



L5-S1, which the Office authorized. She was unable to resume her prior nursing duties. Appellant received Office sponsored rehabilitation services and on September 1, 1998 she returned to work through the assisted reemployment program as an occupational therapy assistant with weekly earnings of \$520.00.

In a decision dated September 19, 2000, the Office found that appellant's job as an occupational therapy assistant effective September 1, 1998 represented her wage-earning capacity. The Office further noted that appellant's weekly wages of \$520.00 beginning September 1, 1998 exceeded the wages she would have received of her date-of-injury job effective September 1, 1998. Accordingly, the Office found that appellant had a zero percent loss of wage-earning capacity retroactive to September 1, 1998.

On May 31, 2002 the Office advised appellant that she had received an overpayment of benefits in the amount of \$30,694.92. The Office explained that the overpayment resulted from appellant's receipt of disability compensation while she was employed during the period September 1, 1998 to July 15, 2000. The Office further advised appellant that she was at fault in creating the overpayment.

Appellant requested a preresoupment hearing, which was held on June 17, 2003. In a decision dated September 24, 2003, the Office hearing representative determined that appellant received an overpayment in the amount of \$30,694.92 and she was at fault in creating the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.<sup>1</sup>

### **ANALYSIS -- ISSUE 1**

The record indicates that appellant returned to work on September 1, 1998 as an occupational therapy assistant with weekly earnings of \$520.00. She continued to work in this capacity for at least 60 days and the wages she received exceeded the pay rate of her date-of-injury job on September 1, 1998. Based upon her earnings as an occupational therapy assistant, appellant had a zero percent loss of wage-earning capacity and she was not entitled to further wage-loss compensation under the Act. The Office, however, continued to pay appellant disability compensation through July 15, 2000. Appellant received an overpayment of compensation in the amount of \$30,694.92 from September 1, 1998 to July 15, 2000. Accordingly, the Office's determination of the amount of the overpayment is proper and is supported by the evidence of record.

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<sup>1</sup> 5 U.S.C. § 8116; *Kenneth E. Rush*, 51 ECAB 116, 117 (1999).

## LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered 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.<sup>2</sup> Waiver of recovery of an overpayment is not possible if the individual is at fault in creating the overpayment.<sup>3</sup>

Section 10.433 of the implementing regulations specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>4</sup> The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.<sup>5</sup> Under the regulations a recipient will be found to be at fault with respect to creating an overpayment if the recipient “[a]ccepted a payment which he or she knew or should have known to be incorrect.”<sup>6</sup>

## ANALYSIS -- ISSUE 2

The Office hearing representative found that appellant accepted a payment that she knew or should have known to be incorrect. The Office based this finding on a June 29, 1998 letter from the claims examiner advising appellant that she would receive 90-days of placement assistance, and thereafter, the office anticipated reducing her compensation based on her ability to earn \$27,000.00 a year as an occupational therapy assistant. The Office however failed to make a wage-earning capacity determination until September 19, 2000, when it made a retroactive determination.

The Board finds that the Office’s June 29, 1998 letter did not place appellant on notice that her compensation would be reduced to zero when she was reemployed effective September 1, 1998. The letter does not indicate that appellant would be entitled to zero benefits if and when she returned to work. The Office failed to make the wage-earning capacity determination until September 19, 2000. Appellant would not be expected to calculate her own loss of wage-earning capacity once she returned to work to determine if she was entitled to further compensation. There is nothing in the record to establish that appellant either knew or should have known that she was no longer entitled to any compensation once she returned to work on September 1, 1998. Accordingly, the Board finds that the Office erred in concluding that appellant was at fault in creating the overpayment. The case will be remanded to the Office for a determination of whether appellant is entitled to a waiver of recovery of the overpayment.

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<sup>2</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

<sup>3</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>4</sup> 20 C.F.R. § 10.433(a) (1999).

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

<sup>6</sup> 20 C.F.R. § 10.433(a)(3) (1999).

**CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$30,694.92. The record, however, does not support a finding that appellant was at fault in creating the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2003 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: January 28, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member