

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN A. LACZENSKI and U.S. POSTAL SERVICE,
POST OFFICE, North Reading, MA

*Docket No. 03-420; Submitted on the Record;
Issued May 21, 2003*

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 \$2,351.99 overpayment for the period October 13, 2001 through January 26, 2002; (2) whether the Office properly determined that appellant was at fault in creating the overpayment, thereby, precluding waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment.

On June 3, 1999 appellant, then a 45-year-old distribution clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that while lifting a parcel post sack into a cage he felt a pinching pain in his left buttock. In an August 11, 1999 decision, the Office accepted appellant's claim for a herniated disc at L3-4. On October 27, 1999 appellant underwent an authorized laminectomy.

On August 1, 2000 appellant returned to work four hours per day with restrictions. On October 16, 2001 appellant returned to work six hours per day and notified the Office that his hours increased.

In a September 24, 2002 preliminary decision, the Office notified appellant that it found he had received an overpayment of \$2,351.99 for the period of October 13, 2001 through January 26, 2002. The overpayment occurred because the Office paid appellant wage-loss compensation for four hours a day when in fact, he should have received wage-loss compensation for only two hours per day. The Office further found that appellant should have been aware of the error and therefore appellant was at fault for the overpayment.

In an October 17, 2002 letter, appellant requested a telephone conference. During the October 24, 2002 conference call and in an October 31, 2002 follow up letter, appellant argued that he had notified the Office that he was increasing his work to six hours a day and that he was not aware that he had received an overpayment because his checks were deposited directly into his account and he never saw the checks. Appellant said that he had a number of other things on

his mind at that time, such as the anthrax scare at his employing establishment.¹ Appellant also clarified that his stated annual salary of \$38,465.00 represented his compensation if he worked full time with the employing establishment, not his current compensation from the employing establishment which was based on six-hour days.

In the conference call and in his responses to an overpayment recovery questionnaire, appellant indicated that his monthly expenses totaled \$1,690.00 consisting of rent at \$400.00, food at \$500.00, clothing at \$80.00, utilities at \$240.00, \$220.00 in credit card payments and \$250.00 in miscellaneous expenses such as transportation and medical prescriptions. The record shows appellant's monthly income was \$1,863.00 based on \$1,450.00 from his paycheck at the employing establishment and \$413.00 in wage-loss payments from the Office. Appellant also indicated that he had \$702.63 in savings.

In a November 15, 2002 decision, the Office found appellant at fault for the overpayment and not eligible for a waiver. The basis of fault was that he knew or should have known the check amounts were for an incorrect amount.

The Board finds that appellant received a \$2,351.99 overpayment of compensation for the period of October 13, 2001 through January 26, 2002. In the present case, appellant received wage-loss compensation based on four hours of disability per day for the period of October 13, 2001 through January 26, 2002 when he was entitled to only two hours wage-loss compensation per day for this period. The record contains evidence that shows appellant received \$3,895.50 in compensation for this period when he was only entitled to receive \$1,543.51. Therefore, the Office properly determined that appellant received a \$2,351.99 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 Act² 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.³ 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."⁴ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

¹ An October 12, 2002 report from appellant's psychotherapist indicates that appellant's work involved repairing and processing mail damaged as a result of the anthrax scare.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

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....”⁵

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment because he should have known that he was receiving an incorrect amount. Appellant testified that he did not pay attention to the amount being deposited into his checking account because he had other things on his mind. However, appellant admitted that he was aware that he was only entitled to two hours of compensation after he returned to work and that he notified the Office of his increased work hours. As appellant knew he was not entitled to more than two hours compensation per day, he should not have accepted the compensation.

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.”⁶

Even though the Office may have been negligent in continuing to issue appellant checks based on four hours per day of disability this does not excuse appellant’s acceptance of such checks which he knew or should have been expected to know were not the correct amount and should have been returned to the Office.⁷

As appellant was at fault in the creation of the overpayment, the overpayment cannot be waived.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every four weeks.

⁵ 20 C.F.R. § 10.433(a).

⁶ 20 C.F.R. § 10.433(c).

⁷ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further 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.”⁸

The record supports that, in requiring repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 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 November 15, 2002 decision by the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC
May 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ 20 C.F.R. § 10.321(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).