

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOUIS F. BERTONCINI and U.S. POSTAL SERVICE,  
POST OFFICE, Taunton, RI

*Docket No. 00-2688; Submitted on the Record;  
Issued March 12, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly calculated the amount of the overpayment that occurred in appellant's case.

In the prior appeal of this case,<sup>1</sup> the Board found that the Office had to recalculate the amount of the overpayment. The Office had correctly determined that the amount of the overpayment must be calculated by determining appellant's loss of wage-earning capacity during the period he worked and subtracting the amount due for loss of wage-earning capacity from the amount appellant was paid for total disability during that period. The Office had used an incorrect pay rate, however, to calculate appellant's compensation after May 3, 1990 and erroneously used appellant's gross earnings rather than his net earning for his work as a real estate agent in computing his loss of wage-earning capacity.

The Board further found that appellant was not without fault in the creation of the overpayment, as he knew or should have known that the compensation checks he received for total disability while he worked and had earnings were incorrect. The Board affirmed the Office's finding of fault and remanded the case for a recalculation of the amount of the overpayment. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On remand the Office obtained a statement of operating expenses from appellant and deducted these expenses from his gross earnings. The Office also recalculated appellant's loss of wage-earning capacity using his recurrent pay rate. Subtracting the amount due for loss of wage-earning capacity from the amount appellant was paid for total disability during the periods in question, the Office determined that the overpayment amounted to \$2,043.87 for the period November 1, 1990 to February 28, 1991 and \$12,272.52 for the period October 1, 1991 to October 31, 1993, for a total of \$14,316.39.

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<sup>1</sup> Docket No. 97-2165 (issued July 12, 1999).

On November 4, 1999 the Office issued a preliminary determination that an overpayment of \$14,316.39 occurred in appellant's case. The Office also made a preliminary determination that appellant was at fault in the matter. The Office requested that appellant complete an attached overpayment recovery questionnaire and submit documentation to support the income and expenses listed.

Appellant completed the overpayment recovery questionnaire and requested a prerecoumment hearing before an Office hearing representative. At the hearing, which was held on May 18, 2000, the hearing representative reviewed with appellant the income and expenses listed on the overpayment recovery questionnaire.

In a decision dated July 28, 2000, the hearing representative finalized the preliminary determination of November 4, 1999, finding that appellant received an overpayment of \$14,316.39. The hearing representative noted that the Board had affirmed the prior decision with respect to fault and that fault was therefore not an issue. In setting the amount of recovery, the hearing representative questioned some but accepted all of the expenses appellant listed and determined that appellant's monthly income exceeded monthly expenses by \$506.00. The hearing representative set the amount of recovery at \$500.00 per month.

The Board finds that the Office properly calculated the amount of the overpayment that occurred in appellant's case.

The record shows that, on remand, the Office deducted appellant's operating expenses from his gross earnings and recalculated loss of wage-earning capacity using his recurrent pay rate. The Office properly followed the Board's instructions and properly subtracted the amount due for loss of wage-earning capacity from the amount appellant was paid for total disability during the periods in question. The Board will therefore affirm the Office's July 28, 2000 decision finding an overpayment of \$14,316.39.

The Office correctly observed that fault was no longer an issue; the Board had already found that appellant was not without fault in the creation of the overpayment, as he knew or should have known that the compensation checks he received for total disability while he worked and had earnings were incorrect.

As the Board noted in its prior decision, the Office continued to pay compensation for temporary total disability after May 3, 1990 until appellant returned to light-duty work on June 30, 1994. He was therefore not currently in receipt of compensation when the Office issued its July 28, 2000 decision. Because collection of the overpayment in this case cannot be made by adjusting later payments but must be recovered by other means, the Board has no jurisdiction to review the \$500.00 per month rate of recovery set by the Office, which appears to have left appellant a total of \$6.00 in disposable current income per month.<sup>2</sup>

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<sup>2</sup> The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled. 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

The July 28, 2000 decision of the Office of Workers' Compensation Programs is affirmed on the issue of amount of overpayment.

Dated, Washington, DC  
March 12, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member