

**United States Department of Labor
Employees' Compensation Appeals Board**

RANDALL LUCKENBILL, Appellant

**and
U.S. POSTAL SERVICE, POST OFFICE,
Euless, TX, Employer**

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**Docket No. 05-919
Issued: November 9, 2005**

Appearances:
Randall Luckenbill, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 7, 2004 which found that he received an overpayment in the amount of \$13,629.57, for which he was at fault.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment of this case. On appeal, appellant contends that he was not at fault in creating the overpayment and the Office should waive recovery of the overpayment.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$13,629.57; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; thus, precluding waiver of recovery.

¹ The record also contains a separate decision dated December 7, 2004 which suspended appellant's compensation for failure to submit a Form EN1032. However, he has not appealed this decision.

FACTUAL HISTORY

On April 7, 1986 appellant, then a 27-year-old letter carrier, sustained an injury when he twisted to the left to pull a tray of flats and felt sharp pain in his left shoulder, back and right foot. The Office accepted his claim for lumbar strain, myofascial pain and herniated nucleus pulposus at L5. He underwent surgical exploration of the L5-S1, interspace with fusion and was paid compensation.² The Office also accepted appellant's claims for recurrences of disability on September 23, 1988 and May 14, 1993 and paid appropriate compensation.

By letter dated March 26, 1996, the employing establishment advised appellant of a position as a limited-duty city carrier. He returned to work for four hours a day on April 3, 1996.

By decision dated June 26, 1996, the Office found that appellant was reemployed as a limited-duty city carrier effective April 3, 1996, with actual wages of \$346.40 per week which fairly and reasonably represented his wage-earning capacity. The Office noted that he had a weekly loss of wage-earning capacity of \$339.15 and would be entitled to adjusted weekly compensation of \$260.75. The Office advised appellant that his compensation would be modified to \$1,043.00 every four weeks. The record reflects that he continued to work four hours per day in his position as a modified distribution clerk.

By letters dated October 2 and December 3, 2003, the Office requested that appellant provide information concerning any wages he may have earned from January 1, 2002 to the present and requested that he sign and complete an EN1032 form.

By decision dated January 5, 2004, the Office suspended appellant's compensation benefits because he failed to submit the Form EN1032.³ On February 3, 2004 the Office advised him that his compensation was reinstated as his Form EN1032 was received. By letter dated February 4, 2004, appellant was advised that he would receive a check in the amount of \$2,447.00, for the period December 28, 2003 to January 24, 2004 and that he would be returned to the periodic rolls as of January 25, 2004.

The Office continued to develop appellant's claim.

In a November 8, 2004 memorandum, the Office determined that an error had occurred when appellant's compensation was reinstated on December 28, 2003. The Office indicated that the compensation payments were issued as total disability as opposed to partial disability and thus, an overpayment in the amount of \$13,629.57 was created. The Office advised that appellant's compensation was corrected effective October 31, 2004. The Office found that he

² Appellant underwent a lumbar laminectomy on November 11, 1986. He returned to modified duty in 1987, went off work in October of 1988 and returned to work in December of 1989 for four hours a day to a modified light-duty position. Appellant subsequently returned to full-time computer work in May 1990 with permanent restrictions. In August 1994, he underwent a reexploration and discectomy at L5-S1 with posterior spinal implementation and fusion.

³ A periodic rolls sheet dated January 5, 2004 showed that appellant had a weekly wage-earning capacity of \$339.14.

was at fault because he accepted a payment which he knew or should have been expected to know was incorrect. The Office explained that prior to the reinstatement of appellant's benefits on December 28, 2003, his net compensation was \$1,223.00 and after reinstatement, his net compensation payments were in the amount of \$2,486.00. The Office noted that he did not return any of the payments. Appellant's compensation was corrected as of October 31, 2004.

On November 8, 2004 the Office completed an overpayment worksheet and determined that appellant's loss of wage-earning capacity was not taken into consideration when his compensation was reinstated on December 28, 2003 following suspension for failure to submit the Form EN1032. The Office determined that his wage-earning capacity was \$339.14 per week and calculated that appellant received payments totaling \$27,256.86 and that he should have received \$13,627.29 in compensation based on his loss of wage-earning capacity. This resulted in an overpayment of compensation in the amount of \$13,629.57, for the period December 28, 2003 to October 30, 2004.

On November 8, 2004 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$13,629.57, because he was paid compensation for total disability instead of partial disability for the period December 28, 2003 to October 30, 2004. The Office further notified him of its preliminary determination that he was at fault in the creation of the overpayment because appellant accepted a payment he knew or should have known to be incorrect. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods, including a request for a telephone conference, a request for a written review of the record or a request for a precouplement hearing. If he wished a waiver of the overpayment, he was specifically directed to submit financial information by completing an overpayment recovery questionnaire. Appellant did not respond.

By decision dated December 7, 2004, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$13,629.57, for the period December 28, 2003 to October 30, 2004. The Office found that he was at fault in the creation of the overpayment and, therefore, not entitled to waiver. The Office requested that appellant repay the overpayment in full or contact it to make appropriate arrangements for recovery.⁴

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁵ When an overpayment has been made to an individual 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 the individual is entitled.⁶

⁴ The Office did not make a final decision with respect to recovery of an overpayment from continuing compensation. Therefore the Board does not have jurisdiction over the issue. See *Teresa A. Ripley*, 56 ECAB ____ (Docket No. 05-189, issued May 9, 2005); *Levon H. Knight*, 40 ECAB 658 (1989).

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

ANALYSIS -- ISSUE 1

The record establishes that appellant received an overpayment of compensation in the amount of \$13,629.57, for the period December 28, 2003 to October 30, 2004. On November 3, 2004 the Office determined that an error had occurred when appellant's compensation payments were reinstated as of December 28, 2003 after being suspended due to nonreceipt of a requested EN1032. The Office explained that his compensation payments were inadvertently reinstated and processed as total disability instead of at the partial disability rate, even though appellant continued working four hours a day and that his compensation had been based on his loss of wage-earning capacity since 1996. The Office noted that the error caused appellant's payments to almost double, as he began receiving \$678.29 per week instead of \$339.14, based on his loss of wage-earning capacity. This created an overpayment in the amount of \$13,629.57, for the period his compensation benefits were reinstated until the error was corrected effective October 31, 2004. The Office determined that appellant was only entitled to receive payments every four weeks for partial disability in the amount of \$1,223.00, instead of the payments which he received or \$2,486.00. The Office calculated the amount of the overpayment by determining that he received payments totaling \$27,256.86 from December 28, 2003 to October 30, 2004 and that he should have received \$13,627.29, during this period based on his loss of wage-earning capacity. Subtracting \$13,627.29 from \$27,256.86 resulted in an overpayment of compensation in the amount of \$13,629.57 for the period. The Board will affirm the Office's December 7, 2004 decision regarding the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁷ provides that "[a]djustment 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 the purpose of this subchapter or would be against equity and good conscience." Section 10.433 of the Office's implementing regulations⁸ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

"(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."

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

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433.

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.⁹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that he was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.¹⁰ In this case, he received total disability payments as of December 28, 2003 and while he was working four hours a day, instead of the partial disability payments that he was entitled to based on his loss of wage-earning capacity. As noted, appellant was entitled to receive and had been receiving compensation payments in the amount of \$1,223.00, every four weeks. With the reinstatement of payments on December 28, 2003 he received compensation in the amount of \$2,486.00, an amount he knew or should have known to be incorrect.¹¹ He did not submit any response to the Office's preliminary notice and finding of fault. The Board finds that appellant knew or should have known that the compensation payment he received on and after December 28, 2003 were incorrect and were in an amount substantially greater than the compensation payments he had been receiving prior to the suspension of his benefits. Therefore, he is not without fault in the creation of the overpayment and waiver of the overpayment is not possible.

On appeal, appellant argues that he was without fault in creating the overpayment and that he was not familiar with workers compensation procedures. However, the fact that the Office may have been negligent in issuing him checks for total disability instead of partial disability does not excuse appellant's acceptance of such checks, which he knew or should have been expected to know were incorrect payments.¹² Further, appellant suggested that he may have been entitled to a schedule award and he thought the increase was related to a schedule award. However, there is no evidence in the record to suggest that he made a schedule award claim or was in receipt of benefits under a schedule award or that he had been apprised by the Office of any entitlement to a schedule award. In these circumstances, appellant's contention is without merit.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$13,629.57, which occurred for the period December 28, 2003 to October 30, 2004, for which he was at fault in creating.

⁹ 20 C.F.R. § 10.433(b).

¹⁰ See *Robin O. Porter*, 40 ECAB 421 (1989).

¹¹ See *Luis D. Alamo*, 35 ECAB 1045, 1050 (1984) (the Board found that the increase in appellant's monthly checks was so great that he should have known the payment was incorrect).

¹² See for example *Robert W. O'Brien*, 36 ECAB 541 (1985).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board