



## **FACTUAL HISTORY**

The Office accepted that on May 16, 1997 appellant, then a 53-year-old postal operations/finance clerk, sustained a lumbosacral strain as he was lifting heavy boxes of books. Thereafter, the Office expanded his claim to include a disc herniation at L4-5, for which he underwent a discectomy on June 4, 1998. Appellant received appropriate wage-loss compensation and medical benefits.

On February 2, 2000 the Office determined that appellant was working three hours per day, five days per week, and that his wage-earning capacity should be calculated. On March 22, 2000 the Office noted that appellant had been recently reemployed as a finance clerk with wages of \$160.20 per week. The Office advised that it would reduce his monetary compensation effective January 30, 2000 based upon his actual earnings. However, appellant was removed from his position due to his "physical inability to perform the major duties" of his position. His last day at work was May 26, 2000.

Payment of compensation for temporary total disability resumed August 12, 2000. Appellant was advised that if his employment status changed he was to immediately notify the Office and to return any incorrect payments.

On October 17, 2000 appellant contacted the Office to advise that he had resumed part-time work as of September 5, 2000.

On November 29, 2000 the Office noted that appellant had started working part time at the sports center on the base on September 5, 2000 making \$5.60 per hour working 20 hours per week. It calculated that this amounted to \$112.00 per week.

By letter dated November 29, 2000, the Office advised appellant that he had been re-employed with wages of \$112.00 per week effective September 5, 2000, and that it was reducing his compensation benefits effective December 3, 2000 based upon his actual earnings. The Office provided calculations of appellant's new compensation rate.

On January 25, 2001 the Office noted in a preliminary determination that appellant had received wages for working 20 hours per week beginning September 5 through December 2, 2000 at the same time he was being paid compensation for total disability. It calculated that appellant received an overpayment of compensation in the amount of \$1,017.14. The Office determined that appellant was at fault in the creation of the overpayment because he knew, or reasonably should have known, that he was not entitled to compensation for total disability at the same time he was earning wages working part time. The Office advised appellant that if he disagreed with the fact or amount of the overpayment, or the finding of fault, he could request a prerecoupment hearing. Appellant did not respond.

By decision dated April 16, 2003, the Office finalized the overpayment determination, finding the \$1,017.14 was due and owing.

In a letter dated August 6, 2003, the Office advised appellant that the amount of his debt, \$1,017.14 would begin to accrue interest if it was not paid. No response was received from appellant.

By letter dated October 22, 2003, the Office advised appellant that his overpayment had not been satisfied and that no response had been received about his repayment.<sup>1</sup> It indicated that the overpayment would be recovered by a withholding from his continuing compensation benefits, effective October 5, 2003. The Office indicated that \$50.00 would be deducted from each of his monthly compensation checks until the debt was satisfied.

### **LEGAL PRECEDENT -- ISSUE 1**

While an employee is receiving compensation under the Act,<sup>2</sup> he may not receive salary, pay or remuneration of any type from the United States.

### **ANALYSIS -- ISSUE 1**

Appellant was paid compensation for total disability beginning on August 12, 2000 but he resumed part-time work at the employing establishment on September 5, 2000, making \$5.60 per hour working 20 hours per week or \$112.00 per week. Therefore, an overpayment of compensation benefits was created.

On November 29, 2000 the Office found out that appellant had been working part time since September 5, 2000 and reduced his compensation benefits effective December 3, 2000 based upon his actual earnings. The Office noted that appellant received compensation for total disability during the period September 5 through December 2, 2000 while receiving wages for part-time employment. The Office properly determined that an overpayment of compensation was created in the amount of \$1,017.14 for the period September 5 through December 2, 2000 because appellant received dual benefits for that period, consisting of compensation for total disability at the same time he was receiving wages for working 20 hours per week.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of the Act<sup>3</sup> provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test 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

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<sup>1</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Overpayment Overview*, Chapter 6.0100 (September 1994). See also Chapter 6.200, *Initial Overpayment Actions*.

<sup>2</sup> 5 U.S.C. § 8116.

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

the purpose of the Act or would be against equity and good conscience.”<sup>4</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault. Section 10.433(a) and (b) of the implementing federal regulations provides, as follows:

“[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 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.”<sup>5</sup>

### **ANALYSIS -- ISSUE 2**

On January 25, 2001 the Office properly found that appellant was at fault in the creation of the overpayment based upon the third standard above: accepting a payment which he knew or should have been expected to know was incorrect. Appellant did not dispute the finding of fault, nor did he provide any evidence which would mitigate the Office’s finding or explain why he accepted compensation for total disability while he was receiving his salary for part-time work. On a Form EN1032 dated May 14, 2002 appellant indicated that he received \$5.96 per hour for work as a sales clerk beginning in September 2000. However, as he submitted this information only after the preliminary determination that an overpayment had occurred, appellant was properly found at fault in the creation of the overpayment. The Office found that appellant was at fault in the creation of the overpayment because at the time of payment, he accepted compensation for total disability which he knew or reasonably have known to be incorrect. The Board finds that appellant is at fault in the creation of the overpayment, and is not eligible for waiver of recovery of the overpayment.

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<sup>4</sup> 5 U.S.C § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.433(a), (b).

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441(b) of Title 20 of the Code of Federal Regulations<sup>6</sup> provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. Section 10.441(a) provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.

### **ANALYSIS -- ISSUE 3**

In this case, appellant failed to provide any financial information to aid the Office in determining the amount of compensation to be withheld from his continuing benefits. Therefore, the Office evaluated the nature and amount of compensation appellant received, the amount of money he earned at his part-time employment, and the extent of his future compensation payments. The Office determined that withholding \$50.00 per month from appellant's continuing benefits would most promptly collect the overpayment without causing undue financial hardship.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.<sup>7</sup> In this case, appellant has submitted no evidence to establish abuse of discretion on the part of the Office in determining the recovery from his continuing compensation.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to establish that there was an overpayment of compensation in the amount of \$1,017.14 because appellant received compensation for total disability for the period September 5 through December 2, 2000, while earning a salary for part-time employment. The Office properly determined that appellant was at fault in the creation of the overpayment because he knew or should have known that the payment of compensation for total disability was incorrect. The Office properly determined that the overpayment would be recovered without causing undue financial hardship at a rate of \$50.00 per month.

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<sup>6</sup> 20 C.F.R. § 10.433(a),(b).

<sup>7</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 16, 2003 be and hereby is affirmed.

Issued: October 25, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member