

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JACK POLCYN and U.S. POSTAL SERVICE,  
POST OFFICE, Austin, TX

*Docket No. 98-1516; Submitted on the Record;  
Issued June 5, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating a \$2,415.11 overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

The Office accepted appellant's claim for a strain of his lumbar spine and herniated disc which occurred on April 18, 1994, when appellant was on an airplane travelling for training and the airplane had a sudden loss of altitude which lasted several seconds and then stopped abruptly. He advised the Office that he would like to receive his checks through direct deposit.

Appellant stopped working after the injury, then returned to a limited-duty job. He ceased working again on May 25, 1995 and returned to limited duty for four hours a day on September 22, 1995. On January 12, 1996 he again stopped working, then returned to work four hours a day on June 10, 1996. Appellant resumed full-time employment on June 24, 1996.

The employing establishment paid compensation benefits to appellant. In a letter dated April 3, 1996, the Office advised appellant that the payments would continue "until April 1, 1997 or until you return to duty, *whichever occurs first.*" (Emphasis in the original.)

By preliminary determination dated November 19, 1996, the Office advised appellant that an overpayment had occurred in the amount of \$2,415.11. The Office noted that appellant was receiving compensation for temporary total disability commencing on March 25, 1996 and that these payments continued until June 10, 1996. However, as he started working four hours a day on June 10, 1996 and returned to full-time work on June 24, 1996 and continued to receive compensation checks until July 21, 1996, the Office found that appellant received an overpayment in the above amount. The Office noted that as appellant had been advised by letter dated April 3, 1996 that he was not entitled to payment of compensation and his regular salary for the same period of time, he should have reasonably been aware that he was not fully entitled to the compensation checks dated June 22 and July 20, 1996.

On December 18, 1996 appellant requested a waiver of overpayment and requested an oral argument before the Office hearing representative.

At the hearing, which was held on October 23, 1997, appellant noted that, in hindsight, he did not dispute the amount of the overpayment, but objected to the finding that he was at fault in its creation. He noted that he had completed all the required forms indicating that he had returned to work, that the money had been directly deposited into his bank account, that he received no statements from the Office explaining the amount of money deposited and that he believed that the payments were part of his leave buy back.” Appellant further noted that in the past, he had never had any problem with the Office immediately cutting his compensation when he returned to work.

By decision dated January 5, 1998, the hearing representative finalized the Office’s preliminary determination of an overpayment in the amount of \$2,415.11. In making this determination, the hearing representative noted that, although the deposits were classified as “miscellaneous pay,” they were for the same amount appellant had been receiving for compensation and that appellant was a reasonably intelligent individual and should have known what these payments were for. Accordingly, the hearing representative affirmed the preliminary determination that appellant was not without fault in creating the overpayment that since appellant was not without fault, there was no basis for waiving the overpayment. Accordingly, the hearing representative affirmed the preliminary determination dated November 19, 1996. The hearing representative found that appellant should pay \$150.00 a month until the amount is paid in full.

The Board finds that the Office improperly determined that appellant was not without fault in the creation of the \$2,415.11 overpayment of compensation.

Section 8129 of the Federal Employees’ Compensation Act 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 would be against equity and good conscience.”<sup>1</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

Section 10.433 of the implementing regulations provides the following:

“An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to 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.”<sup>3</sup>

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 10.433(b) of the Office’s regulations provides in relevant part:

“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 Board finds that the facts of this case do not establish that appellant knew or should have been expected to know that he accepted an incorrect payment. The record indicates that appellant did not physically receive the checks in question. The Office directly deposited the amounts to his account, and nothing in the record supports that he was put on notice that he was being paid incorrectly for the period of time during which he worked, as there is nothing to indicate what or when this compensation payment covered.<sup>5</sup> The bank statements received by appellant record the compensation as miscellaneous pay. Furthermore, appellant would have not been notified of these deposits until several weeks later when the bank statement arrived. As there was no evidence which indicated appellant knew or should have known at the time the incorrect payment was accepted that the payment was not due, the Office cannot meet its burden of proof in finding that appellant was at fault in accepting an incorrect payment.<sup>6</sup>

For these reasons, the Office has not met its burden of proof in establishing that appellant was at fault in creating a \$2,415.11 overpayment of compensation.

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<sup>3</sup> 20 C.F.R. § 10.433(a).

<sup>4</sup> 20 C.F.R. § 10.433(b).

<sup>5</sup> See *John DeLuca*, 36 ECAB 337 (1984).

<sup>6</sup> *Robin O. Porter*, 40 ECAB 421, 425-26 (1989).

The January 5, 1998 decision of the Office of Workers' Compensation Programs is set aside as to the finding of fault and the case is remanded to the Office for a determination on the issue of waiver.

Dated, Washington, D.C.  
June 5, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member