

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM S. SIRHAN and DEPARTMENT OF THE ARMY,  
Fort Bragg, NC

*Docket No. 99-230; Submitted on the Record;  
Issued April 6, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether appellant was with fault in the matter of the overpayment that occurred in his case.

On September 20, 1994 appellant, an aircraft electrician, filed a claim asserting that he had developed numbness in both hands as a result of continuous repetitive motions during normal work maintenance. The Office of Workers' Compensation Programs accepted his claim for bilateral carpal tunnel syndrome and paid compensation for temporary total disability on the periodic rolls.

Following a reduction of his compensation based on his capacity to earn wages as a manager trainee, appellant notified the Office on January 7, 1997 that he wanted to receive disability retirement benefits in lieu of compensation. On March 10, 1997 he requested that the Office terminate workers' compensation payments immediately. He explained that he wished to be placed on disability retirement and needed a letter stating the exact date his compensation payments would be terminated. Upon receiving an election form from the Office, appellant elected retirement benefits in preference to any benefits under the Federal Employees' Compensation Act<sup>1</sup> effective March 31, 1997. Appellant certified that he understood that he was not entitled to receive compensation benefits and retirement benefits concurrently.

Despite appellant's election, the Office did not terminate compensation payments until September 13, 1997, creating an overpayment of \$4,323.75 from March 31 through September 13, 1997.

On February 5, 1998 the Office issued a preliminary determination that appellant was with fault in the creation of the overpayment because he accepted payments, to which he knew or reasonably should have known he was not entitled.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

Appellant completed an overpayment recovery questionnaire indicating that he no longer had the incorrectly paid checks and that he knew the overpaid amount was not due him as dual compensation was not allowed. During a telephone conference on March 20, 1998, appellant stated that he knew he was not entitled to both compensation and retirement checks. He explained that for a while he put the compensation checks in the bank so that when the Office requested the money it would be there. Other expenses occurred, however, and appellant had to borrow from this money.

In a decision dated July 20, 1998, the Office finalized its preliminary determination of fault, finding that appellant knew or reasonably should have known that he was not entitled to checks following the effective date of his election of retirement benefits.

The Board finds that appellant was with fault in the matter of the overpayment that arose in his case.

Section 8129 of the Act 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, the Office must recover an overpayment if the individual is with fault.

Section 10.320 of the implementing federal regulations<sup>2</sup> provides the following:

“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.”

Appellant is with fault in the creation of the overpayment under the third criterion. The evidence, including appellant’s election form, overpayment recovery questionnaire and the telephone conference of March 20, 1998, establishes that he accepted checks after the effective date of his election and that he knew or should have been expected to know that these payments were incorrect. Appellant understood that he was not entitled to receive compensation benefits and retirement benefits concurrently. He knew that the compensation checks he received after

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<sup>2</sup> 20 C.F.R. § 10.320.

he elected retirement benefits were not due him. Rather than return these checks, however, he accepted them by putting them in the bank.

In determining whether an individual is with fault in the creation of an overpayment, it is immaterial that the Office was also with fault in failing to terminate compensation payments following an election of retirement benefits. Regardless of the Office's fault, appellant should have returned the compensation checks, to which he knew he was not entitled.

The July 20, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
April 6, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member