

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE C. ESTOESTA and U.S. POSTAL SERVICE,
POST OFFICE, Fremont, CA

*Docket No. 00-1728; Submitted on the Record;
Issued May 3, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$4,819.93 overpayment of compensation for April 3 to June 5, 1998 and June 23 to 28, 1998; and (2) whether the Office properly found that appellant was not without fault in the creation of the overpayment.

On February 13, 1998 appellant, then a 54-year-old distribution clerk, filed a claim alleging that he pulled shoulder muscles on February 5, 1998 while in the performance of duty. The Office accepted appellant's claim for a C5-6 disc herniation and authorized a May 6, 1998 surgical discectomy.

On March 20, 1998 appellant filed a claim for wage-loss compensation from April 2 to May 1, 1998. The Office paid compensation for temporary total disability beginning April 3, 1998 and placed him on the periodic rolls on May 24, 1998. Appellant used annual and sick leave from April 1 to June 5, 1998 and returned to work for 27 hours from June 23 to 28, 1998.

In a letter dated August 28, 1998, the Office informed appellant of its preliminary determination that he had received an overpayment of \$4,819.93. The Office stated that the overpayment occurred because appellant received payment from the employing establishment for leave usage while also receiving compensation from the Office for temporary total disability. The Office notified appellant of its preliminary determination that he was not without fault in the creation of the overpayment and advised him that he had 30 days within which to submit additional evidence or arguments.

In a response dated September 18, 1998, appellant related that he requested leave on the advice of his supervisor. He stated that he used 344 hours of annual and sick leave from April 17 to June 12, 1998. Appellant added: "I am surprised that my employer did not cease paying me my annual and/or sick leave pay when they know that it is prohibited to receive paid

leave and compensation concurrently. I was not aware of this rule[]. My employer did not explain this to me....”

In a statement dated September 18, 1998, Edward Sang, appellant’s supervisor, related that he authorized appellant’s use of sick leave rather than leave without pay. He stated that when the employing establishment realized that appellant had been paid twice, it arranged for him to buy back his sick leave.

In a letter dated March 15, 1999, Maretta Harris, an official with the employing establishment, disagreed with appellant’s statement that “no one explained to him the pay process.” Ms. Harris related that she had explained to appellant the process of obtaining workers’ compensation, the prohibition against dual payments and how to buy back his leave.

By decision dated March 16, 2000, the Office finalized its determination that appellant received an overpayment of \$4,819.93 and that he was not without fault in the creation of the overpayment. The Office further found that appellant should repay the debt in full because he had failed to provide financial data.

The Board finds that the Office properly determined that an overpayment of compensation occurred in this case. The case is not in posture for decision on the amount of the overpayment.

An overpayment occurred because appellant received payment from the employing establishment for sick and annual leave from April 3 to June 5, 1998 while at the same time receiving compensation from the Office for temporary total disability. On appeal, appellant argued that he did not receive payment from May 23 to June 28, 1998. The record establishes that appellant received sick and annual leave from the employing establishment from April 17 to June 5, 1998, and salary for 27 hours of work from June 23 to 28, 1998. Office computer records establish that appellant received compensation for total disability from April 3 to June 5, 1998. The Office, therefore, properly determined that appellant received an overpayment. Appellant was in receipt of compensation for the same period he received sick and annual leave and salary from the employing establishment.

However, for June 23 to 28, 1998, the record contains no Office computer record or other evidence indicating that appellant received compensation from the Office for temporary total disability. As it is unclear from the record whether appellant received compensation for that period, the case will be remanded to the Office to redetermine the period and the amount of the overpayment of compensation. On remand, the Office should obtain all relevant records and thereafter issue a decision with regard to the amount of the overpayment.

The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act¹ 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."² Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.³ In determining whether an individual is with fault, section 10.433 of the Office's regulations provides in relevant part:

"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;
- (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 in determining that appellant was at fault in creating the overpayment. Thus, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁴

With respect to whether an individual is at fault, section 10.433(b) provides in pertinent 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."

In this case, appellant filed a claim for compensation with the Office and also submitted requests for sick and annual leave to the employing establishment. While appellant argued that he thought the checks from the Office were actually sick and annual leave from the employing establishment, the Board finds that this argument is not credible given the circumstances.

¹ 5 U.S.C. § 8101 *et seq.*

² 5 U.S.C. § 8129.

³ *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).

⁴ *See Robin O. Porter*, 40 ECAB 421 (1989).

Appellant should have been aware of the receipt of dual payments and knew or should have known the nature of payments from his employing establishment for leave usage. Additionally, Ms. Harris, an official with the employing establishment, stated that she explained to appellant that he could not receive dual compensation payments and also discussed the proper method to obtain leave buy back. Based on this information, appellant should have known that he was not entitled to compensation for temporary total disability from the Office while receiving leave and salary from the employing establishment. Thus, under these circumstances, the evidence supports the Office's finding that he is not without fault.

The Board further notes that it does not have jurisdiction to review the Office's finding regarding repayment of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.⁵ As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.⁶

The March 16, 2000 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
May 3, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁵ *Levon H. Knight*, 40 ECAB 658 (1989).

⁶ 5 U.S.C. § 5511 *et seq.*