

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DUONG V. LY and U.S. POSTAL SERVICE,
POST OFFICE, Monrovia, CA

*Docket No. 02-1687; Submitted on the Record;
Issued November 25, 2002*

DECISION and ORDER

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

The issues are: (1) whether an overpayment of \$1,902.21 occurred in appellant's case; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and therefore not entitled to waiver of the overpayment.

Appellant's claim filed on June 8, 1999 after he bent down to pick up mail bundles was accepted for a lumbar strain with radiculopathy. The Office authorized a lumbar laminectomy at L4-5, which was done on August 31, 1999. Appellant, a part-time flexible employee, returned to limited duty for four hours a day on February 22, 2000.¹

On July 11, 2000 the Office found that an overpayment of compensation had occurred because appellant had returned to work on February 22, 2000 but had continued to receive wage-loss compensation until May 20, 2000. On October 18, 2000 the Office informed appellant of the overpayment of \$1,902.21 and determined that he was at fault in creating the overpayment because he should have known that he could not return to work and still receive wage-loss compensation. The Office informed appellant of his options to request a telephone conference, a hearing or a decision on the record, and to submit financial documents showing his monthly income and expenses.

Appellant disagreed with the Office's finding of fault, requested a hearing and submitted financial documents. Following the hearing on March 27, 2001, the hearing representative found that appellant was at fault in creating the overpayment and that he should repay the amount at the rate of \$50.00 a month.

¹ The hearing representative determined on June 10, 2002 that appellant was not entitled to wage-loss compensation from November 29, 2000 to October 7, 2001 because he was a part-time flexible clerk when injured and thus was not guaranteed any set number of hours of work. Appellant has not appealed this decision to the Board in this case.

The Board finds that the Office properly determined that appellant received a \$1,902.21 overpayment of compensation.

The basic rate of compensation under the Federal Employees' Compensation Act² is 66 and 2/3 percent of the injured employee's monthly pay.³ When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation augmented at eight and one-third percent.⁴ In this case, appellant claimed no dependents and was thus entitled to the two-thirds' rate.

Section 8114(b)⁵ provides for computing monetary compensation for disability or death on the basis of monthly pay, which is defined as one twelfth of the average annual earnings of the employee at the time of injury.⁶ If the employee worked substantially the whole year immediately preceding the injury but his annual rate of pay was not fixed, average annual earnings are determined by multiplying his daily wage or the average if the daily wage fluctuated, by 300 if he was employed for 6 days a week, by 280 if employed for 5.5 days a week or by 260 if employed for a 5-day week.⁷

The Board finds that the Office properly computed appellant's rate of pay, pursuant to section 8114(d)(1)(B). The employing establishment indicated that appellant's work schedule varied but that he did work in his date-of-injury position for a year. His hourly rate at the time of injury was \$13.91 and his daily work hours averaged 6.41 over a 5-day week. The Office multiplied the hourly wage by the number of work hours to arrive at \$89.16 per day. That figure was multiplied by 260 to show average annual earnings of \$23,182.41, which was divided by 52 to equal the weekly pay rate of \$445.82 used by the Office in calculating appellant's wage-loss compensation of \$1,188.84, less deductions for optional life insurance, every 4 weeks.

Despite his return to four hours' work on February 22, 2000, the record shows that appellant continued to receive the same amount of wage-loss compensation -- \$1,188.84 -- instead of the reduced amount of \$624.14 for the 2.41 hours per day to which he was entitled. Subtracting the appropriate amount from the compensation he was paid from February 22 to May 20, 2000 resulted in the \$1,902.21 overpayment.

The Board further finds that appellant was at fault in the creation of the overpayment, which is not, therefore, subject to waiver.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8105(a).

⁴ 5 U.S.C. § 8105(b).

⁵ 5 U.S.C. § 8114(b).

⁶ 5 U.S.C. § 8114(c).

⁷ 5 U.S.C. § 8114(d)(1)(B).

Section 8129(a) of the 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.⁸ The only exception to this requirement must meet the tests set forth 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.”⁹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁰

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations provides in relevant part:

“(a) [The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of the benefits. A recipient who had done any of the following will be found to be at fault with respect to creating an overpayment:

(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 known to be incorrect. (This provision applies only to the overpaid individual.)

(b) 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.”¹¹

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. The Office found that appellant should have known that he

⁸ 5 U.S.C. § 8129(a).

⁹ 5 U.S.C. § 8129(b).

¹⁰ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

¹¹ 20 C.F.R. § 10.433 (1999).

could not continue to receive wage-loss compensation after he had returned to work. The December 17, 1999 letter sent to appellant stated that appellant would be paid until February 26, 2000 or his return to duty, whichever occurred first and emphasized in capital letters that appellant must notify the Office immediately when he returned to work.

The letter also informed appellant that the period of payment was shown on each check and that, if a payment included money for a period after his return to duty, that would constitute an overpayment, for which he would be responsible. Appellant had the option of returning the entire check to the Office, which would then calculate the correct amount, or estimating the amount of the overpayment and holding that amount until the Office requested repayment. Finally, the letter stated that to request additional compensation beyond February 26, 2000 appellant should file a CA-7 form for disability compensation through his employer, along with his treating physician's report on his disability.

Appellant returned to duty on February 22, 2000, but acknowledged at the hearing that he did not inform the Office. He subsequently claimed compensation for 2.41 hours a day by submitting CA-7 forms dated February 28, April 24 and June 30, 2000 in which he requested leave without pay intermittently. By submitting these forms appellant demonstrated that he had knowledge of the Office's December 17, 1999 letter informing him of the necessity of notifying the Office when he returned to work.

Appellant argued that the nurse assigned by the Office to assist his rehabilitation and the employing establishment were aware of his return to work and that their knowledge should have been sufficient to inform the Office. He also stated that he simply followed the instructions of the employing establishment in filing the CA-7 forms and that he was confused about the irregular payments he received and what they represented.

First, the December 17, 1999 letter to appellant clearly instructs him to notify the Office of his return to work and to return any compensation checks covering the period that coincides with his return. Second, the benefits statements that appellant received and submitted to the Office clearly outline the date of the check, the period covered and the amount.

Finally, the record demonstrates that appellant received a net disability payment of \$1,178.64 each 28 days from September 11, 1999 through May 20, 2000. Appellant should have known that he was not entitled to receive this amount after he returned to half-time work on February 22, 2000. His protestations to the contrary, the Board finds that appellant knew or should have known that he accepted compensation checks to which he was not entitled, pursuant

to section 10.433(a)(2).¹² Because appellant was at fault in creating the overpayment of compensation, the overpayment was not subject to waiver.¹³

The June 25, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 25, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹² 20 C.F.R. § 10.433(a)(2).

¹³ Because appellant was not receiving continuing disability compensation from the Office, the Board has no jurisdiction over the Office's recovery of the overpayment. *See John E. Martin, Jr.*, 49 ECAB 298, 303 (1998) (finding that, absent recovery of the overpayment from continuing compensation, the Board has no jurisdiction to review the Office's collection of the overpaid amount).