

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREW FORD, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

*Docket No. 98-1418; Submitted on the Record;
Issued May 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether an overpayment of \$5,005.32 occurred from March 14 through May 27, 1995; and (2) whether appellant was at fault in the creation of the overpayment.

On May 24, 1989 appellant, a postal clerk, injured his right wrist while in the performance of his duties when mail fell from a belt onto his arm. On April 13, 1990 he reinjured his right wrist while lifting a sack of mail. On April 28, 1994 he felt something pop on the lateral side of his right wrist while pushing up the latch on a mail container. The Office of Workers' Compensation Programs accepted his claim for the conditions of right wrist strain, mild carpal instability and, later, left shoulder impingement. Appellant stopped work on August 24, 1994 and underwent surgery later that year. He received compensation for temporary total disability.

On February 28, 1995 appellant was released to return to limited duty. His physical limitations included working only with the left hand.

Appellant reported to work on March 13, 1995¹ but was sent home because no work was available on Tour one. An employing establishment memorandum dated March 14, 1995 stated as follows: "[Appellant] reported for work if any was available -- the answer is NO. He has left hand use only according to Hand Surgery Ltd. and the left hand he says also has carpal tunnel and if we were to allow him to work with only his left hand this would cause more damage to his left wrist." On March 28, 1995 appellant's rehabilitation nurse reported the following: "Telephone contact has been made with the employer, however, I am aware they are unable to accommodate his current restrictions, which are one-handed work only. [Appellant] took these restrictions to his employer and they were not able to accommodate him on second or third shift." Leave analysis worksheets show that appellant was credited with working three-fourths of an hour on March 14, 1995, but thereafter he took leave without pay through April 12, 1995.

¹ Appellant's tour began at 11:25 p.m. and ended at 7:00 a.m. the following morning.

The employing establishment reported that work was not available within appellant's restrictions.

A treatment note dated March 17, 1995 indicated that appellant was limited to one-handed work "but now with a two-pound assist on the contralateral side." Appellant remained off work until the employing establishment could find something for him. Appellant worked a partial day on April 13, 1995 then took annual leave. Thereafter, at least through April 28, 1995, he worked and covered his absences with paid leave. He did not take leave without pay.

On May 12, 1995 appellant was restricted to lifting and carrying no more than 10 pounds. On May 25, 1995 his rehabilitation nurse reported that he had been working eight hours a day with light-duty restrictions, including left-handed work with right-hand assist only. She reported: "The restrictions have now been changed to accommodate both hands, lifting no more than 10 pounds or carrying no more than 10 pounds." On May 30, 1995 appellant's attending hand surgeon, reported that appellant had been back to work on light duty for some time and that he would like to see appellant be able to increase his activity level. He requested that appellant be put back on his regular job for two hours a day and that his regular work exposure be gradually increased if possible.

On June 7, 1995 the Office notified appellant that its records indicated that he had returned to work on March 13, 1995 and that he had received compensation checks to which he was not entitled for the period March 5 to May 27, 1995. The Office requested that appellant return the checks if still in his possession. On June 12, 1995 appellant advised that he had cashed the checks he received.

The record shows that the Office issued three checks from March 5 to May 27, 1995. The Office calculated that all compensation paid after appellant returned to work from March 14 to May 27, 1995 constituted an overpayment of compensation.

On November 6, 1995 the Office made a preliminary determination that an overpayment of \$5,005.32 occurred from March 14 through May 27, 1995 because appellant returned to work on March 14, 1995 and continued to receive compensation for temporary total disability through May 27, 1995. The Office also made a preliminary determination that appellant was at fault in the matter of the overpayment because he accepted payment that he knew or reasonably should have known to be incorrect. In a memorandum dated November 6, 1995, the Office noted that appellant received a check every 28 days beginning December 1, 1994; that the Office sent a letter to appellant on January 6, 1995 advising him that compensation was being paid; and that appellant had signed a Form CA-1032 on February 19, 1995 and was aware of his responsibility to report any change of income.

The Office notified appellant of his right to submit evidence or argument if he disagreed with the fact or amount of the overpayment or with the preliminary finding of fault. The Office advised appellant that he had 30 days to request a telephone conference or a precoupment hearing. The Office requested that appellant complete an enclosed overpayment recovery questionnaire and attach any supporting documents to support the income and expenses listed thereon.

On November 12, 1995 appellant replied by submitting copies of leave and disability slips.

In a decision dated January 21, 1998, the Office finalized its preliminary determination that appellant was at fault in the matter of the overpayment of \$5,005.32 that occurred because he returned to work on March 14, 1995 and continued to receive compensation at the total disability rate through May 27, 1995. The Office found that appellant should have reasonably known that he could not receive compensation for being totally disabled and at the same time work for wages. As appellant was not currently receiving compensation for wage loss, the Office requested that he send a check for the entire amount of the overpayment.

The Board finds that an overpayment of compensation occurred when appellant returned to work in a pay status in 1995 and continued to receive compensation for temporary total disability. The Board will, therefore, affirm the Office's January 21, 1998 decision on the issue of fact of overpayment.

Because appellant did not work in a continuous pay status from March 14 to May 27, 1995, however, the Office must recalculate the amount of the overpayment. The record shows that appellant returned to work on March 14, 1995 but for only three-fourths of an hour. Work was not available within his medical restrictions, so the employing establishment sent him home. He took leave without pay for the rest of that work shift and did not return to work in a pay status until April 13, 1995. Appellant thereafter covered his absences with paid leave. In addition to the partial hour appellant was credited with working on March 14, 1995, the period of the overpayment in this case is from April 13 to May 27, 1995. When calculating the amount of the overpayment, the Office assumed that when appellant returned to work on March 14, 1995 he remained in a continuous pay status. As the record shows otherwise, the Board will set aside the Office's January 21, 1998 decision on the issue of the amount of the overpayment and will remand the case for an appropriate recalculation.

The Board also finds that the record is insufficient to establish that appellant was at fault in the matter of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act² 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." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320(b) of the implementing federal regulations³ provides as follows:

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

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.320(b).

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
- (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 Office found that appellant was at fault under the third criterion. Appellant informed the Office on June 12, 1995 that he had cashed the checks in question, so acceptance is established. The question for determination is whether appellant knew or should have been expected to know that these checks were incorrect.

The first check in question covered the period March 5 to April 1, 1995. During this period appellant was credited with working only three-fourths of an hour on March 14, 1995. As the employing establishment had no work for appellant and sent him home, it cannot reasonably be argued that he returned to work that day. And as there was no work for appellant, it cannot reasonably be argued that he knew or should have been expected to know that he was not entitled to the full amount of the first check in question. Under these circumstances, the Board finds that appellant was not at fault in the matter of the overpayment that occurred on March 14, 1995.

With respect to the overpayment that occurred from April 13 to May 27, 1995, the Office considered several factors in determining that appellant knew or should have been expected to know that the payments were incorrect. First, appellant received a check every 28 days beginning December 1, 1994. This alone is insufficient to support that appellant was at fault and presumes that he understood the basis for the Office’s payment of compensation and what he should do after returning to work in a pay status. Second, the Office sent a letter to appellant on January 6, 1995 advising him that compensation was being paid. This letter stated that the Office accepted appellant’s claim for left shoulder impingement with arthroscopic decompression and that this condition was expected to resolve by February 3, 1994. The letter did not further explain the conditions under which appellant was being paid. It did not advise appellant what he should do if his left shoulder condition did not resolve by the expected date, nor did it advise him how to avoid an overpayment or what to do when he returned to work. Third, appellant signed a Form CA-1032 on February 19, 1995 and was aware of his responsibility to report any change of income. Because the Office found appellant to be at fault under the third criterion and not for failing to furnish information that he knew or should have known to be material, his signature on the Form CA-1032 is immaterial and fails to support that he knew or should have been expected to know that the checks he received were incorrect.

Whether a claimant is at fault in the creation of an overpayment must be determined from the evidence of record. In this case, the evidence on which the Office relied to make its finding

of fault fails to establish, either separately or taken as a whole, that appellant knew or should have been expected to know that the checks he received covering the period April 13 to May 27, 1995 were incorrect. The Board will reverse the Office's January 21, 1998 decision on the issue of fault and remand the case for proper consideration of the issue of waiver. Following such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on the issue of the amount of the overpayment and on the issue of waiver.

The January 21, 1998 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment, is set aside on the issue of the amount of the overpayment, is reversed on the issue of fault and is remanded for further action consistent with this opinion.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member