

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS R. HOFIUS and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

*Docket No. 00-1558; Submitted on the Record;
Issued November 21, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$12,005.11 from May 16 through July 18, 1998; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On July 30, 1997 appellant, a 48-year-old postal inspector, injured his lower back at work. The Office accepted appellant's claim for lumbar strain and plexicitis. Appellant stopped work on August 1, 1997.

By letters dated January 7 and March 3, 1998, the Office notified appellant that he would be paid temporary total disability compensation every 28 days. Both letters indicated that appellant would be paid every four weeks until July 18, 1998 or until he returned to work, whichever occurred first. The Office also indicated that to avoid overpayment appellant should notify the Office immediately when he returned to work.

On May 16, 1998 appellant returned to part-time limited-duty working four hours a day but receiving his full salary.

By letter dated March 8, 1999, the Office advised appellant that an overpayment of compensation had occurred in the amount of \$12,005.11, from May 16 through July 18, 1998. The Office found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to wage-loss compensation for temporary total disability when he was working and receiving a full salary.

In a March 8, 1999 response, appellant requested a prerecoupment hearing and disagreed with the Office's finding that he was at fault. In addition, appellant submitted a completed form outlining his income and assets as well as his household expenses and debts.

At the hearing on October 27, 1999, appellant testified that his benefits were initially issued sporadically, that he was unsure whether he received all the benefits to which he was entitled and that the benefits he received after returning to work represented past benefits due to him. Appellant stated that an Office official indicated that after the payment cycle was over, his case would be reevaluated and if any additional compensation were due to him he would be notified. Appellant indicated that he informed the Office official that he had returned to work part time and that the official told him that compensation would continue through July 1998.

In a decision dated January 10, 1999, the hearing representative found that appellant was at fault in creating the overpayment of \$12,005.11 on the grounds that he either knew or reasonably should have known that the payments he accepted were incorrect.

The hearing representative stated that appellant listed \$4,653.00 in monthly income on the overpayment recovery questionnaire,¹ and had regular monthly expenses of \$4,095.00, which left a balance of \$558.00 per month. The hearing representative concluded that \$350.00 a month from appellant would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant. The hearing representative indicated that the recovery would be made from appellant's payroll check.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$12,005.11 from May 16 through July 18, 1998.

The record reflects that on May 16, 1998 appellant returned to part-time limited duty at full salary and continued to receive wage-loss compensation through July 18, 1998. Thus, an overpayment occurred in the amount of \$12,005.11. Appellant did not dispute the fact and amount of the overpayment.

The Board further finds that appellant was not without fault in creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides that 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.³

The implementing regulation⁴ provides that a claimant is at fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she

¹ The overpayment recovery questionnaire was completed by appellant in March 1999. Appellant indicated at the precoupment hearing that his financial status had not changed since that time.

² 5 U.S.C. § 8129(a), (b).

³ See *Bonnye Mathews*, 45 ECAB 657 (1994).

⁴ 20 C.F.R. § 10.433(a).

knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.

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

Because appellant returned to part-time employment on May 16, 1998 and was, therefore, only partially disabled, he knew or should have known that he was no longer entitled to the amount of weekly compensation he had been receiving. Appellant had on January 7, 1998 and as recently as March 3, 1998 received notification from the Office that he was to “return the compensation check” upon returning to work. Upon returning to work in May 1998, appellant had an obligation to return any compensation checks that he subsequently received. Instead, appellant accepted and deposited these checks.

Appellant asserts that he thought he was entitled to such payments because prior payments had been sporadic. He also alleges that he contacted the Office about these payments and was not told to return such payments. The record contains no evidence that any outstanding compensation was owing appellant at the time he accepted the checks in question. Further, there is no corroborating evidence such as an internal memorandum of telephone calls that the Office instructed appellant to keep such checks.

The Board finds that, under the circumstances of this case, appellant reasonably knew or should have known that he accepted wage-loss payments from May 16 to July 18, 1998 that were incorrect. Because appellant was not without fault in creating the overpayment, recovery of the overpayment in the amount of \$12,005.11 may not be waived.

The Board further finds that it does not have jurisdiction to review the Office’s finding that the overpayment of compensation would be obtained through deductions from appellant’s employing establishment pay at the rate of \$350.00 per pay period. Such method of recovery is within the discretionary authority of the Office under the Debt Collection Act of 1982.⁵ The Board’s jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits. This is not the situation with respect to the \$350.00 per pay period payroll deduction.⁶

⁵ U.S.C. § 5511 *et seq.*

⁶ See *Lewis George*, 45 ECAB 144, 154 (1993); *Edward O. Hamilton*, 39 ECAB 1131, 1137 (1988); *Joyce Y. Wescott*, 30 ECAB 349, 362 (1988).

The January 10, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 21, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member