

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYLVESTER BENNETT and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 02-458; Submitted on the Record;
Issued June 12, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$12,282.71 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.

The Board finds that appellant received a \$12,282.71 overpayment of compensation.

On April 4, 1998 appellant, then a 61-year-old mail carrier, sustained employment-related fractures of his hands, wrist and feet when he was hit by a vehicle.¹ By decision dated September 27, 2001, the Office determined that appellant received a \$12,282.71 overpayment of compensation and that he was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

The record reveals that, on October 6, 2000, the Office mailed appellant a \$12,282.71 compensation check covering the period June 22, 1998 to May 19, 2000. However, appellant was not entitled to this check because, in August 2000, an \$18,319.62 settlement had been reached in connection with the third-party claim he filed against the driver of the vehicle which struck him on April 4, 1998. The record further reflects that the third-party settlement created a surplus and that appellant was not entitled to receive any more compensation from the Office

¹ Appellant received disability compensation from the Office for periods through mid 2000.

until the surplus had been absorbed.² For these reasons, the Office properly determined that appellant received a \$12,282.71 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

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.

² Section 8132 of the Federal Employees’ Compensation Act provides, “If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney’s fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury.” 5 U.S.C. § 8132.

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).

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 clearly reflects that appellant cashed a \$12,282.71 check from the Office despite knowing that he was not entitled to such funds. On October 6, 2000 the San Francisco branch of the Office mailed the \$12,282.71 check to appellant's home address in Hawaii. On that same date, *i.e.*, at a time prior to appellant's receipt of the check, an official from the San Francisco branch of the Office telephoned appellant and advised him that he would be receiving a \$12,282.71 check. The official further advised appellant that he should immediately return the check in that he was not entitled to the funds because the third-party settlement he had received in August 2000 had not yet been absorbed.⁸

The record contains a statement in which appellant acknowledged that he was advised by an Office official on October 6, 2000 that he should return the \$12,282.71 check to the Office without cashing it. Appellant asserted that he did not receive a “letter of instructions” or an additional telephone call from the Office regarding what he should do with the \$12,282.71 check. However, appellant did not adequately explain why he proceeded to cash the check despite the explicit instruction from the Office on October 6, 2000 not to do so, nor did he explain why he cashed the check after making an assurance that he would return the check to the Office.⁹

Even though the Office may have been negligent in sending appellant the \$12,282.71 check on October 6, 2000, this does not excuse appellant's acceptance of this check which he knew or should have known had to be returned to the Office.¹⁰ For these reasons, the Office properly determined that appellant was at fault in creating the \$12,282.71 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

⁷ 20 C.F.R. § 10.433(c).

⁸ The record reflects that appellant advised the official on October 6, 2000 that he would not cash the check even though “the mortgage is due” and “I really need the money.” Nevertheless, appellant cashed the check shortly after he received it.

⁹ Appellant indicated that he “used the funds to pay bill[s] that were overwhelming his family.” He alleged that he believed monies would be deducted by the Office after he cashed the \$12,282.71 check, but he did not articulate the basis for this claim.

¹⁰ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

The September 27, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 12, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

A. Peter Kanjorski
Alternate Member