

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD LOVEJOY and U.S. POSTAL SERVICE,
MAIL PROCESSING CENTER, Elmira, NY

*Docket No. 02-1393; Submitted on the Record;
Issued October 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$754.99; and (2) whether appellant was without fault in the creation of the overpayment.

On November 2, 1987 appellant, then a 45-year-old postal distribution clerk, filed a notice of traumatic injury alleging that he strained his lower back on November 2, 1987 when he was loading and unloading mailbags weighing 50 to 60 pounds. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral sprain and paid appropriate compensation benefits. Appellant returned to limited-duty work in 1991 and stopped work in 1993.

In June 2000, Dr. Sury M. Putcha, a Board-certified orthopedic surgeon, found that appellant could return to limited-duty work for eight hours per day. He accepted a job offer and returned to full-time limited duty on November 18, 2000. Appellant's annual salary was \$38,684.00 (\$743.92 per week or \$18.59 per hour). Since appellant also had a nighttime job his wages increased to \$780.62 per week.

By decision dated August 20, 2001, the Office found that appellant was at fault in the creation of an overpayment in the amount of \$754.99 for the period November 18 to December 2, 2000.¹

By decision dated October 22, 2001, the Office finalized the August 20, 2001 decision.

The Board finds that appellant received an overpayment of compensation in the amount of \$754.99 for the period November 18 to December 2, 2000.

¹ The Office vacated an earlier decision dated August 6, 2001, finding that appellant was not at fault in the creation of the overpayment.

The primary purpose of workers' compensation is to provide an adequate substitute for an employee's work-related loss of wage-earning capacity. When an employee returns to work and resumes earning wages the same or greater than those earned before, the work injury compensation is no longer payable.²

The record establishes and appellant does not dispute, that he began full-time work on November 18, 2000. Office computer records establish that appellant received compensation for partial disability in the amount of \$1,409.32 for the period November 5 to December 2, 2000. Appellant's receipt of compensation for loss of wage-earning capacity should have stopped on November 18, 2000 when he began full-time work. Appellant did not submit any evidence indicating that he did not receive an overpayment of compensation. On the contrary, the record shows that the amount of \$1,409.32 was directly deposited into appellant's checking account, check number 3693, when he was already working. Since appellant was working full time from November 18 to December 2, 2000 and was still receiving compensation benefits, a partial overpayment was created.³

The Board further finds that appellant was not at fault in creating the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act⁴ 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. 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 [the Act] or would be against equity and good conscience."⁵

No waiver of overpayment 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 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an 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 *Chauncey L. Moore*, 34 ECAB 553 (1983).

³ Appellant's appeal to the Board reveals that he was under the impression that he allegedly cashed a check in the amount \$754.99, not comprehending that it was a partial overpayment that was created and subtracted from the full amount of \$1,409.32.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129.

(2) Failed to furnish information which the individual knew or should have know 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 found that appellant was at fault in the creation of the overpayment because he accepted compensation benefits when he had already returned to full-time work. The Board notes, however, that the beginning date of the period of compensation was November 5, 2000 and appellant only returned to full-time work on November 18, 2000. The record indicates that appellant did not physically receive the check in question. The Office directly deposited the amount to his account, without other notice as to the amount of the deposit. The Board finds that, since the money was directly deposited into appellant’s checking account and appellant began work in the middle of the pay period, there was no way that appellant knew or should have known that the payment would be incorrect. For this reason the Board finds that appellant was not at fault in the creation of the overpayment and remands the case to the Office to determine the question of waiver.

The October 22 and August 20, 2001 decisions of the Office of Workers’ Compensation Programs are affirmed on the issue of overpayment and the issue of fault is set aside and remanded for further development.

Dated, Washington, DC
October 22, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

⁶ 20 C.F.R. § 10.433(a).