

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE J. MILLER and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

*Docket No. 98-2250; Submitted on the Record;
Issued July 10, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$32,816.00 overpayment of compensation for the period December 10, 1995 to March 1, 1997; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

On March 1, 1992 appellant, then a 46-year-old letter carrier, sustained an employment-related herniated disc at L4-5. By award of compensation dated October 18, 1995, appellant received a schedule award for a 10 percent permanent impairment of his right leg and a 38 percent permanent impairment of his left leg. The award was to run for 138.24 weeks from June 12, 1995 to February 3, 1998. Appellant requested a payment of his award in a lump sum and, by notice dated November 14, 1995, the Office advised appellant that his request for a lump-sum payment had been accepted. Appellant agreed to the payment and received a check for \$54,129.94 in early December 1995. The Office continued to send periodic schedule award checks to appellant for the period December 10, 1995 to March 1, 1997. By notice dated April 2, 1997, the Office advised appellant that it had made a preliminary determination that he received a \$32,816.00 overpayment for the period December 10, 1995 to March 1, 1997 and that he was at fault in the creation of the overpayment. Appellant requested a preresoupment hearing which was held on March 19, 1998. By decision dated and finalized June 24, 1998, an Office hearing representative determined that appellant received a \$32,816.00 overpayment and that he was at fault in the creation of the overpayment such that the overpayment was not subject to waiver.¹

¹ The Office hearing representative determined that the overpayment should be recovered through payments of \$400.00 per month. As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

The Board finds that appellant received a \$32,816.00 overpayment of compensation for the period December 10, 1995 to March 1, 1997.

Appellant received schedule award payments during the period December 10, 1995 to March 1, 1997 despite the fact that he was not entitled to such compensation because he had already received the remainder of his schedule award compensation through a \$54,129.94 lump-sum payment. The record contains evidence which shows that appellant received \$32,816.00 in compensation for this period which he was not entitled to receive. Therefore, the Office properly determined that appellant received a \$32,816.00 overpayment for the period December 10, 1995 to March 1, 1997.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Act² provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.³ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment 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.”⁴ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320(b) of Title 20 of the Code of Federal Regulations provides 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.”⁵

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.320(b).

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).”⁶

The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment. Appellant had signed a statement in which he acknowledged that the receipt of the \$54,129.94 lump-sum payment represented the “full and final settlement” of his schedule award and that “no further monetary compensation benefits will be extended to me for the duration of the schedule award.”⁷ At the hearing, appellant admitted that he had understood that the lump-sum payment was intended to constitute all the money owed to him by the Office. Appellant claimed at the hearing that he thought the \$32,816.00 was intended for his medical treatment costs, but he also admitted that his doctors were directly reimbursed by the Office for their fees. In an April 25, 1997 statement, appellant asserted that he felt additional money was due to him, but he did not articulate the basis for this belief. For these reasons, the evidence shows that appellant knew or should have been expected to know that he had already received all the money due to him from the Office and that he could not receive periodic payments totaling \$32,816.00 during the period December 10, 1995 to March 1, 1997.⁸ Therefore, the Office properly denied his request for waiver of the overpayment.

⁶ 20 C.F.R. § 10.320(c).

⁷ The schedule award was initially designed to run until February 3, 1998.

⁸ Even though the Office may have been negligent in continuing to issue appellant schedule award checks after the lump-sum payment, this does not excuse appellant's acceptance of such checks which he knew or should have been expected to know should have been returned to the Office. *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

The decision of the Office of Workers' Compensation Programs dated and finalized June 24, 1998 is affirmed.

Dated, Washington, D.C.
July 10, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member