

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLEVELAND C. ROCK and DEPARTMENT OF THE ARMY,
FORT A.P. HILL, Bowling Green, VA

*Docket No. 01-946; Submitted on the Record;
Issued February 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether an overpayment was created in appellant's case in the amount of \$24,098.53; (2) whether appellant was at fault in the creation of the overpayment and therefore the overpayment was not subject to waiver; and (3) whether the Office of Workers' Compensation Programs properly required recovery of the overpayment by withholding \$232.00 a month from appellant's continuing benefits.

On August 8, 1991 appellant, then a 59-year-old laborer, sustained a fractured right femur and lacerations of the right arm and leg while in the performance of duty.

Appellant began receiving compensation benefits for temporary total disability effective September 23, 1991 at the rate of \$356.80 each week.

In Office Form EN-1032 dated February 24, 1997, appellant indicated that he began working as a skycap in 1996 and received approximately \$300.00 per month.

By decision dated September 12, 2000, the Office reduced appellant's compensation on the grounds that he was re-employed on April 30, 1996 as a skycap with weekly wages of \$179.14.¹

By letter dated October 6, 2000, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$24,098.53 because he was employed in private industry commencing April 30, 1996 with a loss in wage-earning capacity but continued to receive compensation for total wage loss through September 9, 2000. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because he should have known that he was not entitled to receive compensation for total wage loss after his return to work on April 30, 1996.

¹ It is unclear from the record how the Office determined that appellant's average weekly earnings as a skycap were \$179.14. The Office's worksheet at R 318 indicates average weekly earnings of \$89.50.

By decision dated January 3, 2001, the Office determined that an overpayment had occurred in the amount of \$24,098.53 because appellant returned to work on April 30, 1996 but received compensation for total disability through September 9, 2000. The Office found that appellant was at fault in the creation of the overpayment because he should have known that he was not entitled to receive compensation for total wage loss after his return to work on April 30, 1996 and, therefore, accepted payments which he knew or should have known were incorrect.

The Board finds that this case is not in posture for decision.

The Federal Employees' Compensation Act² provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.³ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before the Office at the time of its final decision,⁴ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,⁵ it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.⁶

The Office stated in its January 3, 2001 decision that it had received no response from appellant following its October 6, 2000 letter advising him of an overpayment of compensation. However, the record submitted to the Board on appeal contains two documents from appellant, which were dated as being received by the Office prior to its January 3, 2001 decision. On October 31, 2000 the Office received from appellant a partially completed overpayment recovery questionnaire containing financial information and a request for a prerecoupment hearing. On November 6, 2000 the Office received from appellant a completed overpayment recovery questionnaire and another request for a prerecoupment hearing.

On remand the Office should schedule a prerecoupment hearing, as requested by appellant, and consider any additional evidence submitted by appellant regarding the overpayment of compensation.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125, 126 (1999).

⁴ 20 C.F.R. § 501.2(c).

⁵ 20 C.F.R. § 501.6(c).

⁶ See *William A. Couch*, 41 ECAB 548, 553 (1990).

The January 13, 2001 and September 12, 2000 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
February 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member