to exercise the right to a prerecoupment hearing within 30 days of the date of notice of overpayment shall constitute a waiver of that right.⁷ If additional written evidence is not submitted, or a hearing requested, within the 30-day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action.⁸

In the present case, appellant did not request a hearing concerning the Office's preliminary determination that she was at fault in the creation of the overpayment of compensation until after that determination had been finalized. Appellant's request for a hearing was dated May 27, 1995. Since appellant's request for a hearing was not within 30 days of the Office's February 21, 1995 preliminary determination of an overpayment of compensation, she waived the right to a hearing and the Office properly denied this request.

The decisions of the Office of Workers' Compensation Programs dated June 19 and April 28, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 3, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ 20 C.F.R. § 10.321(d)(4).

⁷ *Id.* § 10.321(e).

⁸ *Id.* § 10.321(h).