

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HUGH J. NOTEMAN and FEDERAL EMERGENCY MANAGEMENT
AGENCY, MOBILE EMERGENCY RESPONSE SUPPORT DETACHMENT,
Thomasville, GA

*Docket No. 98-345; Submitted on the Record;
Issued October 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$13,276.00 occurred; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and therefore the overpayment is not subject to waiver.

The Office accepted appellant's claim for a left corneal abrasion and laceration and commenced payment of temporary total disability benefits. On September 2, 1995 appellant went on disability retirement. On January 25, 1996 appellant was referred for vocational rehabilitation but instead elected to receive disability retirement benefits. By decision dated April 30, 1996, the Office terminated appellant's compensation benefits effective April 27, 1996 stating that appellant refused to undergo vocational rehabilitation without good cause and that the vocational rehabilitation would have resulted in his return to work with no loss of wage-earning capacity. Appellant requested an oral hearing before an Office hearing representative which was held on January 28, 1997. By letter dated February 10, 1997, the Office hearing representative modified the April 30, 1996 decision to show that, at the time of the July 11, 1994 employment injury, appellant was employed as a Security Officer, GS-080-13, with the employing establishment, that as a result of his July 11, 1994 employment injury, he sustained a left corneal abrasion with laceration and retinal damage and that the Office terminated appellant's compensation benefits not because he failed to comply with vocational rehabilitation efforts but because he elected disability retirement benefits in lieu of compensation benefits. The hearing representative stated that appellant agreed that with such modifications made part of the record, the need for a formal hearing decision on the April 30, 1996 decision was not necessary. The hearing representative stated that as he indicated at the hearing, the case would be returned to the district Office for issuance of a schedule award for permanent impairment to appellant's left eye and that he would instruct the district Office to issue a formal decision as to whether appellant's claim should be accepted for the additional condition of post-traumatic stress disorder with payment for psychiatric treatment benefits.

By decision dated March 10, 1997, the Office awarded appellant a schedule award for 80 percent loss of the left eye for the period April 28, 1996 to May 22, 1999.

By letter dated April 16, 1997, the Office agreed to pay appellant the schedule award in a lump-sum amount of \$83,228.55.

By letter dated May 12, 1997, the Office stated that a check for \$83,228.55, which covered the period April 27, 1997 through May 22, 1999 was issued May 3, 1997. The Office stated that no monetary compensation benefits of any kind were payable until the time period expired.

A subsequent finding by an audit team showed that compensation payments had been made to appellant in the amount of \$3,319.00 on May 24, June 21, July 19 and August 16, 1997.

In a preliminary determination dated September 16, 1997, the Office found that appellant received an overpayment in the amount of \$13,276.00 because appellant received a lump-sum payment on May 3, 1997, which covered the period April 27, 1997 through May 22, 1999 and, by letter dated May 12, 1997, the Office informed appellant that he was not entitled to any other monetary benefits through that date. The Office found, however, that appellant's monthly benefits were not stopped and he continued to receive checks for the period April 27 through August 16, 1997. The Office therefore found that appellant was at fault in the creation of the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

By decision dated October 22, 1997, the Office finalized its preliminary determination of an overpayment in the amount of \$13,276.00 stating that appellant did not reply to the Office's initial letter or argue that he was not aware that he was no longer entitled to ongoing compensation benefits.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$13,276.00.

In its May 12, 1997 letter, the Office informed appellant that it was issuing him a lump-sum payment for his schedule award in the amount of \$83,228.55, which covered the period April 27, 1997 through May 22, 1999 and that he was not entitled to any other monetary payments through that time period. The computer printout from the Employment Standards Administration dated August 28, 1997 shows that a check in the amount of \$83,228.55 was issued to appellant on May 9, 1997. The Office also determined through an audit that appellant was issued compensation checks each in the amount of \$3,319.00 on May 24, June 21, July 19 and August 16, 1997 or a total of \$13,276.00. Appellant did not refute the fact of the overpayment and there is no evidence to the contrary.

The Board finds that the Office properly determined that appellant was at fault in the matter of the overpayment and that, therefore, the overpayment is not subject to waiver.

Section 8129(b) of the 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 be against equity and good conscience.² Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.³

The implementing regulation⁴ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

In the present case, the Office determined that appellant was at fault in the creation of the overpayment because in its May 12, 1997 letter, the Office informed appellant that it was issuing him the lump-sum payment of \$83,228.55 for the period April 27, 1997 through May 22, 1999 and that no monetary payments of any kind were payable until that time period expired. Appellant's payment records show that he was issued the lump-sum payment of \$83,228.55 on May 9, 1997 and received compensation benefits for total disability from May 23 through August 16, 1997, which totaled \$13,276.00. Therefore, appellant, in accepting those compensation payments, accepted payments which he should have known were incorrect. The Board has held that appellant may not concurrently receive compensation for a schedule award and for disability from work.⁵ In response to the September 16, 1997 preliminary determination, appellant presented no evidence or information to show that he was not at fault in the creation of the overpayment. As appellant is at fault in its creation, the overpayment of compensation cannot be waived.⁶

¹ 5 U.S.C. § 8129(b).

² *Barbara L. Kanter*, 46 ECAB 165, 171 (1994); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁴ 20 C.F.R. § 10.320(b).

⁵ *See Joseph R. Waples*, 44 ECAB 936, 939 (1993).

⁶ *See Barbara L. Kanter*, supra note 2.

The decision of the Office of Workers' Compensation Programs dated October 22, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 22, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member