

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SINCLAIR L. TAYLOR and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, MO

*Docket No. 00-607; Oral Argument Held December 6, 2000;
Issued January 23, 2001*

Appearances: *Sinclair L. Taylor, pro se; Miriam D. Ozur, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment existed in the amount of \$14,750.69; and (2) whether appellant was at fault in the creation of the overpayment.

The Office accepted that appellant, a tractor trailer operator, sustained an abrasion of the elbow and forearm and post-traumatic stress syndrome following an accident in the performance of duty on April 21, 1998 when his truck ran into an apartment building. On September 3, 1998 appellant filed a claim for wage-loss benefits. By letter dated September 22, 1998, the Office stated that payment of compensation at the augmented rate of three-fourths of appellant's salary would be effective September 3, 1998.¹ The Office further outlined appellant's entitlement to compensation benefits and his responsibilities. The letter provided: "OTHER COMPENSATION AND DISABILITY BENEFITS. If you have filed for or receive other compensation or disability benefits (for example, [B]lack [L]ung benefits or [V]eterans' benefits) from any federal agency, advise the OWCP of the name of the federal agency and the nature of the disability involved." (Emphasis added.) By his signature dated October 7, 1998, appellant acknowledged that he understood the terms and conditions of his entitlement to compensation benefits.

Prior to the April 21, 1998 injury, appellant had an approved claim for post-traumatic stress disorder from the Department of Veterans Affairs (VA) under which he was entitled to a 10 percent disability award. The VA subsequently increased the award from 10 to 50 percent in October 1, 1998 and appellant received a retroactive payment for the increase in VA benefits

¹ See 5 U.S.C. § 8110(b).

beginning April 21, 1998. On December 3, 1998 appellant advised the Office that his VA benefits had increased.

By letter dated April 8, 1999, the Office noted that appellant was in receipt of VA benefits. It advised appellant that section 8116(a)(3) of the Act prohibits the simultaneous payment of wage-loss compensation by OWCP and service-connected disability benefits for the same injury. The Office informed appellant that he had 30 days to elect between the receipt of the additional VA benefits and his OWCP compensation. The letter further stated that, if no election was received, the Office would assume that VA benefits were elected and would suspend OWCP benefits. No response was received from appellant.

By decision dated May 10, 1999, the Office suspended appellant's compensation benefits effective April 8, 1999 for failure to elect between OWCP benefits and his increase in VA benefits.²

On June 3, 1999 the Office made a preliminary finding that an overpayment of compensation benefits in the amount of \$14,750.49 occurred because appellant had received dual benefits. The Office determined that appellant was at fault in the creation of the overpayment as he knew or should have known that he was not eligible to receive dual benefits. By decision dated August 13, 1999, the Office finalized its determination.

The Board finds that the Office properly determined that appellant received an overpayment of \$14,750.69 resulting from his dual receipt of benefits from September 3, 1998 through April 24, 1999.

Section 8116³ of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, *he may not receive salary, pay, or remuneration of any type from the United States, except --*

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) *other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death....*” (Emphasis added.)

² On May 10, 1999 the Office suspended appellant's compensation benefits effective April 22, 1999 as appellant failed to show good cause for refusing to attend or obstructing an examination for psychological testing. Inasmuch as appellant did not appeal this decision, the Board will not address this decision.

³ 5 U.S.C. § 8116.

The record establishes that the Office properly calculated an overpayment of \$14,750.69 in this case. On May 10, 1999 the Office completed a disability payment work sheet, in which it computed that appellant was paid disability compensation at the rate of \$630.37 from September 3 through 12, 1998 and at the rate of \$1,765.04 for each subsequent monthly period from September 3, 1998 until April 24, 1999. The Office properly calculated that, from September 3, 1998 through April 24, 1999, appellant received disability compensation totaling \$14,750.69. As appellant also received VA benefits during this period, for the same injury, he was not entitled to receipt of compensation benefits under the Act during this period and the \$14,750.69 he received from the Office constituted an overpayment of compensation.

Effective April 21, 1998, the date of the employment-related injury, appellant was in receipt of VA benefits for a 10 percent service-connected disability due to post-traumatic stress disorder. Based on the April 21, 1998 employment-related injury, appellant was in receipt of compensation under the Act for total disability due to the acceptance of a post-traumatic stress disorder. As of October 1, 1998, appellant received an increase in benefits from the VA from 10 to 50 percent retroactive to the April 21, 1998 injury. Such benefits were paid for the same injury as benefits paid by the Office and became dual benefits pursuant to section 8116(a)(3).⁴ Therefore, the Office properly concluded that an overpayment of \$14,750.69 had occurred.

The Board finds, however, that the Office improperly determined that appellant was at fault in the creation of an overpayment of compensation.

Section 8129(b) of the Act states that “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.”⁵ Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.⁶

⁴ See *Gary L. Bartolucci*, 34 ECAB 1569 (1983).

⁵ 5 U.S.C. § 8129(b).

⁶ See *Barbara L. Kanter*, 46 ECAB 165, 171 (1994).

Section 10.433⁷ of the regulation provides:

“(a) OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)

In this case, the Office applied the third standard -- acceptance of a payment which the recipient either knew or should have known was incorrect -- in finding appellant at fault in creating the overpayment.

The Office found that appellant was at fault in the creation of the overpayment as he was aware or should have been aware that he was not entitled to dual benefits based on its letter of September 22, 1998. This letter advised appellant to notify the Office immediately of the receipt of any VA benefits, but did not notify appellant that he was not entitled to both VA benefits and workers' compensation. Thus, the September 22, 1998 letter was not sufficient to support the Office's finding that appellant should have been aware that he was not entitled to both workers' compensation and the increase in his VA benefits.

Appellant, pursuant the September 22, 1998 letter, accurately reported the adjustments in his VA benefits to the Office on December 3, 1998. Appellant was first advised that he was not entitled to receive both VA benefits and workers' compensation in the Office's April 8, 1999 letter to him concerning his election of benefits. The Board finds that the Office improperly found that appellant was at fault in the creation of the overpayment.

The Board will set aside the finding of fault and remand the case for the Office to make a determination on whether appellant is entitled to waiver of the overpayment.⁸

⁷ 20 C.F.R. § 10.433 (1999).

⁸ *William J. Murphy*, 40 ECAB 569, 571 (1989).

The August 13, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed, in part, on the issue of an overpayment in the amount of \$14,750.69 and set aside, in part, on the issue of waiver. The case is remanded for further development consistent with this opinion.

Dated, Washington, DC
January 23, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member