

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBIN D. CALHOUN and U.S. POSTAL SERVICE,  
GREENVILLE PROCESSING & DELIVERY CENTER ANNEX,  
Greenville, SC

*Docket No. 00-1757; Submitted on the Record;  
Issued May 21, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$1,126.09 overpayment of compensation from May 28 to June 6, 1997 and from October 7 to 11, 1997; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required that appellant repay the entire amount in one payment, as a deduction from compensation benefits.

Appellant, a 35-year-old clerk, filed a notice of traumatic injury alleging that she developed low back pain in the performance of duty. The Office accepted her claim for herniated disc L5-S1 and authorized epidural injections on February 20, 1997. The Office entered appellant on the periodic rolls on March 28, 1997 and informed her of her obligation to report her return to work.

Appellant returned to work on May 28, 1997 working two hours a day until June 7, 1997. On June 30, 1997 the Office informed appellant that she had received compensation on the periodic rolls through June 21, 1997 and that her periodic rolls compensation ceased on June 22, 1997 to prevent a growing overpayment. On July 31, 1997 the Office informed appellant that she was paid compensation for total disability through June 21, 1997 and that "therefore, actually a very small overpayment is present for the few hours that you did work."

On August 25, 1997 the Office entered appellant on the periodic rolls. The Office again informed appellant that it required immediate notification when she returned to work to avoid an overpayment.

Appellant returned to full time light duty on October 7, 1997. She stopped work on October 10, 1997.

By decision dated January 16, 1998, the Office terminated appellant's compensation benefits finding that she failed to work after suitable work was provided.

The Office issued a preliminary determination of overpayment on January 28, 1998. The Office stated that it calculated the overpayment of compensation in the amount of \$1,126.09 by determining the entire amount that appellant received from May 28 to June 6, 1997 and October 7 to 11, 1997. The Office found that appellant was at fault in the creation of the overpayment.

Appellant requested an oral hearing of the termination issue on February 2, 1998. By decision dated February 10, 2000, the hearing representative found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits and reinstated her compensation benefits to the date of termination.

By decision dated April 4, 2000, the Office finalized the overpayment decision in the amount of \$1,126.09, finding that appellant was at fault in the creation of the overpayment as she returned to full duty from May 28 to June 6, 1997 and from October 7 to 11, 1997. The Office therefore found that the overpayment was not subject to waiver and that appellant should repay the entire amount.

The Board finds that the Office properly determined that an overpayment of compensation occurred in this case, but that the case is not in posture for a decision on the amount of the overpayment.

The record establishes that appellant returned to work at the employing establishment on May 28, 1997. However, the evidence of record establishes that appellant worked only two hours per day from May 28 to June 6, 1997, not eight hours a day as alleged by the Office in the overpayment decision. Therefore, the Office improperly calculated the amount of appellant's overpayment from May 28 to June 6, 1997 as she was entitled to compensation for six hours on these days. As the record does not contain a calculation of appellant's overpayment based on the actual hours that she worked, on remand the Office should obtain all relevant records and thereafter issue a decision with regard to the amount of the overpayment.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and that it was not subject to waiver.

Section 8129(a) of the Federal Employees' Act<sup>1</sup> provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. 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 the Act or would be against equity and good conscience."<sup>2</sup> Accordingly, no

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8129(a).

<sup>2</sup> 5 U.S.C. § 8129(b).

waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations<sup>3</sup> 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.”

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 at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant accepted the compensation check in question, she knew or should have known that the payment was incorrect.<sup>4</sup>

The Office determined that appellant was at fault in creating the overpayment because the face of the checks issued contained the period of compensation. In the present case, the Office produced copies of relevant payment records demonstrating notation of the dates covered by the checks that appellant improperly accepted and therefore, it has established that she knew or should have known she accepted improper payments of compensation. Therefore, appellant cannot be found to be without fault in the creation of the overpayment and appellant is not entitled to consideration of waiver.

The Board further finds that the Office properly determined to recover the overpayment in a lump sum.

Section 10.321(a) of the regulations<sup>5</sup> 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,

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<sup>3</sup> 20 C.F.R. § 10.320(b).

<sup>4</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

<sup>5</sup> 20 C.F.R. § 10.321(a).

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.<sup>6</sup> The Board finds that the Office did not abuse its discretion in following those guidelines in this case, and deducting the entire overpayment at one time.

The April 4, 2000 decision of the Office of Workers’ Compensation Programs is hereby affirmed in part and set aside and remanded for further calculation of the amount of the overpayment.

Dated, Washington, DC  
May 21, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> *Gail M. Roe*, 47 ECAB 268 (1995).