

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM F. SALMONSON and U.S. POSTAL SERVICE,
POST OFFICE, Duluth, MN

*Docket No. 02-1448; Submitted on the Record;
Issued October 9, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant is at fault in the creation of a \$1,621.36 overpayment from December 17, 1994 to January 7, 1995.

On March 13, 1987 appellant, then a 35-year-old letter sorting machine clerk, filed a claim asserting that his carpal tunnel symptoms were a result of his federal employment. The Office of Workers' Compensation Programs accepted his claim for mild bilateral carpal tunnel syndrome and bilateral mononeuritis not otherwise specified. Appellant sustained a recurrence of disability on October 30, 1989 and had surgery on both wrists in December of that year. He received a schedule award for permanent impairment to both arms.

Beginning September 1, 1992, appellant received compensation for temporary total disability on the periodic rolls. On November 9, 1992 the Office notified appellant of the following:

“In order to avoid an overpayment of compensation, *NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK*. Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result.” (Emphasis in the original.)

On May 2, 1994 appellant completed a Direct Deposit Sign-up Form authorizing the Office to send his compensation payments to his credit union for direct deposit to his account.

Effective December 17, 1994, appellant returned to full-time duty with the employing establishment. The Office issued its final check on the periodic rolls on January 7, 1995. The check was for \$2,040.44 and covered the period December 11, 1994 to January 7, 1995. The Office deposited this check directly to appellant's account.

On October 2, 1997 the Office made a preliminary finding that an overpayment of \$1,621.36 had occurred in appellant's case because he returned to work on December 17, 1994 and continued to receive compensation for temporary total disability through January 7, 1995. The Office also made a preliminary finding that appellant was at fault in the matter for the following reason: "You accepted payment you know or reasonably should have known that you were not entitled to."

The Office asked appellant to complete and submit an overpayment recovery questionnaire together with any supporting financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payment, pay slips and other records to support the income and expenses listed on the enclosed questionnaire. The Office advised appellant as follows:

"This financial information will assist us in determining whether or not to waive the overpayment. In the event that the preliminary determination is upheld or waiver is not granted, this information will be used to decide how to recover the overpayment. It should be noted that when a final decision is made that a claimant was at fault in the creation of the overpayment, no basis exists to waive recovery of the overpayment. No collection action shall be taken until a final decision on your request for waiver and/or reconsideration is reached."

Appellant requested a review of the written record by an Office hearing representative.

In a decision dated January 16, 2002, the hearing representative found that an overpayment of \$1,621.36 occurred in appellant's case because he had returned to work on an eight-hour basis on December 17, 1994 and continued to receive compensation for temporary total disability until January 7, 1995. The hearing representative found that appellant was at fault in creating the overpayment "because he was advised, on November 9, 1992, of his responsibility to return any check sent to him after his return to work in order to prevent an overpayment but failed to take this action." In view of this, the hearing representative found that appellant accepted a check, which he knew or should have been expected to know represented an incorrect payment.

The Board finds that appellant was not at fault in the creation of a \$1,621.36 overpayment from December 17, 1994 to January 7, 1995.

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 received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has 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 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 (this provision applies only to the overpaid individual).¹

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.²

An overpayment of compensation occurred in this case when appellant returned to full-time work on December 17, 1994 and received compensation for temporary total disability for the period December 11, 1994 to January 7, 1995. The compensation check dated January 7, 1995 thus covered two periods: a period of total disability through December 16, 1994, for which appellant remained entitled to compensation and a period of full-time employment from December 17, 1994 to January 7, 1995, for which he was not entitled to compensation. It is during this latter period that the overpayment occurred.³

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, namely, that he accepted a payment which he or she knew or should have known to be incorrect. This case, however, is distinguishable from those in which a claimant returns to work, subsequently receives a compensation check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation but decides nonetheless to cash or deposit the check. In such cases the cashing or depositing of the check has established the acceptance necessary under the third criterion above.⁴ In this case, appellant authorized the Office to deposit his compensation directly to his bank account. After appellant returned to work on December 17, 1994 he received no check in the mail. Under the facts of this case, appellant had no opportunity to make a decision on the January 7, 1995 check before it was deposited to his account.

The Board finds that under the circumstances of this case the Office has not presented sufficient evidence to establish that appellant accepted a payment which he knew or should have known to be incorrect. The Board will, therefore, reverse the Office's finding of fault and remand the case to the Office for further development and a final decision on the issue of waiver.

¹ 20 C.F.R. § 10.433(a) (2001).

² *Id.* § 10.433(b).

³ The Office explained to appellant the calculation of the amount of the overpayment in a letter dated May 29, 2002.

⁴ *E.g., Gerald A. Karth*, 36 ECAB 503 (1985) (holding that the claimant had an obligation to return any checks to the Office after his return to work).

The January 16, 2002 decision of the Office of Workers' Compensation Programs is reversed in part and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
October 9, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member