

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNARD L. SMILEY and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, Mich.

*Docket No. 97-1688; Submitted on the Record;
Issued March 18, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$5,824.64 occurred; and (2) whether appellant was at fault in the creation of the overpayment.

On December 1, 1994 appellant, then a 39-year-old letter carrier, suffered a laceration of his right thumb and subsequent tendon injury while in the performance of his work duties. On February 29, 1996, the Office awarded appellant compensation for 65.52 weeks from January 23, 1996 to April 25, 1997 for a 21 percent permanent impairment to his left upper extremity. The amount of compensation every four weeks was \$1,456.16.

In a March 25, 1996 letter to the Office, appellant requested a lump-sum payment of his schedule award. By letter dated June 19, 1996, the Office informed appellant that the remaining compensation for the schedule award was \$14,451.17 which covered the period July 21, 1996 through April 25, 1997. The Office further advised appellant that "any lump-sum payment would represent full and final payment of compensation for the period of the award even if you suffer a total recurrence of disability. Thus, if you opt for the lump sum you would not be eligible to receive compensation in any form until after April 25, 1997." On June 21, 1996 appellant signed an agreement stating that he understood the terms and conditions of accepting a lump-sum payment. The terms and conditions were stated on the agreement which appellant signed.

By letter dated December 11, 1996, the Office made a preliminary determination that an overpayment to appellant had occurred in the amount of \$5,824.64 because appellant received dual benefits. The Office stated that appellant was entitled to and received a lump-sum schedule award commuted beginning July 21, 1996 and ending April 25, 1997 for full and final payment. The Office noted that the record was to have been deleted from the computer system as of July 21, 1996, but the delete did not "take." Appellant, therefore was paid periodic roll payments from July 1 through November 9, 1996, which resulted in an overpayment in the

amount of \$5,824.64 since appellant had also been paid for the same period in the commuted lump-sum award. The Office stated that it had made a preliminary finding that appellant was at fault in creating the overpayment because he had received the June 19, 1996 letter from the Office informing him that the lump-sum payment would represent full and final payment of compensation for the period of the award and that he would not be entitled to additional compensation for the period until April 25, 1997, even if he suffered a total recurrence of disability. The Office noted that appellant had indicated that he understood this on the signed June 21, 1996 agreement form. The Office informed appellant that if he disagreed with the fact or the amount of the overpayment or that he was at fault in the creation of the overpayment or that recovery should not be waived, he had the right to submit new evidence in support of his contention. The Office described the specific information appellant should provide pertaining to his income and his expenses if he should seek a waiver of repayment.

Appellant completed the Overpayment Recovery Questionnaire as requested and through a January 3, 1997 letter from his representative stated that if an overpayment occurred, it was through no fault of his and that recovery should be waived for the reason that any repayment would cause severe hardship upon himself and his family.

In a January 14, 1997 letter, the Office stated that it reviewed the statements in regard to the "not without fault" finding that there was no basis for changing the initial finding as appellant was appropriately notified that the lump-sum payment for the schedule award would represent full and final payment of compensation for the period of the award; therefore, waiver was not available as an option. The Office further noted that additional information was needed to clarify the information contained on the OWCP-20.

By decision dated January 24, 1997, the Office found that appellant was overpaid in the amount of \$5,824.64 as a result of accepting periodic payments between July 21 and November 9, 1996 after being paid a lump-sum commuted payment of \$14,451.17 covering the period July 21, 1996 through April 25, 1997. The Office found that appellant was at fault in the creation of the overpayment. The Office stated that appellant was notified by letter dated June 19, 1996 that the lump-sum payment would represent full and final payment of compensation for the period of the award and that he would not be entitled to additional compensation for the period until April 25, 1997 even if he suffered a total recurrence of disability. Appellant also signed an agreement to that effect dated June 21, 1996. The Office requested full repayment of the overpayment within 30 days or for appellant to contact the office to arrange an appropriate recovery method.

The Board finds that the Office properly determined that appellant accepted an overpayment of compensation in the amount of \$5,824.64 for the period July 21 through November 9, 1996 when he had previously been paid a commuted lump-sum payment of \$14,451.17 that covered the same period. Appellant did not dispute accepting the periodic payments for the period July 21 through November 9, 1996 or the amount of the overpayment.

The Board further finds that appellant was at fault in the creation of the overpayment.

Section 8129(b) of the Act¹ provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience.² Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.³

The implementing regulation⁴ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

The Board notes that appellant was at fault in the matter of the overpayment because he had received the June 19, 1996 letter from the Office informing him that the lump-sum payment would represent full and final payment of compensation for the period of the award and that he would not be entitled to additional compensation for the period until April 25, 1997 even if he suffered a total recurrence of disability. The record reveals that appellant indicated that he understood this by signing an agreement to that effect dated June 21, 1996. Since appellant indicated in writing that he understood that he was not entitled to receive additional benefits for the period of the lump-sum award until April 25, 1997 when the award period ended, he knew or should have known that, in accepting continuing payments for the period July 21 through November 9, 1996, he accepted payments to which he was not entitled and thus was at fault in creating the \$5,824.64 overpayment. Because appellant was at fault in the creation of the overpayment, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.⁵

¹ 5 U.S.C. § 8129(b).

² *Philip G. Arcadipane*, 48 ECAB ____ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁴ 20 C.F.R. § 10.320(b).

⁵ See *Philip G. Arcadipane*, *supra* note 2.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 24, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 18, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member