

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALAN D. FASSNACHT and U.S. POSTAL SERVICE,
POST OFFICE, Akron, Ohio

*Docket No. 97-1642; Submitted on the Record;
Issued March 26, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that there was a \$6,577.92 overpayment in compensation; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On January 12, 1993 appellant, then a 47-year-old letter carrier, sustained injuries to his right leg, hip and back while in the performance of duty. The Office initially accepted his claim for right posterior hip and buttock contusion. Subsequently, the Office accepted appellant's claim for rupture of the L4-5 disc and approved surgery for a lumbar laminectomy and discectomy. Appellant filed a claim for recurrence of disability beginning January 6, 1994 in relation to the approved surgery. Appellant received compensation for all periods of temporary total disability. By letter dated February 12, 1997, the Office advised appellant that it had made a preliminary determination that there was an overpayment in compensation of \$6,577.92 as he had been compensated at the rate of 3/4 or 75 percent of his pay rate at that time rather than the proper rate of 2/3 or 66 2/3 percent beginning December 4, 1994 and he was at fault in the matter of the overpayment as he received compensation that he was aware or should have reasonably been expected to be aware was incorrect. The Office informed appellant that he had the right to submit any arguments or evidence if he disagreed that the overpayment occurred, disagreed with the amount of the overpayment, believed the overpayment occurred through no fault of his own or believed that recovery of the overpayment should be waived. The Office informed appellant that he had a right to a precoupment hearing before an Office hearing representative. In response appellant submitted an overpayment questionnaire form which he had filled in and in which he indicated he was not at fault as he had not advised the Office he had dependents. In a decision dated March 25, 1997, the Office finalized its determination that appellant was at fault in the creation of the overpayment of compensation.

The Board finds that the Office properly determined that there was a \$6,577.92 overpayment in compensation.

In the present case, the Office found that there had been an overpayment in compensation because appellant received compensation at the rate of 75 percent after December 4, 1994 when he should have been compensated at the rate of 66 2/3 percent as he had no dependents. The fact that appellant has no dependents is not disputed. Therefore since appellant received compensation at an augmented rate when he had no dependents, there was an overpayment of compensation to appellant.

The Board further finds that appellant was not “without fault” in the creation of the overpayment.

Section 8129(b) of the Federal Employees’ Compensation Act¹ provides that an overpayment of compensation must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [Act] or would be against equity and good conscience.”² Thus, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining if an individual is at fault, section 10.320(b) of the Office’s regulations provide 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 the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. A review of the record reveals that by letter dated March 1, 1994, the Office advised appellant that he would receive compensation at a 2/3 percentage of his pay rate for a gross amount every 4 weeks of \$1,795.96. Appellant received compensation at this rate through December 3, 1994. Thereafter appellant’s compensation rate was inadvertently changed to a 3/4 percentage pay rate. Notwithstanding the error in the checks received by appellant, by letter dated January 18, 1995, the Office advised appellant that he was entitled to receive compensation at a 2/3 percentage of his pay rate for a gross amount of \$2,020.44 every 4 weeks. Any overpayment resulting from the Office’s negligence does not permit an employee to accept compensation which he knew or should have been expected to know he was not

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8129.

³ 20 C.F.R. § 10.320(b).

entitled.⁴ As appellant had received compensation at a proper rate for most of 1994 and he was advised by letter dated January 18, 1995 of the proper rate of compensation for payments made beginning December 4, 1994, he knew or should have been expected to know that he was accepting payments which were incorrect. The Office properly determined that appellant was at fault in the creation of the overpayment. Therefore, he is not entitled to waiver of the overpayment.

The decision of the Office of Workers' Compensation Programs dated March 25, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 26, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁴ See generally *Russell E. Wageneck*, 46 ECAB 653 (1995).