

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT A. MILLS and U.S. POSTAL SERVICE,  
POST OFFICE, Boston, MA

*Docket No. 01-340; Submitted on the Record;  
Issued November 27, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found appellant at fault in the creation of an overpayment of compensation benefits in the amount of \$1,481.60 so that the overpayment was not subject to waiver; and (2) whether the Office properly directed repayment of the overpayment by withholding \$100.00 per month from appellant's continuing monthly compensation benefits.

Appellant, then a 37 year-old letter carrier, filed a claim alleging that on January 18, 1982 he sustained a right shoulder and lower back injury in the performance of duty. The Office accepted his claim for sacroiliac and right shoulder sprains. Appellant began receiving compensation on the periodic rolls for temporary total disability, with compensation based on the augmented rate of 75 percent.

By letter dated June 5, 2000, the Office advised appellant that a preliminary determination had been made that an overpayment of compensation occurred for the period August 17, 1998 through February 27, 1999 as he received compensation at the augmented rate while he was separated from his wife and, therefore, was without a dependent. The Office advised that appellant was at fault in the creation of the overpayment as he was aware or should reasonably have been aware that he was no longer entitled to augmented compensation as of August 17, 1998, but he continued to accept augmented compensation checks through February 27, 1999. The Office noted that, as appellant began living with his wife effective September 10, 1999 and would be receiving augmented compensation effective May 21, 2000, he was entitled to receive augmented compensation from September 10, 1999 through May 20, 2000. The Office found that an overpayment in the amount of \$1,481.60 occurred by calculating the amount appellant should have received at the basic rate for the period August 17, 1998 through February 27, 1999 and should have received at the augmented rate for the period September 10, 1999 through May 20, 2000 and subtracting the amount appellant received during those periods. Appellant was advised of the actions he could take if he disagreed with the Office's preliminary finding that he was at fault in the creation of the overpayment and was provided with a Form OWCP-20, overpayment recovery questionnaire.

On June 29, 2000 appellant requested a telephone conference with the Office on the issues of fault and possible waiver of overpayment. Supporting financial documents were not enclosed. Also, in a letter dated June 29, 2000, appellant's attorney advised that appellant was temporarily separated from his wife in residence only; however, he continued to provide financial support during the period of separation from August 17, 1998 through September 10, 1999, when the couple reconciled and began sharing the same household. Appellant's attorney stated that appellant advised the Office of the changes in his household and made no attempt to skirt from his responsibilities of notifying the Office of changes to his marital household. Appellant's attorney further stated his disagreement with the amount of overpayment and argued that the Office owed appellant approximately \$232.64.

In a letter dated July 24, 2000, the Office advised appellant that they received appellant's request for a telephone conference, but noted that appellant did not submit any supporting financial documentation such as Form OWCP-20. The Office further advised that if appellant had made regular contributions to his wife during the period they were separated, proof of such payments were necessary to make a determination as to whether he was entitled to augmented compensation while separated.

In an undated letter, which the Office received September 18, 2000, appellant's wife advised that appellant regularly contributed to her financial support during the time period August 1998 through September 1999 when she was not residing with appellant.

By decision dated October 3, 2000, the Office finalized its determination that appellant was at fault in the creation of the \$1,481.60 overpayment and that the overpayment should be recovered by deducting \$100.00 per month from appellant's continuing compensation benefits.

The Board finds that appellant was at fault in the creation of the overpayment of compensation in the amount of \$1,481.60 and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. 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 the Act or would be against equity and good conscience."<sup>2</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, § 8129(a).

<sup>2</sup> 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.433 of the Office's regulations<sup>3</sup> 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; or
- (2) Failed to furnish 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.”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation payments in question, he knew or should have known that the payments were incorrect.<sup>4</sup> 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>5</sup>

In support of the finding of fault, the Office noted that appellant indicated on Form CA-1032, which he signed on September 8, 1998, that he separated from his wife on August 17, 1998. The Office further noted that appellant continued to receive augmented compensation through February 27, 1999, when the Office adjusted his compensation rate, even though he was aware or should reasonably have been aware that he was no longer entitled to augmented compensation as of August 17, 1998.

The evidence of record establishes that appellant was aware that he understood or should have understood the circumstances under which augmented compensation could be claimed and the need to immediately report changes in dependent status. Appellant properly informed the Office in a letter dated August 17, 1998 that he was separated from his wife effective that date. He further indicated this information on Form CA-1032 that he was separated from his wife as of August 17, 1998 and did not attempt to claim her as a dependent in the form completed September 9, 1998. The provision contained under Part C – Dependents on Form CA-1032

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<sup>3</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>4</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(b).

clearly advises that appellant could claim compensation for a wife, even if that person does not live with him, so long as regular direct payments are made for her support. Appellant later argued that he regularly contributed to his wife's financial support during the separation period from August 17, 1998 through September 10, 1999 and a letter from appellant's wife attested to that fact, the record is devoid of any such financial proof of such support aside from the letter from his wife, despite the July 24, 2000 request from the Office and the clear directive on Form CA-1032. Despite the fact the Office did not adjust his compensation rate until February 28, 1999 and may have been negligent in issuing incorrect compensation checks, this does not excuse appellant's acceptance of payments he knew or should have known to be incorrect after August 17, 1998.<sup>6</sup>

The Board further finds that the Office properly determined the amount of the overpayment.

Following appellant's notification that he was separated on August 17, 1998, the Office noted that it did not adjust appellant's compensation to the basic rate until February 28, 1999. Thus, appellant received augmented compensation during the period August 17, 1998 through February 27, 1999, when he was only entitled to the basic compensation rate. The Office further noted that as appellant was reunited on September 10, 1999, he was entitled to augmented compensation from that date forward. As the Office changed appellant's entitlement to augmented compensation effective May 21, 2000, the Office found that appellant should have been receiving augmented compensation from September 10, 1999 through May 20, 2000, but had only been receiving the basic compensation rate. The Office then properly calculated the amount of the overpayment by determining the difference between the compensation payments received by appellant from August 17, 1998 through February 27, 1999 calculated at the augmented rate, \$14,527.50, and the compensation payments received by appellant from September 10, 1999 through May 20, 2000 calculated at the statutory rate, \$17,229.04, and the amount that he was entitled to receive at the statutory rate during the period August 17, 1998 through February 27, 1999, \$12,075.74, and the amount he was entitled to receive at the augmented rate from September 10, 1999 through May 20, 2000, \$18,199.20. Appellant received an overpayment of compensation in the amount of \$1,481.60.

The Board further finds that the Office properly directed repayment of the overpayment by withholding \$100.00 per month from appellant's continuing monthly compensation benefits.

Section 10.441(a) of the regulations<sup>7</sup> provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other

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<sup>6</sup> See *Martin Boroian*, 40 ECAB 1260 (1989).

<sup>7</sup> 20 C.F.R. § 10.441(a).

relevant factors, so as to minimize any hardship. Should the individual die before collection has been completed, collection shall be made by decreasing later payments, if any, payable under the [the Act] with respect to the individual's death."

In the present case, the Office, in determining the rate of repayment by deduction from appellant's continuing compensation payments, had no financial information in which to consider whether the debt amortization schedule of \$100.00 per payment at a five percent interest rate would result in any hardship. As the Office had directed the appellant to submit financial information in its letters of June 5 and July 24, 2000 and no financial information was received, the Board finds that this case record is devoid of any indication that repayment of \$100.00 from appellant's continuing compensation payments would result in a severe hardship.

The October 3, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.<sup>8</sup>

Dated, Washington, DC  
November 27, 2001

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> The Board notes that the Office issued an October 20, 2000 decision approving appellant's attorney fees. As neither appellant nor his attorney is contesting this decision, the Board will not address the merits of that decision.