

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM G. LOUGHREY and U.S. POSTAL SERVICE,  
WASHINGTON BULK MAIL CENTER, Washington, DC

*Docket No. 01-1861; Submitted on the Record;  
Issued July 12, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment in the amount of \$10,310.32 during the period August 31, 1996 to December 6, 1997, thus precluding waiver of recovery.

This is the second appeal in this case.<sup>1</sup> On the first appeal, the Board reviewed an April 17, 1998 decision, by which the Office found that appellant was at fault in the creation of an overpayment in compensation in the amount of \$10,310.32 during the period August 31, 1996 to December 6, 1997 and, therefore, was not entitled to waiver of recovery. In finding appellant at fault, the Office noted that, following his August 31, 1996 return to part-time work, appellant continued to receive and cash checks for compensation for total disability during the period he was regularly receiving pay checks from the employing establishment. By decision dated January 23, 2001, the Board affirmed the Office's decision with respect to the fact and amount of the overpayment, but set aside the Office decision with respect to the issues of fault and repayment. The Board specifically found that the Office erred in finalizing its preliminary decision without first granting appellant's request for a telephone conference and without considering appellant's completed overpayment recovery questionnaire and supporting documents. The facts of this case are set forth in the Board's January 23, 2001 decision and are herein incorporated by reference.

On remand the Office granted appellant's request for a telephone conference, which was held on May 29, 2001. During the telephone conference, and in his supporting letter, appellant asserted that the overpayment occurred through no fault of his own because, following his return to part-time work on August 31, 1996, his benefits went into his account *via* direct deposit and he did not receive a statement from the Office as to the amount or the time covered by the payment, which made it difficult for him to track his benefits. Appellant stated that when his September bank statement arrived and revealed no adjustment in the amount of compensation

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<sup>1</sup> Docket No. 99-405 (issued January 23, 2001).

deposited, he left telephone messages for both the Office and the employing establishment's workers' compensation specialist, but received no reply. When his October bank statement arrived and still showed no adjustment in the amount paid, appellant asserted that he again left messages for both the Office and the employer. However, after receiving no replies, he assumed that the Office knew what they were doing and that his payments were correct.

By decision dated June 8, 2001, the Office found that appellant was at fault in the creation of the overpayment in the amount of \$10,310.32 which occurred during the period August 31, 1996 to December 6, 1997 and that, therefore, waiver of recovery was precluded.<sup>2</sup>

The Board finds that appellant was at fault in an overpayment of \$10,310.32 which occurred during the period August 31, 1996 to December 6, 1997.

An overpayment of compensation occurred in the present case when appellant returned to work on August 31, 1996 but continued to receive compensation for total disability through December 6, 1997. 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 (this provision applies only to the overpaid individual).<sup>3</sup>

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.<sup>4</sup>

The record reflects that, by letter dated November 9, 1990, the Office fully explained the terms under which appellant was entitled to receive compensation and specifically instructed appellant that, in order to avoid an overpayment of compensation, he should notify the Office immediately when he returned to work and that, if he worked for any portion of the period for which a payment was made, he must return that compensation check to the Office. On November 19, 1990 appellant signed and returned a form provided by the Office indicating that he understood the terms of his compensation benefits. In addition, he made clear in this case that he knew he was not entitled to all of the compensation he received through December 6, 1997. This is shown by his statements made during the telephone conference and in his supporting

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<sup>2</sup> The Board notes that, while the decision dated June 8, 2001 ordered appellant to forward a check to the Office in the amount of \$10,310.32, in a subsequent letter to appellant dated July 25, 2001, the Office adjusted the amount to \$9,987.42 to account for payments made by appellant and interest accrued.

<sup>3</sup> 20 C.F.R. § 10.433(a).

<sup>4</sup> *Id.* at § 10.433(b).

letter, in which he stated that when his September and October bank statements showed no reduction in the amount of compensation being paid despite his return to work, he left telephone messages for both the Office and the employing establishment's workers' compensation specialist, but received no reply. While his calls to the employing establishment and the Office show good faith, the evidence supports the Office's finding that appellant accepted checks that he knew or should have known to be incorrect. Appellant is, therefore, at fault in the creation of the overpayment and waiver is precluded.

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.<sup>5</sup> However, the Office may find that 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) at 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.<sup>6</sup> Thus, although the Office's failure to respond to appellant's telephone inquiries may have led him to believe his payments were correct, as there is no evidence that appellant relied on misinformation given in writing, the Board will affirm the Office's finding that appellant is at fault in the creation of the overpayment and it is not subject to waiver.

With respect to the issue of repayment, the Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later compensation payments to which the individual is entitled under the Act.<sup>7</sup> Because collection of the overpayment in this case cannot be made by adjusting later compensation payments but must be recovered by other means (appellant is receiving Office of Personnel Management (OPM) benefits in lieu of compensation under the Act), the Board lacks jurisdiction to review the Office's finding concerning repayment of the overpayment.<sup>8</sup>

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<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> *Id.* at § 10.435.

<sup>7</sup> 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

<sup>8</sup> On February 25, 1999 appellant elected to receive OPM benefits in lieu of compensation under the Act effective December 1, 1998 and his election was subsequently approved.

The June 8, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
July 12, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member