

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES L. SEYMORE and U.S. POSTAL SERVICE,
POST OFFICE, Coppel, TX

*Docket No. 00-2012; Submitted on the Record;
Issued May 3, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$41,193.97 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

In August 1995 appellant, then a 35-year-old distribution clerk, filed a claim alleging that he sustained an employment-related upper extremity condition. The Office accepted that he sustained bilateral carpal tunnel syndrome. Appellant returned to limited-duty work on November 8, 1995 and the Office paid compensation for the period October 18 to November 8, 1995 based on a weekly pay rate of \$718.85.¹

By decision dated November 19, 1997, the Office granted appellant a schedule award for a 10 percent permanent impairment of each upper extremity. The Office advised her that the schedule award payments would be based on a weekly pay rate of \$718.85 to be paid at the $\frac{3}{4}$ compensation rate or weekly compensation of \$539.14. During the periods October 22 to November 8, 1997 and November 9 to December 6, 1997, the Office mistakenly made schedule award payments based on a weekly pay rate of \$436.80. Appellant contacted the Office and provided calculations detailing the proper amounts he should have received under the schedule award and the Office paid an adjustment of \$1,451.77 in order to correct its error.

The Office issued a revised schedule award notice on December 23, 1997 in which it slightly increased his compensation due to cost-of-living adjustments; it advised appellant that he would receive continuing checks in the amount of \$2,228.00 each 4 weeks. However, appellant was mistakenly issued a check for \$1,354.00 for the period December 7, 1997 to January 3, 1998; the Office later issued appellant a check for \$874.00 in order to pay him the proper amount

¹ Appellant's salary pay rate as of October 19, 1995 was \$35,604.00 per year (\$684.69 per week) and he also earned \$34.16 per week in Sunday premium pay.

of \$2,228.00 for that period. In connection with his schedule award compensation, the Office continued to issue appellant checks every four weeks in amounts well above the proper amount of \$2,228.00. The Office issued appellant checks for \$122.64 and \$5,317.00 for the period January 4 to 31, 1998 and a check for \$5,349.64 for the period February 1 to 28, 1998. Appellant continued to receive improper payments in the amount of \$5,439.64 every four weeks through December 5, 1998; the Office issued appellant a \$5,245.29 check for the final payment period of December 6, 1998 to January 1, 1999.

By letter dated February 3, 1998, the Office advised appellant that the \$5,317.00 check which had been mailed to him in January 1998 was incorrect and that he should have received a check in the amount of \$2,228.00. The Office informed appellant that the overpayment of \$3,089.00 would be applied to the next 2 checks; that he would receive \$1,367.00 in March; and that he would be placed back on the periodic rolls. As noted above, appellant continued to receive checks in improper amounts. By letter dated February 25, 1995, the Office advised appellant that the 2 checks totaling \$10,756.64 had been incorrect and that he should have received 2 checks for \$2,228.00 totaling \$4,456.00. The Office informed appellant that he had been overpaid \$6,300.64 as a result. It further advised appellant that he could return \$6,300.64 within 20 days or have his schedule award payments temporarily suspended until June 1998 in order to offset this amount. Appellant did return the \$6,300.64 and the Office continued to make payments in the amount of \$5,439.64 every four weeks.

By preliminary determination dated February 25, 1999, the Office determined that appellant had received a \$41,193.97 overpayment of compensation due to his receipt of schedule award compensation checks in incorrect amounts between January 1998 and January 1999. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. By decision dated February 25, 1999, appellant requested a hearing regarding the overpayment and, by decision dated and finalized April 27, 2000, an Office hearing representative finalized the Office's preliminary determinations regarding the overpayment amount and fault.²

The Board finds that appellant received a \$41,193.97 overpayment of compensation.

In the present case, appellant was entitled to receive schedule award compensation over an extended period; for the period January 1998 to January 1999, he was entitled to receive compensation in the amounts of \$2,228.00 every four weeks. During this period, however, appellant received compensation checks every four weeks in incorrect amounts. The record contains evidence which shows that, as a result of these incorrect checks, appellant received \$41,193.97 in compensation which he was not entitled to receive. Therefore, the Office properly determined that appellant received a \$41,193.97 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

² The hearing representative addressed the method of recovery of the overpayment. However, 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 method of overpayment repayment. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

Section 8129(a) of the Act³ 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.⁴ 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.”⁵ 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 10.433(a) 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 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....”⁶

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

Section 10.433(c) of the Office’s regulations provides:

“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.”⁷

The record contains ample evidence showing that appellant accepted payments which he knew or should have known to be incorrect and the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. When his initial schedule award checks were issued in incorrect amounts, appellant took the initiative to contact the Office and provide calculations detailing the proper

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433(a).

⁷ 20 C.F.R. § 10.433(c).

amounts he should have received. Moreover, the Office advised appellant in several letters towards the beginning of the overpayment period that he had received checks of incorrect amounts well above the proper compensation rate of \$2,228.00 every four weeks.

At the hearing, appellant suggested that he felt he was entitled to the checks in higher amounts after the issuance of the revised schedule award in December 1997. However, the revised schedule award clearly indicated that the proper compensation rate was \$2,228.00 every four weeks. Appellant received checks over a one-year period based on compensation rates almost 150 percent higher than the proper compensation rate. Even though the Office may have been negligent in continuing to issue appellant checks in incorrect amounts, this does not excuse appellant's acceptance of such checks which he knew or should have known were incorrect.⁸ Based on the evidence of record, the Office's determination of fault was proper and there can be no waiver of the overpayment.

The decision of the Office of Workers' Compensation Programs dated and finalized April 27, 2000 is affirmed.

Dated, Washington, DC
May 3, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).