

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. SACCHETTI and U.S. POSTAL SERVICE,
POST OFFICE, Boston, MA

*Docket No. 03-1494; Submitted on the Record;
Issued November 25, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$8,139.01 existed; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the full amount of the overpayment is recoverable in a lump-sum payment.

The Office accepted appellant's claim for lumbosacral strain, herniated nucleus pulposus at the L4-5 level with subsequent reparative surgery and consequential blood clot in the right leg.

In the preliminary determination dated February 22, 2002, the Office found that appellant received an overpayment in the amount of \$8,139.01, because the Office erroneously paid appellant compensation for temporary total disability while appellant was working from August 15, 1999 through May 12, 2000 and from February 6 through 24, 2001. In another preliminary determination dated February 22, 2002, the Office found that appellant received an overpayment in the amount of \$1,235.41, because the Office did not deduct health insurance and optional life insurance from the compensation payment for the period May 13, 2000 through February 5, 2001. The Office found that appellant was not at fault in the creation of the overpayments. In both preliminary determinations, the Office informed appellant that if he disagreed with the fact or the amount of the overpayment or believed that he should receive a waiver instead of repaying the overpayment, he had the right to submit new evidence to support his contention and could request a prerecoupment hearing within 30 days of receipt of the letter and submit appropriate evidence to justify his request. The Office enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived.

Appellant requested an oral hearing before an Office hearing representative, which was scheduled for October 24, 2002. On that date appellant's attorney opted to request a written review of the record for both overpayments. Appellant submitted a financial statement indicating his weekly income and expenses and his assets and liabilities. He also submitted an "affidavit," in which he stated that his father-in-law, Walter Lynn, gave his family a substantial

amount of money over the past several years to help meet their living needs and they rented an apartment from his brother-in-law at below market rates. In an “affidavit,” Mr. Lynn stated that over the past five years he gave appellant and his wife approximately \$16,000.00 to \$18,000.00 to help them with their living expenses. Mr. Lynn stated that the money was a gift and he did not expect to be repaid.

By decision dated March 13, 2003, the Office finalized the preliminary determination, finding that there was an overpayment created in the amount of \$8,139.01, but the preliminary determination must be modified to reflect that appellant was at fault in the creation of the overpayment. The Office hearing representative noted that the Form EN-1049, issued to appellant on August 12, 1999 informed him that he must advise the Office if he returned to his former job and if he obtained work other than his former job, his pay rate should include not only cash wages but “wages in kind.” Appellant was also informed that each payment showed the period for which payment was paid and if he worked any portion of this payment, he should return the payment to the Office even if he had already advised the Office that he was working.

The Office hearing representative stated that on September 11, 1999 a periodic rolls check covering the period August 15 through September 11, 1999 was issued to appellant and that he was “clearly on notice” at the time of the overpayment that he was not entitled to both full temporary total disability benefits and wages for part-time employment. The Office hearing representative found that appellant would have seen no change in his compensation check subsequent to his return to work and, therefore, reasonably should have known that an overpayment was occurring. The Office hearing representative found that, since appellant was at fault, no waiver of the overpayment was possible.

The Office hearing representative considered appellant’s financial status and stated that he had monthly indebtedness of approximately \$189.40, obtained by subtracting his monthly expenses of \$2,896.92 by monthly income of \$2,707.52. He noted that appellant had \$18,810.91 in liabilities reflecting appellant’s credit cards from Sears, Providian, Direct Merchants, Fleet Bank Loan and Uninsured Medical. The Office hearing representative noted that appellant was incapable of paying more than minimum payments toward his liabilities with those payments being directed toward maintaining and keeping his accounts open. He considered that the payments from appellant’s father-in-law, Mr. Lynn, to appellant, which Mr. Lynn stated were \$16,000.00 to \$18,000.00 a year, or an average of \$17,000.00 a year when divided over five years, yielded a payment of \$3,400.00 per year. The Office hearing representative determined that the payment of \$3,400.00 would cover appellant’s \$2,270.80 annual indebtedness plus approximately \$1,127.20 to be applied to his revolving accounts or liabilities. He stated that, “[a]lthough the claimant continues to get approximately \$1,647.00 in monthly workers’ compensation benefits, it is the opinion of this reviewer that no repayment plan can be established and, therefore, compromise of sum [some] or all of the principle or interest in this case cannot be considered.” The Office hearing representative stated that “[g]iven the extent of the claimant’s monthly losses and the inability to establish a reasonable payment plan,” the full amount of the overpayment of \$8,139.01 must be recovered and was due payable.¹

¹ In another decision dated March 13, 2003, the Office hearing representative finalized the preliminary determination regarding appellant’s overpayment of \$1,235.41 and found that the overpayment should be waived.

The Board finds that the Office properly determined that an overpayment of \$8,139.01 was created.

The record contains worksheets and computer printouts from the Office, showing that while appellant was working four hours a day the Office paid him \$16,262.48 from August 15, 1999 through May 12, 2000 and from February 6 through 24, 2001 and paid appellant total disability compensation for that time period in the amount of \$8,123.47, creating an overpayment of \$8,139.01. There is no evidence in the record to the contrary. Therefore, the Office properly determined that an overpayment in the amount of \$8,139.01 occurred.

The Board finds, however, that the case is not in posture for decision regarding the issue of whether appellant was at fault in the creation of the overpayment.

Section 8129(b) of Federal Employees' Compensation Act² 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 be against equity and good conscience."³ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁴

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation provides in relevant part that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.⁵

In this case, in its February 22, 2002 preliminary determination, the Office informed appellant that he was without fault in the creation of the overpayment. Appellant requested a written review of the record and submitted a financial statement showing his income, assets and liabilities. Following the receipt of this evidence, the Office hearing representative issued the March 13, 2003 decision, which changed the Office's determination to a finding of fault and finalized the determination without providing appellant an opportunity to respond.

Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁶ In *Califano v. Yamasaki*,⁷ the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected

² 5 U.S.C. § 8129(b).

³ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁴ *Diana L. Booth*, 52 ECAB 370 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.433(a) (1999).

⁶ See generally FECA Circular No. 82-48, "Overpayments and Waiver" (issued December 1, 1982).

⁷ 442 U.S.A. 682 (1979).

overpayments until, *inter alia*, it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act and the Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Federal Employees' Compensation Act.⁸

The Board finds that, after the Office informed appellant that it had made a preliminary determination that he was without fault, it erred when it subsequently changed the preliminary determination to a finding of fault without providing appellant the opportunity to respond. Appellant was not given the opportunity to request a hearing on the issue of fault, nor was he allowed to submit written evidence following a finding of fault.⁹ His earlier request for a written review of the record was based on a preliminary determination that he was without fault and, therefore, the evidence he had the opportunity to submit was not directed toward that issue. Because of the inherent unfairness in the procedure employed by the Office, this case must be remanded for further consideration.¹⁰ On remand, the Office should make a preliminary determination on the issue of fault and afford appellant a proper opportunity to submit evidence and request a hearing on the issue of fault.

⁸ This policy was announced in FECA Bulletin No. 80-35, issued October 20, 1989 and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994). See *Kathleen D. Abbott*, 53 ECAB _____ (Docket No. 01-423, issued December 19, 2001); *Earl D. Long*, 50 ECAB 464, 469 (1999).

⁹ Section 20 C.F.R. § 10.431(b) and (d) provides that in the preliminary determination the Office will advise an individual in writing whether or not he is at fault in the creation of the overpayment and that appellant has the right to present evidence, which challenges a preliminary finding that he was at fault. Section 20 C.F.R. § 10.432 provides that the individual may present the evidence challenging a finding of fault to the Office in writing or at a precoupment hearing, but he must present the evidence or request the hearing within 30 days of the date of the written notice of overpayment.

¹⁰ See *Kathleen D. Abbott*, *supra* note 8.

The March 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed regarding the fact that an overpayment of \$8,139.01 was created from August 15, 1999 through May 12, 2000 and from February 6 through 24, 2001, but is set aside on the issue of fault and waiver and remanded for further proceedings in accordance with this decision.

Dated, Washington, DC
November 25, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member