U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN M. STARKSON and U.S. POSTAL SERVICE,
MAIL HANDLING FACILITY, Boulder, Colo.

Docket No. 95-2500; Submitted on the Record;
Issued January 8, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant was not without fault in the creation of the overpayment in the amount of $2,167.82; and (2) whether the Office properly required repayment of the overpayment by withholding $200.00 per month from appellant's continuing monthly compensation benefits.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly found that appellant was not without fault in the creation of the overpayment in the amount of $2,167.82.

On March 21, 1986 appellant, a letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on the same date he injured his left hip and left thigh when he turned to throw a sack of parcels into the cargo area of a truck weighing five tons.[1] Appellant did not stop work. The Office accepted appellant's claim for left buttock and lumbar strain.

The record establishes that appellant was receiving augmented compensation benefits based on court-ordered child support payments which ceased effective August 1, 1993 based on a court order dated August 30, 1993. However, the Office continued to make child support payments to the court until October 17, 1993.[2] In addition, the Office continued to pay appellant

[1] Previously, appellant filed a claim assigned number A12-0062511 for a January 24, 1983 back injury which was accepted by the Office for a sprain and contusion of the dorsal and lumbar spine and a claim assigned number A12-0064878 for a June 8, 1983 back injury which was accepted for low back strain. Subsequent to the filing of the March 21, 1986 claim, appellant filed a claim for a September 29, 1987 back injury assigned number A12-0095344 which was accepted for acute back strain. Appellant filed a claim for a February 26, 1988 back injury assigned number A12-0099878 which was accepted for acute back strain, but a claim for recurrence of disability was denied by decision dated December 14, 1988. Appellant filed a claim for an October 7, 1988 back injury assigned number A12-0104337 which was accepted for back strain and a claim for January 27, 1989 assigned number A12-015070 which was accepted for low back strain. The Office consolidated appellant's claims filed under numbers A12-0095344, A12-0099878, A12-0062511 and A12-0104337 to create a master file under number A12-0084691 because they involved back injuries.

[2] The Board notes that the court sent refunds for the child support payments to appellant's counsel who then gave

at the augmented 75 percent pay rate until April 30, 1994 even though appellant no longer had any dependents. As a result, the Office found that an overpayment was created in the amount of $2,167.82 covering the period August 1, 1993 through April 30, 1994.

By letter dated September 21, 1994, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred during the period August 1, 1993 through April 30, 1994 in the amount of $2,167.82 and that he was at fault in the creation of the overpayment because he continued to receive compensation at the 75 percent pay rate after his obligation to pay court-ordered child support had ceased. The Office also advised appellant that he had the right to submit any additional evidence or arguments if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office further advised appellant that he could request a telephone conference, that he could request a final decision based on the written evidence only, or that he could request a pre-recoupment hearing within 30 days of the date of this letter. Finally, the Office advised appellant to complete the overpayment questionnaire and attach any supporting documents.

In response, appellant submitted a letter dated September 27, 1994 contending that he was not at fault in the creation of the overpayment and that the Office had underpaid him in the amount of $1,105.00. Appellant's letter was accompanied by a sworn affidavit of emancipation signed by his former wife, Karen J. Starkson, reducing child support payments to $200.00 per month for their youngest son, Steven Starkson, due to the emancipation of their son, Scott Starkson, an August 30, 1993 court order terminating appellant's obligation to pay child support for his youngest son effective August 1, 1993 and a statement indicating that appellant received a cost-of-living increase in his compensation benefits.

By letter dated October 5, 1994, the Office reiterated its findings and explanation as provided in its September 21, 1994 letter regarding the creation of an overpayment. Additionally, the Office advised appellant that he was not owed any money because he was incorrectly paid at the pay rate that is used for claimants with dependents. Further, the Office advised appellant to exercise his appeal rights.

In an October 19, 1994 letter, appellant explained the court-ordered reduction and eventual court-ordered termination of child support payments for each of his three sons. Appellant's letter was accompanied by an October 19, 1994 overpayment questionnaire completed and signed by him and a request for an oral hearing before an Office representative.

By decision dated June 9, 1995, the hearing representative found that appellant was at fault in the creation of the overpayment in the amount of $2,167.82 because he accepted payments that he knew of should have known were incorrect. The hearing representative also found that appellant was capable of repaying the debt at the rate of $200.00 per month.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment

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them to appellant.

shall be made by decreasing later payments to which an individual is entitled.[3] The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."[4] Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.[5] In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.[6]

In determining whether an individual is at fault, section 10.320(b) of the Office's implementing 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 the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[7]

In this case, the Office applied the third standard – appellant accepted payments which he knew or should have known were incorrect -- in finding appellant to be at fault in the creation of the overpayment. An August 30, 1993 court order terminated appellant's obligation to pay child support for his youngest son in the amount of $200.00 per month. The record reveals that appellant completed several Forms CA-1032, the most recent was completed and signed by appellant on April 26, 1994.[8] Section B of the Form CA-1032 provided that "[t]he basic rate of compensation is 66 2/3 percent of the applicable pay rate if the claimant has no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if one or more dependents is eligible for compensation. You must therefore answer the questions below to ensure your compensation is paid at the correct rate." The April 26, 1994 Form CA-1032 reveals

[3] 5 U.S.C. § 8129(a).

[4] 5 U.S.C. § 8129(b).

[5] *Harold W. Steele*, 38 ECAB 245 (1986).

[6] 20 C.F.R. § 10.320(c)(1).

[7] 20 C.F.R. § 10.320(b).

[8] The record reveals that appellant completed and signed Forms CA-1032 on March 19, 1990, March 23, 1991 and April 28, 1992.

that appellant answered "no" in response to the question whether he had any dependents. At the hearing on March 30, 1995 appellant testified that despite his notification to the Office about the termination of child support payments, the Office continued to make these payments to the court. Appellant further testified that he notified the Office by certified letter that the court-ordered payments had ceased. Appellant then testified that the payments were stopped by the Office. Additionally, appellant testified that he was not aware that when the court order ended, that his compensation benefits would be reduced. Appellant stated that he believed he would receive between $180.00 and $200.00 more a month because his obligation to pay child support for his youngest child had ceased. Appellant, however, testified that he was aware that his compensation would be reduced from the three-quarters pay rate to the two-thirds pay rate because he did not have any more dependents, but that he was unaware of the amount that he would be receiving each month. Although the Office continued to pay appellant at the 75 percent pay rate between August 1, 1993 and April 30, 1994, the Board finds that the Forms CA-1032 and appellant's hearing testimony establish that appellant was aware that he was not entitled to receive compensation benefits at the 75 percent pay rate as a result of the August 30, 1993 court order terminating child support payments effective August 1, 1993.

Appellant contended that he was not at fault in the creation of the overpayment because he informed the Office that his obligation to make court-ordered child support payments had ceased as of August 1, 1993. In a September 27, 1994 response to the Office's September 21, 1994 letter, appellant stated that after receiving the court order discontinuing child support payments, he brought it to the Office and that he mailed a copy to the Office in September 1993. Appellant also stated that in October 1993, he visited the Office and gave the order to a claims handler who stated that he had made a copy of it and that the situation was "taken care of." Appellant further stated that his October check was less $184.62 and that he returned to the Office in November 1993 with the court order. Appellant then stated that a claims handler took the court order, made a copy of it, and stated that "it was taken care of now." Additionally, appellant testified at the hearing that he did not feel that he was at fault in the creation of the overpayment because he made three attempts to "get the record straight." The Board finds that appellant's argument that he relied on misinformation given by Office personnel is insufficient to excuse the receipt of compensation benefits because he was properly advised by the Forms CA-1032 that he was not entitled to compensation at the 75 percent pay rate if he did not have any dependents.[9]

The Board further finds that the Office properly required repayment of the overpayment by withholding $200.00 per month from appellant's continuing monthly compensation benefits.

[9] The fact that an overpayment resulted from negligence by the Office does not excuse the employee from accepting payment which he knew or should have been expected to know he was not entitled. *Russell E. Wageneck*, 46 ECAB ____(Docket No. 93-1841, issued March 23, 1995).

Section 10.321(a) of the regulations provides:

> "Whenever an overpayment of compensation has been made to an individual who is entitled to future 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, and any other relevant factors, so as to minimize any resulting hardship upon such individual."[10]

The hearing representative found that appellant was capable of repaying the debt at the rate of $200.00 per month. In so doing, the hearing representative calculated the following monthly expenses: food, $160.00; clothing, $50.00; mortgage, $713.00; utilities, $175.00; gas and oil, $150.00; car maintenance, $50.00; car insurance, $70.00; Mastercard, $85.00; "M.B.N.A." credit card, $75.00 based on information provided by appellant in the October 19, 1994 overpayment recovery questionnaire and appellant's hearing testimony. The hearing representative determined that appellant's monthly expenses totaled $1,528.00. Based on the Office's records, the hearing representative determined that appellant received $1,820.20 in monthly compensation benefits. The hearing representative thus subtracted this figure from $1,528.00 in monthly expenses resulting in a remainder of approximately $290.00.

Based on appellant's information regarding his income, assets and expenses, the Office's decision to withhold $200.00 per month from appellant's continuing compensation payments was made with due regard to appellant's monthly household income and expenses, and is therefore appropriate under the circumstances of the case. Therefore, the Board finds that recovery of the overpayment by withholding $200.00 per month from appellant's continuing monthly compensation benefits does not constitute an abuse of discretion.

[10] 20 C.F.R. § 10.321(a).

The June 9, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
January 8, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member