

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAN MORRIS and U.S. POSTAL SERVICE,
POST OFFICE, Shreveport, LA

*Docket No. 00-542; Submitted on the Record;
Issued October 5, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$8,735.53 during intermittent periods from May 1, 1991 through October 10, 1997; (2) whether the Office properly found that appellant was with fault in the creation of the overpayment because he received compensation for temporary total disability at the same time he received income for his work as a school bus driver; and (3) whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$250.00 from each of appellant's continuing periodic compensation payments.

On October 25, 1968 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim alleging that he injured his back on October 22, 1968 when he stepped into a hole while delivering the mail.

The Office accepted appellant's claim for lumbar strain, aggravation of cervical spondylosis and lumbar disc disease.

By decision dated January 30, 1998, the Office reduced appellant's compensation on the grounds that his earnings from January 1 through December 31, 1992 as a part-time school bus driver fairly and reasonably represented his wage-earning capacity. The Office found that appellant worked for the Wilburton Oklahoma Independent School District as a part-time substitute school bus driver beginning in 1991 through 1993. In addition, the Office found that appellant worked for the McAlester Independent School District in March 1997 as a part-time substitute bus driver until May 1997. The Office stated that appellant then worked for the McAlester School District as a full-time bus driver for four hours per day from August 13 through October 11, 1997.¹

¹ The record reveals an October 10, 1997 letter from appellant advising the Office that, effective immediately, he was no longer employed as a bus driver for McAlester Public Schools due to his neck and shoulder conditions.

In a February 17, 1998 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$16,374.25. The Office stated that appellant's earnings as a school bus driver for the Wilburton Independent School District effective January 1, 1992 fairly and reasonably represented his wage-earning capacity, but that appellant continued to receive compensation for total disability. The Office advised appellant that he was at fault in the creation of the overpayment because he failed to furnish information about his earnings that he knew or should have known was material. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

On February 24, 1998 the Office received appellant's completed overpayment questionnaire and supporting documentation.

By decision dated June 22, 1998, the Office hearing representative vacated the Office's January 30 and February 17, 1998 decisions. The hearing representative found that the medical evidence of record established that appellant was unable to perform the duties of a bus driver due to his back condition. The hearing representative instructed the Office on remand to determine appellant's entitlement to compensation for loss of wage-earning capacity based upon his actual earnings during the period May 1, 1991 through December 31, 1993 and March through October 10, 1997.

On remand, the Office recalculated the overpayment amount and issued a September 25, 1998 preliminary letter, finding that an overpayment in compensation had occurred in the amount of \$8,735.53 during the period May 1, 1991 through October 10, 1997. The Office found that appellant was at fault in the creation of the overpayment because he accepted compensation payments at the same time he received income for his work as a bus driver. The Office noted appellant's rights and requested that appellant complete an accompanying overpayment recovery questionnaire and submit supportive financial records.

On October 3, 1998 appellant requested a hearing accompanied by a completed overpayment questionnaire and supporting documentation.

By decision dated September 30, 1999, the Office hearing representative finalized its preliminary determination. In addition, the hearing representative ordered repayment of the overpayment by deducting \$250.00 from each of appellant's continuing compensation payments.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$8,735.53 during intermittent periods from May 1, 1991 through October 10, 1997.

In this case, the record reveals that appellant worked intermittently during the overpayment period for the Wilburton Independent School District and the McAlester

Independent School District as a school bus driver during the period May 1, 1991 through October 10, 1997. The Office calculated that appellant received temporary total disability compensation in the amount of \$151,257.81 and subtracted \$142,522.28, the amount appellant should have received for partial disability during the period May 1, 1991 through September 12, 1998. Therefore, the Office properly found that an overpayment existed in the amount of \$8,735.53.

The Board further finds that the Office properly determined that appellant was with fault in the creation of the overpayment because he received compensation for temporary total disability at the same time he received income for his work as a school bus driver.

Section 8129(a) of the Federal Employees' Compensation Act 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.² The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."³ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁴ In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.⁵

In determining whether an individual is at fault, section 10.433(a) 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 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 been expected to know was incorrect."⁶

² 5 U.S.C. § 8129.

³ 5 U.S.C. § 8129(b).

⁴ *Harold W. Steele*, 38 ECAB 245 (1986).

⁵ 20 C.F.R. § 10.435(b)(1) (January 1999).

⁶ 20 C.F.R. § 10.433(a) (January 1999).

In this case, the Office applied the third standard -- appellant accepted payments which he knew or should have known were incorrect -- in finding appellant to be at fault in the creation of the overpayment in the amount of \$8,735.53. On June 10, 1991 appellant signed a Form EN-1032 instructing him to report any employment, including self-employment in the 15-month period prior to the date of the form. In this Form EN-1032, appellant indicated that he had worked from May 1 through 31, 1991 as a bus driver for Wilburton Public Schools in Wilburton, Oklahoma. By letter dated June 18, 1991, the Office advised appellant to provide whether he worked only during the above period and to submit the total amount of income he earned. Appellant did not respond. Subsequently, appellant submitted additional signed Forms EN-1032 indicating his employment as a school bus driver during the period January through May 1992, August through November 1992, January 4, 1993 and January 24 through May 23, 1997. Although the Office may have been negligent in continuing to issue appellant checks for total disability after it was informed appellant had returned to work and had earnings, this does not excuse appellant's acceptance of such checks to which he should have been expected to know he was not entitled.⁷

The Board finds that the signed Forms CA-1032, together with the Office's June 18, 1991 letter, indicate that appellant should have known that the total disability compensation amounts he continued to receive after he returned to work on May 1, 1991 contained an amount to which he was not entitled. After consideration of all the particular circumstances surrounding the overpayment, the Board finds that the facts of this case establish that appellant should have been expected to know that he accepted incorrect compensation payments in the amount of \$8,735.53 and, therefore, he was at fault in the creation of the overpayment during that period.

Finally, the Board finds that the Office did not abuse its discretion by ordering repayment of the overpayment by deducting \$250.00 from each of appellant's continuing periodic compensation payments.

Section 10.441(a) of the Code of Federal Regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP 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, OWCP 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 relevant factors, so as to minimize any hardship...."⁸

On October 3, 1998 appellant completed an overpayment questionnaire indicating that he received a monthly income of \$2,494.84, which included \$979.00 in social security benefits and \$1,515.84 in other benefits. Appellant also indicated the following monthly expenses: \$429.49 rent or mortgage; \$300.00 food; \$100.00 clothing; \$250.00 utilities; \$550.00 other miscellaneous expenses; \$255.00 charity; \$520.00 bank loan; and \$80.00 credit cards. Further, appellant noted

⁷ *Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

⁸ 20 C.F.R. § 10.441(a) (January 1999).

that he had \$20.00 in cash on hand, \$200.00 in a checking account and \$30.00 in a savings account. Appellant's monthly income and assets totaled \$2,744.84 while his monthly expenses totaled \$2,484.49. Thus, appellant's monthly income and assets exceed his monthly expenses by \$260.35. Accordingly, because the Office considered appellant's financial circumstances and the rate of recovery would not impose a hardship on appellant, the Board finds that the Office did not abuse its discretion.

The September 30, 1999 decision of the Office of Workers' Compensation Programs' hearing representative is hereby affirmed.

Dated, Washington, DC
October 5, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member