

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA A. WREN and DEPARTMENT OF HEALTH &
HUMAN SERVICES, Seattle, WA

*Docket No. 00-1318; Submitted on the Record;
Issued December 3, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that overpayments of compensation in the amounts of \$5,515.42 and \$2,383.30 occurred; (2) whether the Office properly found that appellant was at fault in the creation of the overpayments; and (3) whether the Office properly determined that \$200.00 should be withheld from appellant's continuing compensation checks to recover the overpayments.

The Office accepted appellant's claim for mild carpal tunnel syndrome, left mild extensor tendinitis, right carpal tunnel syndrome and subsequent surgery. Appellant worked intermittently due to her employment injury and worked 24 hours per week as of July 1995.

In a preliminary determination dated September 18, 1998, the Office found that appellant received an overpayment of \$5,515.42 from August 28, 1997 to September 3, 1998 because appellant was receiving total disability compensation when in fact she was a part-time employee working 24 hours a week. The Office found that appellant was without fault in the creation of the overpayment. The Office informed her that she should provide information regarding her income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of Federal Employees' Compensation Act. The Office requested that appellant complete the enclosed overpayment recovery questionnaire, Form OWCP-20.

In a preliminary determination dated March 20, 1999, the Office found that appellant received an overpayment of \$2,383.30 from October 15 through December 11, 1998 when she received total disability compensation but in fact was working part time. The Office found that appellant was at fault in the matter of the overpayment because she demonstrated that she knew that she was not entitled to the pay rate she received when she called the Office to report the error. The Office informed her that she should provide the appropriate financial information and complete Form OWCP-20.

By decision dated May 1, 1999, the Office affirmed the preliminary determination that appellant received an overpayment of \$2,383.30 from October 15 through December 11, 1998

and that she was at fault in the creation of the overpayment. The Office stated that it would withhold the sum of \$200.00 from appellant's continuing compensation commencing May 1999 to recover the overpayment within a year. In a memorandum to the file dated May 1, 1999, the Office stated that appellant did not respond to the preliminary findings with any financial information.

On October 14, 1998 appellant requested waiver of the overpayment and requested a hearing, which was scheduled for April 28, 1999. In a statement dated October 16, 1998, she stated that when she received the checks for the relevant time periods, she called Lillie Hayden at the Seattle Office and Christine Rogers at the Washington, D.C. Office and they assured her that the amount of money she received was correct. Appellant stated that, upon receiving their assurances, she purchased a 1991 Ford F250 pickup van for \$14,000.00, a purchase she would not have made had she received less compensation. Appellant stated that requesting repayment of the overpayments would cause further financial loss to her family. She also stated that no overpayment recovery questionnaire was included with the overpayment notice from the Office.

By letter dated May 18, 1999, appellant explained that she was unable to attend the hearing and, in the alternative, requested a written review of the record. She stated that on March 13, 1998 she received her first check for her claim in the amount of \$8,603.89 from August 23, 1997 through February 17, 1998. Appellant stated that she called the Office to verify the amount she was being paid was correct and stressed that she was working part time. She stated that Ms. Hayden told her that they were aware that she was working part time and "assured" her that the payment was correct. Appellant stated that on April 24, 1998 she received a check in the amount of \$3,577.50 from March 7 through April 10, 1998. She called the Office to verify that the amount was correct, that she was told someone would "get back" to her and Ms. Hayden subsequently called her and told her that the payment was correct. Appellant stated that on June 12, 1998 she received a third check in the amount of \$5,008.50 for the period April 11 through May 31, 1998. She stated that she spoke with Ms. Rogers to verify that the amount was correct and Ms. Rogers was irritated with appellant's insistence that something was wrong and told her to spend the money. Appellant stated that based on the feedback from the Office that the payments she received were correct, she made a cash purchase of a 1991 Ford F250 van which cost \$14,900.00 cash plus tax and licensing. Appellant stated that she used \$9,800 from the insurance company and approximately \$5,000.00 from the her workers' compensation payments for the purchase. Appellant reiterated that in her reliance on the Office's feedback, she spent funds in a way she would not otherwise have done and would suffer a financial loss if she was required to repay the overpayment.

Appellant submitted an overpayment recovery questionnaire dated May 30, 1999 in which she indicated that she had a total monthly income of \$4,800.00, total monthly expenses of \$4,664.00 and general funds of \$1,925.00.

By decision dated November 8, 1999, the Office hearing representative affirmed the September 18, 1998 preliminary determination that appellant received an overpayment of \$5,515.42 but found that she was at fault in the creation of the overpayment. The Office hearing representative stated that appellant "clearly knew the amount of her compensation check was greater than that to which she was entitled as demonstrated by her alleged repeated contact with claims examiners in the Office to discuss the size of her compensation check." The Office

hearing representative stated that he had “reviewed the case record in its entirety paying particular attention to the OWCP-20” and determined that appellant’s gross family income continued to have a positive cash flow. He found that there was “no indication” that the recovery of the overpayment would either defeat the purpose of the Act or be against equity and good conscience. The Office hearing representative, therefore, ordered the amount of \$200.00 to be deducted from appellant’s continuing compensation until the overpayment was recovered.

The Board finds that appellant received an overpayment of \$5,515.42 from August 28, 1997 through September 3, 1998 and an overpayment of \$2,383.30 from October 15 through December 11, 1998. It is undisputed that during these time periods appellant was working 24 hours a week and receiving compensation based on a full-time salary. The Office’s calculations based on computer printouts establish that the amounts of the overpayments for the relevant time periods are correct. There is no contrary evidence in the record.

The Board finds that appellant was at fault in the creation of the overpayments.

Section 8129(b) of Federal Employees’ Compensation Act¹ provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.”² Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.³

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulation provides in relevant part that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.⁵

As indicated in her October 16, 1998 and May 18, 1999 statements to the Office, appellant contacted the Office after she received compensation checks for the relevant time

¹ 5 U.S.C. § 8129(b).

² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *Diana L. Booth*, 52 ECAB ___ (Docket issued No. 99-1760, May 10, 2000); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁴ 20 C.F.R. § 10.433(a)(1999).

⁵ *Diana L. Booth*, *supra* note 3.

periods because she believed she was overpaid. The Office's notes dated December 11, 1998 indicate that appellant called the Office to inform them that she thought she had been overpaid. Although appellant emphasized that two Office representatives, Ms. Hayden and Ms. Rogers, from two different offices, told her that the payments were correct, the Board has held that misinformation from the Office does not excuse appellant from accepting additional compensation she knew or should have known to be incorrect.⁶ The evidence establishes that appellant knew that the amount of checks she received for her compensation from August 27 through September 3, 1998 and from October 15 through December 11, 1998 were incorrect in that she called the Office to report the problem and, therefore, she is at fault in the creation of the overpayments for these time periods.

The Board finds that the Office properly determined that the deduction of \$200.00 a month from appellant's continuing compensation payments to recover the \$2,383.30 overpayment was proper but the case is not in posture for decision regarding the deduction of \$200.00 a month to recover the \$5,515.42 overpayment.

The Office's implementing regulation provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual."⁷

In the May 1, 1999 decision, the Office stated that it would withhold \$200.00 from appellant's continuing compensation payments to recover the amount of the \$2,383.30 overpayment. The Office did not make any findings regarding appellant's financial circumstances but the Office's May 1, 1999 memorandum to the file stated that appellant did not respond to the preliminary findings with any financial information. Since appellant did not submit any financial data regarding the \$2,383.30 overpayment at the time of the May 1, 1999 decision, the Board is unable to perform an analysis of the reasonableness of the monthly recovery rate of \$200.00.⁸ Appellant has, therefore, not shown that the Office abused its discretion in withholding \$200.00 from her monthly compensation payments to recover the \$2,383.30 overpayment.

In the November 8, 1999 decision, the Office hearing representative stated that the Office would withhold \$200.00 to recover the overpayment of \$5,515.42. The Office hearing representative did not address any numbers but stated that it paid particular attention to the OWCP-20 and found that appellant's gross family income continued to have a positive cash flow. He stated that there was no indication that the recovery of the overpayment would either

⁶ See *John L. Wolf*, 48 ECAB 148, 157 (1996); *Russell E. Wageneck*, 46 ECAB 653, 661 (1995); *Dennis W. Simpson*, 43 ECAB 1004, 1010 (1992).

⁷ 20 C.F.R. § 10.441(a) (1999); *Willard S. Moger*, 51 ECAB ___ (Docket No. 99-1798, issued June 15, 2000).

⁸ See *William D. Emory*, 47 ECAB 363, 373 (1996).

defeat the purpose of the Act or be against equity and good conscience. He did not address, however, the significance of the \$200.00 monthly recovery payment the Office had already ordered for the \$2,383.30 overpayment and its impact on appellant's finances especially if another \$200.00 monthly deduction payment was ordered. The Office's findings for recovery of the overpayments in the May 1 and November 8, 1999 decisions suggest that appellant might have a combined monthly deduction from her continuing compensation payments of \$400.00. The Office's findings were not sufficiently detailed on appellant's financial status to enable the Board to determine whether the monthly \$200.00 deduction for the \$5,515.42 overpayment is reasonable.⁹ The case should, therefore, be remanded for the Office to clarify its findings regarding recovery of the \$5,515.42 overpayment and explain how appellant's financial status, with references to specific figures from appellant's OWCP-20 and the previously authorized \$200.00 deduction, would permit that payment.

The May 1, 1998 decision of the Office of Workers' Compensation Programs is affirmed and the Office's November 8, 1999 decision is affirmed in part and vacated and remanded in part for further findings consistent with this decision.

Dated, Washington, DC
December 3, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See *Beverly Dukes*, 46 ECAB 1014, 1017 (1995).