

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY J. SMAHA and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Portland, ME

*Docket No. 98-100; Submitted on the Record;
Issued August 2, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found appellant to be at fault in the creation of an overpayment of \$1,716.42, thereby precluding waiver of recovery of this amount.

Appellant's notice of occupational disease, filed on December 30, 1991, was accepted for bilateral carpal tunnel syndrome, tenosynovitis and epicondylitis caused by appellant's repetitive keying on a letter sorting machine. Appellant returned to limited duty but his condition deteriorated and he underwent surgery for transposition of the left ulnar nerve in January 1994.

On August 17, 1994 appellant signed a limited-duty job offer and returned to work for four hours a day. He filed claims for wage-loss compensation from August 13 through October 28, 1994. On January 5, 1995 the Office issued a preliminary determination of overpayment in the amount of \$1,716.42. The Office noted that appellant had returned to part-time work on August 18, 1994 and continued to receive total disability benefits through September 17, 1994.

On February 24, 1997 the Office issued a final decision that appellant was at fault in creating the overpayment because he was aware or should have reasonably been aware that he could not receive compensation for total disability for a period during which he was working and receiving a salary.

Initially, the Board finds that the Office properly calculated the amount of the overpayment.

The Office found that appellant was paid \$2,276.16 in total disability compensation for the 22 working days from August 19 through September 16, 1994 at a weekly rate of \$517.31. Appellant should have been paid only \$559.74. Therefore, he was overpaid \$1,716.42.

The Board finds that appellant was with fault in the creation of the overpayment and therefore must repay the full amount.¹

Section 8129(a)² of the Federal Employees' Compensation Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. Section 8129(b)³ 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.⁴ Therefore, adjustment or recovery must be made when an incorrect payment has been made to an individual who is found to be with fault.⁵

The implementing regulation⁶ provides 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 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) accepted a payment which the individual knew or should have been expected to know was incorrect. Any overpayment resulting from the Office's negligence does not permit an employee to accept compensation to which he knew or should have known he was not entitled.⁷

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.⁸ In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.⁹ Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported and ability, efforts and opportunities to comply with reporting requirements.¹⁰

¹ Appellant argued on March 10, 1997 that he never received the preliminary notice of overpayment sent to him in January 1995. However, the record shows that the Office spoke with appellant "extensively" on November 11, 1994 explaining how the overpayment occurred.

² 5 U.S.C. §§ 8101-8193 (1974); § 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁵ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁶ 20 C.F.R. § 10.320(b).

⁷ *Russell E. Wageneck*, 46 ECAB 653, 660 (1995).

⁸ *Danny L. Paul*, 46 ECAB 282, 285 (1994).

⁹ *Stephen A. Hund*, 47 ECAB 432, 435 (1996).

¹⁰ *Henry P. Gilmore*, 46 ECAB 709, 719 (1995).

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to, or the amount of, benefits.¹¹ It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.¹²

In this case, the Office informed appellant on June 1, 1992 when his claim was accepted that he would be paid compensation under the conditions set forth in its letter. Among those conditions were the following:

“If you obtain or return to any employment, you should notify this Office immediately. You are not permitted to receive payments for temporary total disability while employed. If you receive any compensation checks which include payment for any period you have worked, you should return them to us immediately to prevent any overpayment.”

On August 16 and December 6, 1993 the Office informed appellant of the amount of his disability compensation and warned: “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work.” The Office repeated this warning in its April 7, 1994 letter accepting his ulnar nerve surgery.

On July 22, 1994 the Office again computed appellant’s weekly disability compensation, payable until October 15, 1994 and again admonished him to return any benefit checks received after he returned to work. The record indicates that appellant informed the Office on August 8, 1994 that he would be starting work the next week. The record shows that compensation checks were issued to appellant on August 20 and September 17, 1994 in the amount of \$1,958.16 each. Appellant was also paid for 16 hours of retraining on August 18 to 19, 1994 and for four hours part-time work. No checks were returned to the Office by appellant.

Inasmuch as appellant was informed repeatedly of the prohibition against receiving disability benefits while working and indicated his understanding of the conditions under which he received such benefits by telling the Office of his imminent return to work, the Board finds that appellant was well aware that by cashing the benefit checks he was accepting compensation to which he knew or should have known he was not entitled.

Based on these circumstances, the Board finds that appellant accepted a payment which he knew or could be expected to know was incorrect.¹³ Thus, the Office properly found him to

¹¹ *Ruth Moreno Rios*, 48 ECAB ____ (Docket No. 94-1977, issued July 14, 1997).

¹² *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹³ 20 C.F.R. § 10.320(b); *see John L. Wolf*, 48 ECAB ____ (Docket No. 95-1932, issued October 23, 1996) (finding that appellant was at fault in creating the overpayment because he knew that he could not receive both retirement benefits and disability compensation at the same time).

be at fault in creating the overpayment. Therefore, no waiver of recovery of the overpayment is possible.¹⁴

The February 24, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 2, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

¹⁴ See *Nina D. Newborn*, 47 ECAB 132, 140 (1995) (finding that appellant was at fault in creating the overpayment because she knowingly failed to report earnings from self-employment).