

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON A. DEAN and DEPARTMENT OF THE ARMY,
Fort Devens, Mass.

*Docket No. 96-2239; Submitted on the Record;
Issued October 22, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant was with fault in the matter of the overpayment that occurred in this case; and if so, (2) whether the Office properly set the rate of recovery.

On January 18, 1980 appellant, a mechanic, sustained an injury while in the performance of duty when he slipped and fell. The Office accepted his claim for low back strain and second-degree spondylolisthesis at L5-S1. Appellant received compensation for temporary total disability on the periodic rolls. Effective April 22, 1982 the Office reduced appellant's compensation by two thirds to reflect his capacity to earn wages as a motel manager.

From November 14, 1993 to November 13, 1994 the Office suspended appellant's compensation for his failure to submit an income and earnings statement. When he did submit the statement, the Office resumed his compensation at the total disability rate instead of the reduced wage-earning capacity rate, thereby creating an overpayment.

On December 13, 1994 the Office issued a preliminary determination finding that appellant was with fault in the matter of the overpayment on the grounds that he should have been aware that such an increase in compensation was unwarranted and that his compensation checks were incorrect. The Office requested that appellant provide financial information to assist it in determining the issue of waiver and, if necessary, the rate of recovery. The Office notified appellant that any request for a hearing on the issue of fault and waiver must be made within 30 days.

In a decision dated May 9, 1996, the Office finalized its preliminary determination. Noting that appellant did not respond to the preliminary determination, the Office set the rate of recovery at \$200.00 per month from continuing compensation to allow the overpayment to be refunded within a reasonable period of time.

The Board finds that the Office properly determined that appellant was with fault in the matter of the overpayment that occurred in this case.

Section 8129 of the Federal Employees' Compensation Act¹ 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 conscience." Thus, if the individual is with fault, the Office must recover the overpayment.

In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.²

The Office found that appellant was with fault under the third circumstance because he should have known that such an increase in his compensation was unwarranted and that his compensation checks were incorrect. The Office's finding is reasonable and is supported by the evidence. The record shows that the Office reduced appellant's compensation by two thirds -- a significant reduction -- to reflect his capacity to earn wages as a motel manager. Appellant received compensation at this rate for many years until the Office suspended his compensation for failure to submit an income and earnings statement. When the Office resumed compensation a year later, it did so at a rate that was approximately three times greater than appellant was previously receiving and with no explanation for the increase. Under these circumstances, and in the absence of evidence to the contrary, it was reasonable for the Office to find that appellant should have known that such an increase was unwarranted and that his compensation checks were incorrect. As appellant is with fault in the matter of the overpayment, the Office may not waive recovery.

The Board also finds that the Office did not abuse its discretion by finding that recovery should be made by deducting \$200.00 from appellant's continuing compensation checks.

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to 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 resulting hardship upon such individual.³ If additional written evidence is not submitted, or a hearing requested within the 30-day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action.⁴

In the present case, the Office requested that appellant provide financial information to assist it in determining the rate of recovery. Having received no response, the Office was unable

¹ 5 U.S.C. § 8129.

² 20 C.F.R. § 10.320(b).

³ *Id.* § 10.321(a).

⁴ *Id.* § 10.321(h).

to exercise its regulatory responsibility to consider an equitable repayment rate that would minimize any resulting hardship upon appellant. In order to recover the debt within a reasonable period of time, the Office decided to deduct \$200.00 from appellant's continuing compensation. The Board finds that, under these circumstances, the Office did not abuse its discretionary authority under 20 C.F.R. § 10.321(a).⁵

On appeal, appellant argues that he had requested a hearing date and time at which he could argue the preliminary decision. He argues that he was without fault in the matter of the overpayment because he had been fighting for an increase in payments for some time and reasonably thought that the increased payments were a result of reports submitted by a new physician in 1993. He also argues that he cannot afford to have \$200.00 a month removed from his paycheck. The Board's review of this case, however, is limited to the evidence in the case record that was before the Office at the time of its final decision.⁶ As the record before the Office at the time of its final decision contains no evidence of a hearing request, no argument on the issue of fault and no argument on the issue of rate of recovery, the Board is precluded from reviewing the merits of appellant's arguments for the first time on appeal.

The May 9, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 22, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Iris E. Ramsey*, 43 ECAB 1075 (1992).

⁶ 20 C.F.R. § 501.2(c).