

**United States Department of Labor  
Employees' Compensation Appeals Board**

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MILBURN IWAI, Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Kaneohe, HA, Employer

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**Docket No. 05-1602  
Issued: January 3, 2006**

*Appearances:*  
Milburn Iwai, *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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 25, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated May 13, 2005, which found that he received an overpayment in the amount of \$6,123.70, that appellant was at fault and denied waiver of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment of this case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$6,123.70; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver. On appeal, appellant contends that he was not at fault in creating the overpayment and that the Office should waive recovery of the overpayment.

**FACTUAL HISTORY**

On September 23, 1991 appellant, then a 43-year-old letter carrier, filed an occupational disease claim alleging that he sustained stress and an emotional condition while in the

performance of duty. He first became aware of the injury and its relation to his work on August 26, 1991. Appellant stopped work on that same date. On October 27, 1993 the Office accepted the claim for generalized anxiety disorder. Appellant received appropriate compensation benefits. On October 6, 1995 the Office adjusted appellant's compensation effective March 1, 1993, to reflect his wage-earning capacity as a loan specialist.<sup>1</sup>

By letter dated June 5, 1998, the Office referred appellant for a second opinion examination with Dr. Mohan S. Nair, a Board-certified psychiatrist. In an August 10, 1998 report, Dr. Nair determined that appellant's accepted condition subsided in January 1993 and that there were no subjective symptoms or objective findings of the employment-related condition. He further determined that appellant could return to work with the exception of working for his previous employer.

On June 12, 1999 the Office issued a notice of proposed termination of compensation finding that appellant no longer had residuals of the accepted condition.

By decision dated March 18, 1999, the Office terminated appellant's compensation. A March 18, 1999 periodic rolls worksheet indicated that the Office would stop compensation payments effective March 28, 1999. By letter dated April 6, 1999, appellant, through his representative, requested a review of the written record. By decision dated June 21, 1999, the Office hearing representative affirmed the Office's March 18, 1999 decision.

In a memorandum dated October 13, 1999, the Office determined that appellant received an overpayment as he had received four compensation checks for the period March 28 to July 17, 1999, after it was determined that he was no longer disabled for that time frame. In a separate worksheet, the Office determined that appellant had a weekly pay rate of \$746.80. The Office advised that appellant had received total periodic rolls payments in the amount of \$6,123.70.

On November 10, 1999 the Office made a preliminary finding that an overpayment of compensation had been created for the period March 29 through July 17, 1999 in the amount of \$6,123.70. The Office advised appellant that the overpayment was created as he continued to receive benefits following the March 28, 1999 termination. The Office determined that appellant was not without fault in the creation of the overpayment as he accepted payments which he knew or should have known to be incorrect. Appellant was informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods including a request for a telephone conference, a request for a written review of the record or a request for a prerecoumment hearing. If appellant wished a waiver of the overpayment, he was directed to submit financial information by completing an overpayment recovery questionnaire.

By letter dated December 2, 1999, appellant requested a prerecoumment hearing, which was held on August 8, 2001. Appellant testified that the Office was correct regarding the overpayment; however, he was confused because he thought that the checks were going to continue until the issue regarding deductions for health insurance was corrected.

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<sup>1</sup> The record reflects that appellant was reemployed as a loan specialist and subsequently a mortgage broker.

By letter dated January 18, 2002, the Office forwarded a second OWCP-20 form to appellant for completion. However, appellant did not submit any completed forms.

A second hearing was held on October 8, 2003.<sup>2</sup>

By decision dated May 13, 2005, an Office hearing representative finalized the November 10, 1999 preliminary findings on the fact and amount of overpayment. The Office found that appellant was not without fault because he was properly advised that his benefits would terminate on March 29, 1999 and that he had made a timely request for an examination of the written record.<sup>3</sup> The Office noted that appellant should have been aware that he was not entitled to receive any wage-loss compensation after that date.<sup>4</sup> As he was found to be at fault, repayment could not be waived and that the full amount was due and payable. The Office noted that no response was received from appellant and that he had not completed an overpayment questionnaire or provided any other financial information.

### **LEGAL PRECEDENT -- ISSUE 1**

Office regulations, at 20 C.F.R. § 10.500(a), provide as follows:

“Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury....”

### **ANALYSIS -- ISSUE 1**

The record reflects that, by decision dated March 18, 1999, the Office terminated appellant’s compensation benefits. In a periodic rolls worksheet, the Office indicated that appellant’s entitlement to compensation payments ceased on March 28, 1999. However, appellant subsequently received four additional periodic rolls checks for the period March 29 to July 17, 1999. The checks resulted in appellant receiving an overpayment during this time frame in the amount of \$6,123.70. During his hearing, appellant acknowledged that he continued to receive the compensation checks after his benefits were terminated. Appellant has not submitted any evidence showing that he did not receive an overpayment of compensation or contesting the fact and amount of the overpayment. The Office properly determined that appellant received an overpayment of compensation in the amount of \$6,123.70.

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<sup>2</sup> It appears that the Office did not provide appellant with a decision after the first hearing, and he was provided with a second hearing. Appellant testified that he was currently employed as a mortgage broker.

<sup>3</sup> The Office hearing representative advised appellant that he should contact the Office of Personnel Management regarding obtaining a refund for his insurance deductions.

<sup>4</sup> Regarding appellant’s health benefit deductions, the Office noted that the deductions were deleted effective January 4, 1998.

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act<sup>5</sup> provides that "[a]djustment 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." Section 10.433 of the Office's implementing regulation<sup>6</sup> provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. 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."

## ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.<sup>7</sup> In this case, appellant was notified by decision dated March 18, 1999 that his benefits were being terminated as his work-related injury had ceased. Appellant testified during his hearing that the Office was "correct" that he accepted compensation checks during the aforementioned period, that he understood what had happened and that he knew that his checks were supposed to stop, but that they continued. The Board finds that appellant has acknowledged knowing that, when he accepted his compensation checks, he was not entitled to them. Therefore, he is not without fault in the creation of the overpayment. Waiver of the overpayment is not possible.

On appeal, appellant argues that he was without fault in creating the overpayment and the Office made the error. However, the Board has held that the fact that the Office may have been negligent in continuing to issue appellant checks for temporary total disability, after being informed by appellant of a return to work, does not excuse appellant's acceptance of such checks, which he knew or should have been expected to know should be returned to the Office.<sup>8</sup>

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<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> 20 C.F.R. § 10.433.

<sup>7</sup> See *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>8</sup> *Robert W. O'Brien*, 36 ECAB 541 (1985).

Regarding recovery of the overpayment, the Board notes that it has no jurisdiction over this matter as appellant is not in receipt of continuing compensation benefits.<sup>9</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$6,123.70.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 13, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>9</sup> Regarding recovery, the Board's jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where a claimant 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. *See Miguel A. Muniz*, 54 ECAB \_\_\_\_ (Docket No. 02-58, issued December 9, 2002).