

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN L. STRINGER and U.S. POSTAL SERVICE,
NORTHEAST STATION, Columbia, SC

*Docket No. 03-404; Submitted on the Record;
Issued March 18, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of the overpayment and, therefore, it was not subject to waiver.

This case has been before the Board previously. By decision dated September 22, 2000, the Board found the case not in posture for decision because the record before the Board was incomplete. The Board remanded the case to the Office to secure relevant information regarding appellant's receipt of benefits from the Department of Veterans Affairs (VA).¹ Upon reconstruction of the record, in a decision dated November 15, 2000, the Office found that the evidence of record supported that appellant received dual benefits for the period April 3 through June 5, 1996 and that he failed to make an election when offered by the Office. The Office thus found that an overpayment in compensation in the amount of \$2,874.98 was created.² Appellant again filed an appeal with the Board, and in a decision dated June 24, 2002, the Board found that an overpayment in compensation in the amount of \$2,874.98 had been created. The Board, however, again remanded the case to the Office for a finding as to whether appellant was at fault in the creation of the overpayment and, if found to be not at fault, whether appellant was entitled to waiver. The law and the facts as set forth in the previous Board decisions are incorporated herein by reference.

¹ Docket No. 99-2069.

² The Board notes that the Office did not forward a complete record to the Board prior to the issuance of the September 22, 2000 decision. The record also contains a May 28, 1999 decision in which the Office waived an overpayment in compensation in the amount of \$744.00 and a July 6, 1999 decision in which the Office found that appellant's actual earnings as a modified carrier represented his wage-earning capacity. In an August 15, 2000 decision, Docket No. 99-1242, the Board found that appellant failed to establish that he sustained an emotional condition in the performance of duty.

Subsequent to the Board's June 24, 2002 decision, by letter dated July 22, 2002, the Office informed appellant that it had made a preliminary determination that appellant was at fault in the creation of the overpayment in the amount of \$2,874.98 that he had received for the period April 3 through June 5, 1996. The Office stated that he was found at fault because he failed to disclose that he was also receiving benefits from the VA on three Office CA-8 forms and that on three separate occasions he failed to respond when notified by the Office that he was receiving dual benefits, and that an election would have to be made or an overpayment would be created. Hearing nothing further from appellant, by decision dated September 4, 2002, the Office finalized the preliminary finding that appellant was at fault and, thus, not entitled to waiver. The Office requested that appellant repay the overpayment in a lump sum. The instant appeal follows.

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

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment in 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 conscience."³

Section 10.433(a) of the Office's regulation provides that 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 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)."⁴

In this case, the Office applied the second 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.⁵ In determining whether a claimant is at fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.⁶ Factors to be weighed are the individual's

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

⁴ 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.

⁵ *Danny L. Paul*, 46 ECAB 2822 (1994).

⁶ *Stephen A. Hund*, 47 ECAB 432 (1996).

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.⁷ 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.⁸ 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.⁹

In the instant case, the Board finds that appellant was at fault in the creation of the overpayment in compensation. On Office CA-8 forms dated May 7 and June 12, 1996, appellant failed to indicate that he was receiving benefits from the VA. By letters dated October 2, 1997, January 8 and February 12, 1998, the Office informed appellant that, because he was receiving dual benefits, he needed to complete election forms or an overpayment in compensation would be created. The Board therefore finds that under the circumstances of this case the Office properly found that appellant failed to provide information which he knew or should have known to be material. He was, therefore, at fault under the second standard outlined above and recovery of the overpayment of compensation in the amount of \$2,874.98 is not subject to waiver.¹⁰

Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.¹¹

⁷ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁸ *Id.*

⁹ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

¹⁰ *See John L. Wolf*, 48 ECAB 148 (1996).

¹¹ *Robert S. Luciano*, 47 ECAB 793 (1996).

The decision of the Office of Workers' Compensation Programs dated September 4, 2002 is hereby affirmed.

Dated, Washington, DC
March 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member