

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALBERT PINEIRO and U.S. POSTAL SERVICE,  
POST OFFICE, Bellmawr, NJ

*Docket No. 98-552; Submitted on the Record;  
Issued January 31, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2); and if so, (2) whether appellant was at fault in the matter of the overpayment that subsequently arose.

On November 25, 1993 appellant, a mailhandler, sustained an injury while in the performance of his duties when a bundle of magazines struck his head. The Office accepted his claim for the conditions of neck contusion, cervical strain and cervical disc herniation. Appellant received compensation for temporary total disability.

In a decision dated December 28, 1995, the Office terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

On January 4, 1996 the Office provided appellant written authorization to undergo a cervical discectomy with anterior fusion. Appellant underwent surgery on January 30, 1996. He later filed a claim asserting that he sustained a recurrence of disability beginning January 30, 1996. The Office accepted this claim and restored appellant to the periodic rolls effective January 30, 1996.

On July 31, 1996 appellant's attending physician, Dr. Tariq S. Siddiqi, reported that appellant could return to limited duty lifting no more than 10 pounds for the first few weeks. He suggested a functional capacity evaluation if appellant had further complaints after that time.

The employing establishment offered appellant a modified job assignment as a mailhandler, whose duties included lifting trays weighing no more than 10 pounds. On September 5, 1996 the Office notified appellant that this position was suitable and currently available. The Office informed appellant that he had 30 days either to accept the offer or to provide a reasonable, acceptable explanation for refusing it. The Office notified appellant of the penalty provisions of 5 U.S.C. § 8106(c).

On October 8, 1996 the employing establishment confirmed that appellant had not returned to work, that it had received no word on whether appellant accepted or rejected the offer, and that the position remained available.

In a decision dated October 10, 1996, the Office terminated appellant's compensation benefits effective November 10, 1996 on the grounds that he failed to accept suitable employment when it was offered. Appellant requested an oral hearing before an Office hearing representative.

On April 17, 1997 the Office issued a preliminary determination that an overpayment of \$10,174.39 occurred because the Office continued to pay compensation for wage loss after November 10, 1996, the effective date of termination, through March 29, 1997. The Office found that appellant was at fault in the matter because he accepted payment of compensation after November 10, 1996 which he knew or reasonably should have been expected to know was incorrect. Appellant requested a hearing.

The Office conducted a consolidated hearing on May 20, 1997 on the both the termination and overpayment issues.

In a decision dated August 25, 1997, an Office hearing representative reversed the Office's original termination decision of December 28, 1995 on the grounds that the Office failed to follow the procedural safeguards as set forth in *Maggie L. Moore*.<sup>1</sup> The hearing representative affirmed the Office's October 10, 1996 termination decision, however, and finalized the preliminary determination that appellant was at fault in the matter of the overpayment that subsequently arose. The hearing representative noted that appellant had testified at the hearing that he knew he was not supposed to receive the checks but cashed them nonetheless because he felt he was still disabled, because the employing establishment did not make him an offer within his limitations and because he needed the money.

The Board finds that the Office properly terminated appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.<sup>2</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.<sup>3</sup> In other words, to justify termination

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<sup>1</sup> 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>4</sup>

The evidence in this case establishes that appellant could work and that the position offered was medically suitable. Appellant's attending physician, Dr. Siddiqi, released appellant to limited duty on July 31, 1996. The only restriction he imposed was no lifting over 10 pounds for the first few weeks. The position offered to appellant specifically limited lifting to no more than 10 pounds and was therefore within his medical restrictions. The Office properly notified appellant of its suitability determination and availability of the position and properly informed him of the penalty for refusing or neglecting an offer of suitable work. When appellant did not respond to the offer within the time provided, the Office properly invoked the penalty provisions of 5 U.S.C. § 8106(c).

The Board also finds that appellant was at fault in the matter of the overpayment that arose subsequent to the termination of his compensation.

Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.<sup>5</sup>

An overpayment arose in the present case when, after terminating appellant's compensation benefits effective November 10, 1996, the Office continued to pay compensation through March 29, 1997. Section 8129 of the Act provides, however, that the Office may not recover an overpayment when an "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 would be against equity and good conscience."<sup>6</sup> Accordingly, if an individual is at fault, the Office may recover the overpayment.

Section 10.320 of the implementing federal regulations provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. 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

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<sup>4</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>5</sup> 20 C.F.R. § 10.321(b).

<sup>6</sup> 5 U.S.C. § 8129(b).

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>7</sup>

The Office found that appellant was at fault in the matter of the overpayment under the third criterion above because he knew he was not supposed to be receiving the checks but cashed them nonetheless. The Board has held that section 8106(c) of the Act serves as a bar to a claimant’s entitlement to further compensation for total disability, partial disability or a schedule award for permanent impairment arising out of an accepted employment injury.<sup>8</sup> Accordingly, when the Office issued its October 10, 1996 decision invoking section 8106(c), appellant was barred from receiving compensation for wage loss. The Office’s October 10, 1996 decision made clear that appellant was not entitled to further wage-loss compensation after November 10, 1996, and appellant’s testimony before the Office hearing representative established that he knew that the payments he received after that date were incorrect. That appellant accepted these payments, regardless of his reasons, establishes that he was at fault in the creation of the overpayment under the third criterion above, as he accepted payments he knew or should have known to be incorrect.

As the evidence supports the Office’s finding that appellant was at fault in the creation of the overpayment that occurred in this case, section 8129 of the Act does not preclude recovery by the Office.<sup>9</sup>

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<sup>7</sup> 20 C.F.R. § 10.320(b).

<sup>8</sup> *Stephen R. Lubin*, 43 ECAB 564, 569-73 (1992).

<sup>9</sup> The Board’s jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual is entitled; *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because collection of the overpayment in this case cannot be made by adjusting later payments, the Board lacks jurisdiction to review the Office’s recovery.

The August 25, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
January 31, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member