

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DELORES G. BARBER and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Columbia, SC

*Docket No. 03-152; Submitted on the Record;  
Issued February 28, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$2,347.00; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, such that she is not entitled to waiver of recovery; and (3) whether the Office properly required repayment of the overpayment.

The Office accepted that on May 3, 2001 appellant, then a 46-year-old nurse, sustained epicondylitis of the right elbow from carrying x-rays at the orthopedic clinic. Appellant did not stop work, but took intermittent time off as necessary using sick and annual leave.

On October 29, 2001 appellant filed a Form CA-7 claim for compensation to repurchase 111.75 hours of sick and annual leave used during the period June 5 to September 11, 2001. The amount of compensation claimed equaled \$2,342.56.

On November 16, 2001 the Office disbursed to appellant a check in the amount of \$2,347.00. Appellant kept and cashed the check rather than using the money to repurchase leave as requested.

On November 29, 2001 the Office determined that appellant had been overpaid in the amount of \$2,347.00 as she had been paid for 112 hours of leave during the period June 5 to September 11, 2001 and yet kept and cashed the check intended for leave repurchase during the same period. The Office found that appellant was at fault in the creation of the overpayment as she should have reasonably known that she was not entitled to compensation for hours for which she had already received leave pay.

Appellant claimed by letter dated November 29, 2001 that she had spent the check because there was nothing on the check which stated that it was not for her.

On December 10, 2001 the Office issued appellant a preliminary determination that she had received an overpayment of compensation in the amount of \$2,347.00. The Office found that appellant was with fault in the creation of the overpayment because she should have reasonably known that she was not entitled to compensation and leave for the same periods. The Office advised appellant that she had 30 days within which to submit further evidence or argument if she disagreed with the preliminary findings or to request a hearing. Appellant requested a telephone conference and she completed an overpayment recovery questionnaire.

By letter dated August 1, 2002, the Office advised appellant that it had attempted to contact her to discuss the overpayment, but that the calls had been missed. The Office gave appellant another 30 days, within which to contact the Office to discuss the overpayment. Appellant did not respond to this letter.

By decision dated September 30, 2002, the Office finalized the finding of overpayment amount and fault and directed appellant to repay the amount of the overpayment in full.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,347.00 for the period June 5 to September 11, 2001.

Appellant received leave pay for 112 hours during the time period June 5 to September 11, 2001 and then she filed a claim for compensation to repurchase the leave used during that period. When she received a check for compensation for the 112 hours used, she kept and cashed the check instead of forwarding it to the employing establishment for repurchase of her leave. Therefore, the Office properly determined that appellant had received both leave pay and compensation for the same hours of absence and, therefore, was overpaid in the amount of the compensation paid totaling \$2,347.00.

The Board further finds that appellant was with fault in the creation of the overpayment such that waiver may not be contemplated.

Section 8129 of the Federal Employees' Compensation Act<sup>1</sup> 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 would be against equity and good conscience." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

In determining fault, section 10.433 of the Office's implementing federal regulations provides the following:<sup>2</sup>

"[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.... A

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 20 C.F.R. § 10.433.

recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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.”

In its preliminary determination dated December 10, 2001, the Office found that appellant was with fault in the matter of the overpayment because she accepted, kept and cashed a payment, which she knew or should have known was incorrect. The Office determined that appellant should have reasonably known that she was not entitled to compensation and leave pay for the same absences. Although appellant requested a telephone conference regarding the issues of amount and fault, no response to the Office’s attempts to contact her was forthcoming.

By decision dated September 30, 2002, the Office properly found that appellant was with fault in the creation of the overpayment in the amount of \$2,347.00 for the period June 5 to September 11, 2001, under the third criterion because she should have reasonably known that she was not entitled to both leave pay and compensation for wage loss for the same dates.

Accordingly, the Board finds that the Office properly denied waiver of recovery of the overpayment.

Further, the Board finds that the Office properly required repayment of the overpayment in a lump sum.

Section 10.441(a) of the Office’s implementing regulation<sup>3</sup> states that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation considering the circumstances of the overpaid individual. Section (b) states that when an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered. If the individual fails to make such refund, the Office may recover the overpayment through any available means, including salary offset, annuity benefits, or other federal payments, including tax refunds.<sup>4</sup>

The Board’s jurisdiction to review collection of an overpayment is limited to cases of adjustment wherein the Office decreases later compensation payments to which the individual is

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<sup>3</sup> 20 C.F.R. § 10.441(a).

<sup>4</sup> See *Sherry A. Hunt*, 49 ECAB 467 (1998).

entitled.<sup>5</sup> The Board has no jurisdiction to review the discretionary authority of the Office with regard to the method of recovery where the overpaid individual has no continuing compensation entitlement under the Act.<sup>6</sup> In this case, appellant is not being paid further regular payments of compensation, but is rather, pursuing a schedule award and irregular compensation for periodic absences causally related to her accepted condition. Therefore, deductions from these payments to recover the amount of the overpayment are within the Office's discretion.

Accordingly, the September 30, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 28, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>5</sup> *Id.*

<sup>6</sup> *John E. Martin, Jr.*, 49 ECAB 298 (1998).