

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES H. BRANCH and U.S. POSTAL SERVICE,  
POST OFFICE, Los Angeles, CA

*Docket No. 01-386; Submitted on the Record;  
Issued March 8, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$45,563.16 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$550.00 from appellant's compensation payments every four weeks.

The Board finds that appellant received a \$45,563.16 overpayment of compensation.

On November 2, 1972 appellant, then a 29-year-old mail carrier, sustained an employment-related left meniscus tear and cervical and lumbosacral strains.<sup>1</sup> He received compensation for various periods of total and partial disability.<sup>2</sup> During the period from May 1, 1994 to September 9, 2000, appellant was entitled to receive compensation for partial disability. By decision dated October 30, 2000, the Office determined that appellant received a \$45,563.16 overpayment of compensation; that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment; and that the overpayment would be recovered by deducting \$550.00 from appellant's compensation payments every four weeks. By decision dated November 7, 2000, the Office affirmed its October 30, 2000 decision.<sup>3</sup>

In the present case, appellant received total disability compensation for the period May 1, 1994 to September 9, 2000 despite the fact that he was only entitled to receive partial disability

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<sup>1</sup> He also sustained a prior employment-related neck and back injury on November 30, 1971.

<sup>2</sup> In the mid 1970s, appellant's compensation was adjusted to reflect his ability to earn wages as a telephone solicitor.

<sup>3</sup> In connection with the November 7, 2000 decision, the Office considered evidence which it had received prior to the issuance of the October 30, 2000 decision but had inadvertently failed to consider at that time.

compensation for this period. The record contains evidence which reflects that appellant received \$137,337.29 for this period even though he was only entitled to receive \$91,774.13. Therefore, the Office properly determined that appellant received a \$45,563.16 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act<sup>4</sup> 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.<sup>5</sup> 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."<sup>6</sup> 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...."<sup>7</sup>

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

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

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8129(a).

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”<sup>8</sup>

In May 1994 appellant began to receive checks for total disability compensation even though he was only entitled to receive checks for partial disability compensation. Given that these checks for total disability compensation were approximately 40 percent greater in amount than the checks for partial disability compensation which he received for many years, it is apparent that appellant accepted a payment which he or she knew or should have known to be incorrect. Such a finding is further bolstered by the fact that appellant received these improper checks for an extended period of more than six years, the period from September 9, 1990 to May 1, 1994. The record contains copies of the checks which clearly indicate the periods for which they provide compensation.

Appellant has not advanced any reason why he believed that he was entitled to total disability compensation for the period September 9, 1990 to May 1, 1994. Even though the Office may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed he had returned to work, this does not excuse appellant's acceptance of such checks which he knew or should have known were incorrect and which should have been returned to the Office.<sup>9</sup> For these reasons, the Office properly determined that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$550.00 from appellant's compensation payments every 4 weeks.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the 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 relevant factors, so as to minimize any hardship.”<sup>10</sup>

The record supports that, in requiring repayment of the overpayment by deducting \$550.00 from appellant's continuing compensation payments every 4 weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. The Office properly explained that the financial information submitted by appellant did not show that the proscribed method of overpayment recovery would be improper. The

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<sup>8</sup> 20 C.F.R. § 10.433(c).

<sup>9</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>10</sup> 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

Office correctly noted that a number of the monthly expenses claimed by appellant were undocumented or included within other listed expenses.<sup>11</sup> Therefore, the Office properly required repayment of the overpayment by deducting \$550.00 from appellant's compensation payments every four weeks.

The November 7 and October 30, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
March 8, 2002

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> Moreover, it appears that appellant did not disclose the full amount of his monthly income in that he failed to list the \$1,134.00 in Office compensation he received each month.