

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARRON C. HAWKINS and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

*Docket No. 01-226; Submitted on the Record;
Issued March 20, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$11,885.00 was created; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and thus was not entitled to waiver of recovery of the overpayment under section 8129(a).

On August 5, 1997 appellant, then a 35-year-old clerk, filed a traumatic injury claim (Form CA-1), alleging he injured his right shoulder while lifting a shelf. The Office accepted the claim for dislocated right shoulder and authorized a right shoulder arthroscopy.¹

Appellant filed a claim for a schedule award on April 21, 1999. On June 15, 1999 the Office issued appellant a schedule award for a 34 percent permanent impairment of his right arm. The award was to run from August 15, 1999 through June 6, 2001. The Office informed appellant that he would receive \$2,377.00 every four weeks.

In a letter dated June 17, 1999, appellant requested to receive the balance of his schedule award in a lump sum. Appellant inquired as to the status of his request for a lump-sum payment in a letter dated July 15, 1999. In addition, he stated he realized that by accepting a lump-sum payment he would "not be eligible to receive compensation until the year 2001."

On August 9, 1999 appellant agreed to a lump-sum settlement which paid him \$54,423.00 in payment of compensation for a commuted value of his schedule award which was payable from August 15, 1999 to June 6, 2001.

In a letter dated November 20, 1999, appellant requested clarification from the Office as to whether the three checks he had received in the amount of \$2,377.00 each would be considered an overpayment.

¹ Appellant was terminated from his employment effective March 3, 2000.

The Office issued a preliminary determination of an overpayment on January 13, 2000. The Office stated that it calculated the overpayment of compensation in the amount of \$11,885.00 by determining the amount of compensation appellant received while inadvertently receiving payments during the period August 15, 1999 to January 1, 2000 for his schedule award when he had accepted a lump-sum payment for the balance of his schedule for the period August 15, 1999 to June 2, 2001. The Office found that appellant was at fault in the creation of the overpayment as the lump-sum statement he signed stated he understood he was not entitled to further monetary compensation during the duration of the award.

In a letter dated January 27, 2000, appellant requested an oral argument which was held on July 13, 2000.

By decision dated October 17, 2000, the hearing representative finalized the overpayment determination in the amount of \$11,885.00, finding appellant was at fault in the creation of the overpayment as he received a lump-sum payment for his schedule award and received compensation benefits for his schedule award during the period August 15, 1999 to January 1, 2000. The hearing representative therefore found that the overpayment was not subject to waiver and that appellant should repay the entire amount.

The Board finds that the Office properly found an overpayment of \$11,885.00 in appellant's case.

The Board finds that the Office's calculations and the factual information concerning appellant's compensation and schedule award is accurate. The record reflects, and appellant does not dispute, that appellant received a check in the amount of \$54,523.00 in a lump-sum payment for the remainder of his schedule award entitlement and that he received five additional checks in the total amount of \$11,885.00. The Board, therefore, finds that the compensation he received for the period August 15, 1999 to January 1, 2000 is an overpayment of compensation.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment in compensation and, therefore, the overpayment is not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office unless "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 conscious."²

Section 10.433(a) of the Office's regulation provides:

"[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

² 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

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 in 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).³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. The Office has the burden of proof in establishing that appellant was at fault in helping to create the overpayment.⁴ Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments, which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported and ability, efforts and opportunities to comply with reporting requirements.⁵ Thus, an individual will be found to be at fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances, which may affect entitlement to, or the amount of, benefits.⁶ The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he or she knew or should have expected to know he or she was not entitled.⁷

In this case, the Board finds that appellant should have been aware that he was not entitled to receive the compensation checks for his schedule award when he had accepted a lump-sum payment in lieu of payments every four weeks. Appellant acknowledged in a letter dated July 15, 1999 that he understood that by accepting a lump-sum payment that he would "not be eligible to receive compensation until the year 2001." The Board finds that under the circumstances of this case the Office properly found that appellant reasonably knew or should have known that he was not entitled to receive compensation for this period. Appellant was, therefore, at fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$11,885.00 is not subject to waiver.⁸

³ 20 C.F.R. § 10.433 (1999); see *Sinclair L. Taylor*, 52 ECAB ____ (Docket No. 00-607, issued January 23, 2001); see also 20 C.F.R. § 10.430.

⁴ *Danny L. Paul*, 46 ECAB 282 (1994).

⁵ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁶ *Id.*

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ See *John L. Wolf*, 48 ECAB 148 (1996).

The October 17, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member