

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of DANIEL L. LADIG and U.S. POSTAL SERVICE,  
POST OFFICE, Salt Lake City, UT

*Docket No. 02-1019; Submitted on the Record;  
Issued September 6, 2002*

---

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$1,112.13; (2) whether the Office properly determined that appellant was with fault in the creation of the overpayment; and (3) whether the Office properly required repayment of the overpayment.

The Office accepted that on August 2, 2000 appellant, then a 43-year-old distribution clerk, sustained a left inguinal hernia while pulling down priority sacks from the SPBS machine. Surgical repair of the hernia was also authorized and occurred on December 4, 2000. Appellant returned to work with activity restrictions on January 17, 2000.

On April 17, 2001 the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred in the amount of \$1,112.13 because compensation had been paid from December 4, 2000 through January 16, 2001 at an incorrect pay rate, as his night differential was not guaranteed,<sup>1</sup> and because he returned to work on January 17, 2001 but received and kept compensation for the period January 17 through 27, 2001. The Office determined that appellant was at fault in the creation of the overpayment as he should have been aware that he was not entitled to compensation after he returned to work. Appellant's rights were also enumerated.

Appellant did not request a prerecoupment hearing, nor did he provide any further information or argument.

By decision dated October 2, 2001, the Office finalized the preliminary determination finding that the overpayment had occurred as alleged, that appellant was with fault in its

---

<sup>1</sup> Appellant's correct pay rate was \$772.18 per week instead of \$783.80 per week.

creation, and that it would be recovered by requiring appellant to provide a check for the overpaid amount.<sup>2</sup>

The Board finds that an overpayment of compensation in the total amount of \$1,112.13 occurred as alleged.

As appellant received compensation for the period December 4, 2000 through January 16, 2001 at an incorrect pay rate which exceeded that to which he was entitled, an overpayment of compensation occurred. This overpayment was added to the overpayment which was created when appellant received and kept wage-loss compensation for the period January 17 through 27, 2001, and the total amount was calculated by the Office as equaling \$1,112.13.

Therefore, appellant received an overpayment of compensation in the amount of \$1,112.13, to which he was not entitled.

The Board also finds that appellant was with fault in the creation of the overpayment.

Before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault. Section 10.433(a) of the implementing federal regulations provides the following:

“[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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.”<sup>3</sup>

By letter dated April 17, 2001, the Office informed appellant that it had made a preliminary determination that he was at fault in the creation of the overpayment based on the third standard above and accepted a payment which the individual knew or should have known was incorrect. By decision dated October 2, 2001, the Office informed appellant that its

---

<sup>2</sup> Following this final decision appellant sent the Office a check for \$996.34, and the Office wrote off collection of the remainder of \$116.93.

<sup>3</sup> 20 C.F.R. § 10.433(a).

preliminary finding that he was at fault in the matter of the overpayment was correct because he accepted payment that he knew or reasonably should have known was incorrect. The Office indicated that appellant should have known that he was not still entitled to compensation for temporary total disability after he returned to work.

On November 21, 2000 with notification of his receipt of compensation benefits, appellant received a fact sheet which explained that, when he returned to work or obtained new employment, he was to notify the Office immediately. The Office explained that if he received a compensation check which included payment for a period he had worked, he was to return it to the Office immediately to prevent an overpayment of compensation. Appellant did not do this, instead keeping and cashing the incorrect check, after he had returned to work on a full-time basis. He therefore was with fault under standard three because he accepted a payment which he knew or should have known was incorrect.

However, the Board notes that appellant was not with fault in the creation of the overpayment which resulted from the incorrect pay rate provided by the employing establishment to the Office, as he was not involved in providing that rate, nor was he provided with the Office's calculations resulting in his final compensation check amount,<sup>4</sup> and would, therefore, be entitled to consideration waiver of that amount if circumstances so dictated.<sup>5</sup> No such circumstances, however, were delineated, and therefore, based upon the present case record, waiver of that amount will not be considered.

The Board notes, however, that it does not have jurisdiction over the third issue, as collection was directed under the Debt Collection Act.<sup>6</sup>

Section 8129(a) of the Federal Employees' Compensation Act<sup>7</sup> provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 10.441 of Title 20 of the Federal Code of Regulations provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid. Upon failure to make such refund, the Office may proceed to recover the same subject to the provisions of the Federal Claims Collection Act of 1966.

---

<sup>4</sup> Section 10.433(b) provides that whether the Office determines that an individual is at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment, and 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.

<sup>5</sup> Adjustment or recovery by the United States may not be made when incorrect payment had 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; *see* 20 C.F.R. § 10.434(a) and (b). In that case the employee would be entitled to waiver of recovery of the overpayment.

<sup>6</sup> *See Beverly E. Labbe*, 50 ECAB 440 (1999).

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

Consequently, the decision of the Office of Workers' Compensation Programs dated October 2, 2001 is hereby affirmed as modified.

Dated, Washington, DC  
September 6, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member