United States Department of Labor
Employees' Compensation Appeals Board

DANIEL A. MASHE, Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Stamford, CT, Employer**	)	**Docket No. 05-669** **Issued: October 5, 2005**

Appearances:
Daniel A. Mashe, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On January 26, 2005 appellant filed a timely appeal from the January 13, 2005 merit decision of the Office of Workers' Compensation Programs which found him at fault in creating a $12,841.04 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of $12,841.04, from March 25, 1998 through January 24, 2004; (2) whether appellant was at fault in the matter of the overpayment; and (3) whether the Office properly recovered $6,594.35 of the overpayment from a lump sum of compensation owed to appellant.

FACTUAL HISTORY

On the prior appeal of this case,[1] the Board reversed an Office decision finding that appellant had forfeited his right to compensation under 5 U.S.C. § 8106(b)(2). The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On March 31, 1998 appellant notified the Office that his only dependent, his wife, died on March 25, 1998. He asked the Office to change his health benefit deduction from code 322, self and family, to code 321, self only. Thereafter he consistently reported on annual forms that he was no longer entitled to receive compensation for a dependent because of his wife's death on March 25, 1998.

On February 9, 2004 the Office informed appellant that he was paid compensation at an incorrect rate since March 25, 1998. The Office also informed him that health benefit premiums were deducted for self and family since March 25, 1998. The Office corrected appellant's compensation accordingly, beginning January 25, 2004.

On August 6, 2004 the Office made a preliminary determination that appellant received a $12,841.04 overpayment from March 25, 1998 through January 24, 2004, because he incorrectly received compensation at the augmented rate for dependents. The Office also made a preliminary determination that he was at fault in the matter because he should have been aware that he was not entitled to compensation at the augmented rate if he had no dependents. Appellant requested that the Office make a decision in the matter based on the written evidence.

In a decision dated January 13, 2005, the Office finalized its preliminary determinations and found that appellant was at fault in creating a $12,841.04 overpayment from March 25, 1998 through January 24, 2004. The Office advised him that he should forward a check in the full amount within 30 days or contact the Office within that time so that appropriate arrangements for recovery, such as installment payments, could be made.

On appeal, appellant disagrees with the Office's finding of fault. He argues that he knew he was not entitled to receive compensation for dependents, but appellant timely and consistently kept the Office informed of his wife's death. Appellant stated that he felt that the overpayment occurred through no fault of his own.

LEGAL PRECEDENT -- ISSUE 1

A disabled employee is entitled to compensation equal to two-thirds of his monthly pay, if disability is total[2] or two-thirds of the difference between his monthly pay and his monthly wage-earning capacity, if disability is partial.[3] A disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented so that his

[1] Docket No. 97-2115 (issued June 11, 1999).

[2] 5 U.S.C. § 8105(a).

[3] *Id*. at § 8106(a).

compensation is equal to three-fourths of his monthly pay or three-fourths of the difference between his monthly pay and his monthly wage-earning capacity.[4]

ANALYSIS -- ISSUE 1

Appellant does not contest that he received an overpayment of compensation. The Office was paying him augmented compensation for a dependent when his wife died on March 25, 1998. Although promptly and repeatedly informed the Office that he was no longer entitled to compensation for a dependent, the Office continued to pay him at the augmented rate through January 24, 2004. Because the Office paid him more compensation than he was entitled to, the Board finds that appellant received an overpayment.

According to data in the record, the Office paid gross compensation of $175,589.92 from March 25, 1998 through January 24, 2004. This was compensation paid at the augmented rate for dependents. At the correct rate or the rate for no dependents, the Office should have paid gross compensation of $156,154.53. The Board, therefore, finds that appellant received an overpayment of $19,435.39 from March 25, 1998 through January 24, 2004. The Board will modify the Office's January 13, 2005 decision accordingly.

LEGAL PRECEDENT -- ISSUE 2

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 received 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 (this provision applies only to the overpaid individual).[5]

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]

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.[7] However, the Office may find that

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[4] *Id*. at § 8110(b).

[5] 20 C.F.R. § 10.433(a) (1999).

[6] *Id*. at § 10.433(b).

[7] *Id*. at § 10.433(a).

the individual was not at fault if failure to report an event affecting compensation benefits or acceptance of an incorrect payment, occurred because: (1) The individual relied on misinformation given in writing by the Office (or by another government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Federal Employees' Compensation Act or its regulations; or (2) The Office erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment or loss of wage-earning capacity.[8]

In situations where an equally valid argument can be made both for "without fault" and "with fault," the benefit of the doubt should go to the claimant and a finding of without fault should be made consistent with the nature of the Act as social legislation designed to benefit entitled employees. In general, if the evidence shows either a lack of good faith or failure to exercise a reasonable degree of care in reporting changes in circumstances that may affect entitlement or the amount of benefits, an individual will be found to be with fault.[9]

In determining whether the claimant is with fault or without fault for receiving an overpayment, the Office should apply the "reasonable person test." Factors may include age, intelligence or comprehension, education, demonstrated degree of familiarity with the compensation system, consistency of actions, physical and mental condition, the clarity of correspondence and telephone advice from the Office or employing establishment and other factors which can reasonably influence whether a claimant can be considered to have been aware that an error in payment occurred.[10]

ANALYSIS -- ISSUE 2

As the Board noted earlier, appellant promptly and repeatedly informed the Office that he was no longer entitled to compensation for a dependent. He showed good faith and exercised a reasonable degree of care in reporting an event that affected the amount of his benefits. But appellant also did something that conflicted with his commendable reporting. Although he knew that he was not entitled to receive compensation for dependents, he accepted the incorrect payments anyway, in their entirety and continually for almost six years. It was only when the Office finally awoke to the situation and corrected it that his acceptance of incorrect payments ceased. The circumstances of this case, then, fit squarely within the third criterion for fault: Appellant accepted a payment which he knew or should have known to be incorrect. No amount of annual reporting to the Office changes this fact. Even if appellant was not in a financial position to return the first payment he received after his wife's death, foregoing compensation at least temporarily, he made no effort, as a reasonable person would, to return at least a part of the payment received or to hold some amount of it in an account or to set it otherwise aside, until instructed by the Office, in order to demonstrate that he did not want to accept money that did not belong to him. Because appellant's prompt and annual reporting does not justify his

[8] *Id*. at § 10.435.

[9] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.5 (May 2004).

[10] *Id*.

acceptance of payments he knew were incorrect, the Board finds that he was at fault in helping to create the overpayment that occurred from March 25, 1998 through January 24, 2004. The Board will affirm the Office's January 13, 2005 decision on the issue of fault.

The Office, of course, was also at fault for ignoring the information appellant reported. But this does not relieve him from liability for repayment. This was not a case in which appellant relied on misinformation giving in writing by the Office as to the interpretation of the Act or its regulation, nor did this case involve an error by the Office in calculating a cost-of-living increase, the length of a schedule award or a loss of wage-earning capacity.[11] The Office's fault in the matter is, therefore, no defense for appellant. As he is not eligible for consideration of waiver, the Office must by law recover the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that, when an overpayment has been made to an individual 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 the individual is entitled.[12] The implementing regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.[13]

ANALYSIS -- ISSUE 3

In its January 13, 2004 decision, the Office asked appellant to forward a check for $12,841.04 within 30 days or to contact the Office to make appropriate arrangements for recovery. Because the Office has issued no final decision to recover this $12,841.04 by decreasing compensation to which appellant is entitled, the issue is not ripe for appeal.[14]

The Board may review, however, the Office's partial recovery of the $19,435.39 overpayment. Following his wife's death, appellant promptly asked the Office to change his health benefit deduction from code 322, self and family, to code 321, self only. The Office did not make this change until January 24, 2004. As a result, from March 25, 1998 through January 24, 2004 the Office deducted $13,699.08 in health benefit premiums. It should have deducted only $7,104.73. This caused an underpayment of $6,594.35 for the period.

[11] *See supra* notes 7 and 8.

[12] 5 U.S.C. § 8129(a).

[13] 20 C.F.R. § 10.441(a) (1999).

[14] *See Levon H. Knight*, 40 ECAB 658, 665 n.6 (1989). The Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act. There shall be no appeal with respect to any interlocutory (interim or temporary) matter disposed of by the Office during the pendency of a case. 20 C.F.R. § 501.2(c).

Rather than refund this amount to appellant, the Office used it to reduce the $19,435.39 overpayment, thereby affecting an immediate partial recovery.[15] It cannot be said that he refunded this $6,594.35 to the Office. The Office, therefore, had an obligation, when it kept the lump sum to which appellant was entitled, to take into account 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 hardship. But the Office failed to take any of these factors into account. The preliminary and final overpayment decisions are silent. It appears the Office simply reduced the overpayment by the lump sum owed appellant without considering whether such a recovery would minimize any hardship.[16] Because the Office gave no regard to the factors specified in 20 C.F.R. § 10.441(a), the Board will reverse the Office's January 13, 2005 decision on the issue of recovery by offset.

CONCLUSION

The Board finds that appellant received an overpayment of $19,435.39 from March 25, 1998 through January 24, 2004, when the Office paid him compensation at the augmented rate for dependents. The Board finds that he is at fault in creating this overpayment, notwithstanding his prompt and annual reporting and the Office's own fault in the matter, because he accepted payments he knew or should have known were incorrect. The Board also finds that the Office improperly recovered a portion of the overpayment by offsetting a lump sum owed appellant without considering relevant factors so as to minimize any hardship.

[15] In cases where the claimant is not at fault and may be entitled to waiver, the Board has held that the Office's offset practice precludes the proper consideration of waiver of the entire amount of the overpayment. *Diana L. Booth*, 52 ECAB 370, 373 (2001) (finding that the Office's offset practice denied administrative due process rights with respect the amount offset); *Michael A. Grossman*, 51 ECAB 673, 678 (2000). In other cases, if a sufficiently large lump-sum payment of compensation is due for a single period of past entitlement, the debt should be recovered in full by a single deduction from compensation owed. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.0300.8 (May 2004). But the lump-sum payment due appellant in this case was not sufficiently large to allow recovery of the overpayment "in full by a single deduction." A question also arises under this section whether the Office's preliminary determination that the amount of the overpayment was only $12,841.04 constituted an impermissible collection action before the issuance of a final overpayment decision.

[16] *See Earl D. Long*, 50 ECAB 464 (1999) (where the only factor the Office appeared to consider in deducting the overpayment from compensation retroactively due was that the claimant would received a lump sum); *Levon H. Knight*, *supra* note 14 (finding that the Office properly recovered overpaid compensation by withholding the remainder of a schedule award owed to the claimant where the Office considered the relevant factors set forth in the regulation so as to minimize any hardship).

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2005 decision of the Office of Workers' Compensation Programs is modified on the issue of amount of overpayment, is affirmed on the issue of fault and is reversed on the issue of recovery by offset.

Issued: October 5, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board