

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH PEREIRA and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 00-613; Submitted on the Record;
Issued January 7, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$2,536.01 overpayment of compensation; (2) whether appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

The Board finds that appellant received a \$2,536.01 overpayment of compensation.

On March 27, 1986 appellant, then a 34-year-old mail carrier, sustained an injury to his right ankle at work. The Office accepted that appellant sustained a right ankle sprain with tendon damage and depression which affected his physical condition; the Office provided authorization for right ankle surgeries performed in 1986 and 1987. Appellant periodically worked in limited-duty positions for the employing establishment, stopped work in November 1987 and began to receive compensation for total disability. In 1990 appellant began to participate in vocational rehabilitation efforts.

On September 7, 1999 the Office made a preliminary determination that appellant received a \$2,536.01 overpayment of compensation because he had earnings from self-employment as a real estate agent when he was receiving total disability compensation. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because he should have been aware that he could not receive earnings from self-employment and total disability compensation at the same time. By decision dated October 4, 1999, the Office finalized its preliminary overpayment determination and determined that the overpayment would be repaid by deducting \$75.00 from appellant's compensation payments every 28 days.

Appellant had received earnings from his employment as a real estate agent during the years 1990, 1994, 1996 and 1997 despite the fact that he had received compensation for total

disability during these years.¹ The record contains evidence which shows that appellant received \$115,454.94 in total disability compensation from the Office during these years when he was only entitled to receive \$112,918.93 in disability compensation.² The difference between these two figures represents an overpayment of \$2,536.01. Therefore, the Office properly determined that appellant received a \$2,536.01 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act³ provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁴ 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 this subchapter or would be against equity and good conscience."⁵ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations 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 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...."⁶

¹ Appellant received compensation in the form of commissions for sales.

² In determining the amount of appellant's earnings as a real estate agent, the Office deducted amounts for expenses he incurred in this capacity. The Office properly used these figures to recalculate appellant's wage-earning capacity and determine the amount of compensation he was actually entitled to receive during the periods in question.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433(a).

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Section 10.433(c) of the Office's regulations provides:

"Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."⁷

By Form CA-1049, the Office advised appellant that, to avoid an overpayment, he should return any compensation checks he received after he returned to work. The Board has reviewed that evidence of record and notes that it reveals appellant is an intelligent person who had the capacity to realize that he could not receive total disability compensation while receiving earnings as a real estate agent. This capacity is demonstrated by appellant's ability to work as a real estate agent and by his several letters to the Office containing detailed accounts of his real estate expenses. Appellant indicated that he thought he could earn a percentage of his yearly compensation "without penalty" but he did not explain the basis for this claimed belief.

Appellant did report in various Forms CA-1032 that he was employed during the years 1990, 1994, 1996 and 1997 as a real estate agent.⁸ Even though the Office may have been negligent in continuing to issue appellant checks for total disability compensation after it was informed he had returned to work, this does not excuse appellant's acceptance of such checks which he knew or should have known to be incorrect.⁹ For these reasons, the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

"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 the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate

⁷ 20 C.F.R. § 10.433(c).

⁸ However, it should be noted that appellant was vague in reporting his earnings on these forms in that he indicated he worked on a "commission" basis but generally did not report the amount of these commission earnings.

⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁰

The record supports that, in requiring repayment of the overpayment by deducting \$75.00 from appellant’s compensation payments every 28 weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting from appellant’s compensation payments every four weeks.

The October 4, 1999 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC
January 7, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹⁰ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).