

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIVIAN BERSCAK and U.S. POSTAL SERVICE,
POST OFFICE, Manteo, NC

*Docket No. 01-1058; Submitted on the Record;
Issued January 22, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant received a \$9,799.20 overpayment in compensation; and (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of the overpayment.

On March 19, 1998 appellant, then a 40-year-old postmaster, filed a claim for a January 16, 1996 employment injury. She stated that she was lifting a heavy parcel and felt a twinge in her back, followed by sharp, shooting pain. Appellant indicated that she had sustained an acute lumbar disc herniation.

In a May 13, 1998 decision, the Office denied appellant's claim on the grounds that she had not established that her condition was causally related to her employment injury. In a July 2, 1998 letter, appellant's attorney requested reconsideration. In a July 28, 1998 merit decision, the Office denied appellant's request for modification of the May 13, 1998 decision. In a September 21, 1998 letter, appellant's attorney once again requested reconsideration. In a December 2, 1998 decision, the Office vacated its May 13, 1998 decision and accepted appellant's claim for a herniated L4-5 disc with right lumbar radiculopathy.

In the December 2, 1998 letter that accepted the claim, the Office informed appellant that if she lost pay due to the employment injury, she should file an appropriate claim form. The Office indicated that appellant was not entitled to receive temporary total disability compensation while employed.

On March 29, 1999 appellant filed a Form CA-7, which she indicated was a claim for compensation and a request for leave buy back. She indicated that the period of wage loss for her claim was March 19 through September 8, 1998.

In an August 3, 1999 memorandum, an official at the employing establishment indicated that appellant had called the Office and was informed that in order to process her claim for leave buy back and compensation, the Office needed to know some information from the employing

establishment. The employing establishment reported that the Office owed the employing establishment \$10,707.72 for leave buy back and 336 hours of leave without pay. In an August 10, 1999 letter, the Office sent the employing establishment forms to complete to calculate appellant's leave buy back for the period March 19 through September 8, 1998.

In an August 18, 1999 response, the employing establishment returned one of the forms sent by the Office, noting that one of the forms had been annotated in an effort to have the Office pay appellant's claim for the 336 hours of leave without pay. The employing establishment reported that the other forms had been sent to its accounting department to process the necessary information for the leave buy back. The employing establishment subsequently reported that appellant had 336 hours of leave without pay and 632 hours of sick and annual leave used for the period March 19 through September 4, 1998. The employing establishment also calculated that the cost of the leave buy back was \$10,707.72.

The Office issued to appellant a compensation check for \$14,943.78 covering March 19 to September 4, 1998.

In a November 8, 2000 memorandum, an official with the employing establishment indicated that the employing establishment called appellant to inform her that she was sent a check that included the compensation for her leave without pay and the leave buy back reimbursement. The official noted that the leave buy back check did not go to the employing establishment but to appellant. Appellant reported that she had deposited the check and spent the money.

In a January 12, 2001 letter, the Office informed appellant that it had made a preliminary determination that she had received a \$9,799.20 overpayment in compensation because she was sent a check which included compensation for leave without pay and leave buy back reimbursement from March 19 through September 4, 1998 but she was only entitled to compensation for 336 hours of leave without pay. The Office made a preliminary finding that appellant was at fault in the matter of the overpayment because she was aware or should have reasonably been aware that she was not entitled to compensation for leave without pay and reimbursement for leave buy back for the same period. It stated that appellant should have been reasonably aware that she was not entitled to any money for reimbursement of her leave. Appellant was given 30 days to request further proceedings.

In a February 14, 2001 decision, the Office found that appellant had received a \$9,799.20 overpayment in compensation and that she was at fault in the creation of the overpayment because she was aware or reasonably should have been aware that she was not entitled to leave without pay and leave buy back for the same period.

The Board finds that appellant received a \$9,799.20 overpayment in compensation.

Under section 8116(a) of the Federal Employees' Compensation Act, an employee who receives compensation under the Act may not receive salary, pay or remuneration of any type from the federal government except in certain specified cases, none of which applies in this case.¹ Appellant, therefore, was not entitled to compensation for any period in which she also

¹ 5 U.S.C. § 8116(a).

used sick or annual leave. Since appellant was paid for the entire period of March 19 through September 4, 1998 but used leave extensively during the period, she was not entitled to the entire amount of the check issued for the period in question. She was entitled only to the compensation for leave without pay. Appellant therefore received a \$9,799.20 overpayment in compensation.

The Board finds that the case is not in posture for decision on the issue of whether appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Section 10.320(b) of the Office's implementing regulations³ provides as follows:

"In determining whether an individual is with fault the Office will consider all pertinent circumstances, including the age, intelligence, education, physical and mental condition. An individual is with fault in the creation of the overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual 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. (This provision applies to the overpaid individual only.)"⁴

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

The Office stated that appellant was aware or reasonably should have been aware that she was not entitled to compensation for leave without pay and reimbursement for leave buy back for the same period. The Office, however, did not explain how appellant knew or reasonably should have known that the compensation check sent to her was incorrect. Appellant had filed for compensation for March 19 to September 4, 1998, the period of the check. In its letter accepting appellant's claim, the Office stated that appellant was not entitled to compensation for any period in which she was working. However, it did not specifically state that she was not entitled to compensation for any period in which she used sick or annual leave.

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.320(b).

⁴ 20 C.F.R. § 10.433(a).

There is no indication in the record that the Office or the employing establishment explained the leave buy back procedures to appellant, specifically informing her that any reimbursement for leave taken for a period of employment-related disability would be sent to the employing establishment, not to her. There is no evidence of record indicating whether appellant, in her position as a postmaster, was instructed on the procedures involving leave buy back in a compensation case. There is no evidence of record that appellant was informed, prior to the issuance of the compensation check, that she had only 336 hours of leave without pay for the period in question and would therefore receive compensation only for those hours.

The Office therefore has not established how appellant knew or reasonably should have known that she had accepted an incorrect compensation payment. The Office's decision on the issue of fault must therefore be set aside and the case remanded for further development of whether appellant was at fault in the creation of the overpayment. After further development as it may find necessary, the Office should issue a *de novo* decision.

The February 14, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed regarding the \$9,799.20 overpayment in compensation. The decision that appellant was at fault in the creation of the overpayment is hereby set aside and the case is remanded for further action as set forth in this opinion.

Dated, Washington, DC
January 22, 2002

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member