

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUDY R. SANTIAGO and U.S. POSTAL SERVICE, SACRAMENTO
PROCESSING & DELIVERY CENTER, West Sacramento, CA

*Docket No. 02-2207; Submitted on the Record;
Issued January 27, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$11,124.59; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and that therefore, the overpayment was not subject to waiver.

On May 12, 1999 appellant, then a 46-year-old casual postal clerk, filed a notice of occupational injury and claim for compensation (Form CA-2), alleging that he sustained an injury to his back in the performance of duty. On August 12, 1999 the Office accepted appellant's claim for thoracic and lumbar strain and appropriate compensation benefits were paid.

By letter dated February 9, 2000, the Office proposed terminating appellant's compensation and medical benefits for the reason that the evidence substantiated that he no longer suffered from a condition related to his employment with the employing establishment. On February 23, 2000 the Office issued a final notice of proposed termination of benefits. By letter dated March 18, 2000, appellant requested a hearing or reconsideration. A hearing was held on September 19, 2000, at which time appellant testified that he was still undergoing treatment for his work-related injury. By decision dated December 7, 2000, the hearing representative affirmed the Office's decision terminating benefits. After this decision, the Office continued to issue appellant biweekly checks representing the period February 27, 2000 through April 21, 2001. By letter dated August 13, 2001, the Office informed appellant that it made a preliminary determination that an overpayment occurred in the amount of \$11,124.59. The Office noted that this overpayment occurred because appellant continued to receive compensation benefits after he was notified that his monetary and medical benefits were terminated effective February 27, 2000.

By letter to the Office dated August 25, 2001, appellant argued that the overpayment occurred through no fault of his own and that recovery of the overpayment should be waived. He also requested a hearing. A hearing was held on April 18, 2002, at which time appellant and

the hearing representative discussed appellant's income and liabilities. The hearing representative stated that he would send appellant a financial form to complete.

By decision dated August 12, 2002, the hearing representative noted that he sent appellant the form for submitting financial information, but that no further documents or evidence were submitted by him. The hearing representative then found that an overpayment was created in the amount of \$11,124.59 as appellant continued to receive benefits from February 25, 2000 through April 21, 2001, despite having been advised that compensation benefits had been terminated. He also concluded that appellant was at fault in the creation of the overpayment and that, therefore, no waiver was warranted. As appellant had not submitted financial information, the hearing representative determined that the \$11,124.59 was now due and payable.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$11,124.59.

By decision dated February 23, 2000, the Office finalized its termination of appellant's benefits for the reason that the evidence substantiated that he no longer suffered from a condition related to his employment with the employing establishment. This decision was upheld by the hearing representative on December 7, 2000. The record indicates that appellant continued to receive compensation checks covering the time period from February 27, 2000 through April 21, 2001, which the Office calculated to be \$11,124.59. The Board finds that the Office's mathematical calculations are accurate. Also, appellant does not contest the amount of the overpayment. As appellant was not entitled to receive this compensation, as indicated in the decision terminating compensation benefits, the Office properly found an overpayment occurred in the amount of \$11,124.59.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act 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 would be against equity and good conscience."¹ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.²

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

¹ 5 U.S.C. § 8129.

² See *Lorenzo Rodriguez*, 51 ECAB 295, 298 (2000).

(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.”³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment, finding that appellant accepted a payment which he “knew or should have known to be incorrect.”

Section 10.433(b) of the Office’s regulations provides: “Whether or not [the Office] determines that an individual is 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.”⁴

Appellant received a copy of the decision terminating benefits, dated February 23, 2000. Appellant requested a hearing, attended the hearing and received the hearing representative’s affirmance of the termination of benefits. Nevertheless, appellant continued to receive checks from the Office for over one year following the termination of benefits. The Board agrees that appellant should have reasonably known that he was not entitled to this compensation and should have returned the checks to the Office. Accordingly, the Board agrees that appellant was at fault in the creation of the overpayment and that therefore, waiver is not permissible. Therefore, the Office properly determined the amount of the overpayment was not subject to waiver.

The Board further notes that it does not have jurisdiction to review the Office’s finding regarding repayment of the overpayment. The Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.⁵ As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment under the Debt Collection Act.⁶

³ 20 C.F.R. § 10.433(a).

⁴ 20 C.F.R. § 10.433(b).

⁵ *Lorenzo Rodriguez*, 50 ECAB 295, 300 (2000).

⁶ 5 U.S.C. § 5511 *et. seq.*

The decision of the Office of Workers' Compensation Programs dated August 12, 2002 is hereby affirmed.

Dated, Washington, DC
January 27, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member