

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK D. MYHRE and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 98-2214; Submitted on the Record;
Issued April 17, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of a \$6,813.30 overpayment in compensation.

On March 4, 1996 appellant, then a 43-year-old nuclear pipefitter, filed an occupational disease claim, alleging that factors of employment caused painful knees. The Office accepted that appellant sustained employment-related bilateral meniscal tears and authorized arthroscopic surgery. On April 1, 1996 appellant's employment was terminated due to a reduction-in-force and he received severance in pay. Following termination of the severance in pay, by letter dated February 20, 1997, he was placed on the periodic rolls, effective January 21, 1997. The Office informed appellant that full compensation was payable only while he was totally disabled. By letter dated November 30, 1997, appellant submitted an Office Form 1032 indicating that he began part-time work as a bus driver on May 11, 1997. By decisions dated January 21 and March 11, 1998, the Office determined that appellant's wage-earning capacity was represented by his actual earnings as a bus driver. In both decisions, the Office noted that a retroactive overpayment determination was to be made.¹ On January 30, 1998 a telephone conference was held between an Office claims examiner and appellant in which, *inter alia*, the creation of the overpayment in compensation was discussed.

By letter dated March 11, 1998, the Office informed appellant that it had made a preliminary determination that he had received an overpayment in compensation in the amount of \$6,813.30 for the period April 8, 1997 to January 3, 1998. The Office stated that it had found appellant at fault in the creation of the overpayment because he should have known that he was not entitled to compensation for total disability for a period when he was earning wages. In response, appellant submitted an overpayment questionnaire and savings and tax information. By decision dated May 7, 1998, the Office finalized the overpayment decision. On June 17,

¹ Appellant has not filed an appeal with the Board regarding these decisions.

1998 the Office reissued the final overpayment decision because the memorandum of explanation had not been included with the May 7, 1998 decision. The instant appeal follows.

The Board finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation in the amount of \$6,813.30 for the period April 8, 1997 through January 3, 1998 and, therefore, the overpayment was not subject to waiver.

The record in this case indicates that during the period April 8, 1997 through January 3, 1998 appellant received compensation in the amount of \$23,023.92 and, based on his wage-earning capacity as a bus driver, his loss of wage-earning capacity totaled \$16,210.62, yielding an overpayment in compensation of \$6,813.30.

Section 8129 of the Federal Employees' Compensation 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."² Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.³

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides in relevant part:

"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."⁴

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

"Whether an individual is 'without fault' depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return

² 5 U.S.C. § 8129.

³ See *Linda E. Padilla*, 45 ECAB 768 (1994).

⁴ 20 C.F.R. § 10.320(b).

payments which were not due, and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).”⁵

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment and, in such case, for the Office to establish that appellant was at fault in creating an overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he or she knew or should have known that the payment was incorrect.⁶ The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he or she knew or should have been expected to know he or she was not entitled.⁷ By letter dated February 20, 1997, the Office informed appellant that compensation was payable only while he was totally disabled, stating:

“To avoid an overpayment in compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you go back to work.”

Appellant timely informed the Office that he had returned to work. He did not, however, return the compensation. While the Office may have been negligent in continuing to issue appellant checks for disability after he returned to work, the Board finds that appellant had sufficient notice that he was not entitled to receive full compensation during this period.⁸ Appellant was, therefore, at fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$6,813.30 is not subject to waiver.

⁵ 20 C.F.R. § 10.320(c).

⁶ See *George A. Hirsch*, 47 ECAB 520 (1996).

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ See *John L. Wolf*, 48 ECAB 148 (1996).

The decision of the Office of Workers' Compensation Programs dated June 17, 1998 is hereby affirmed.

Dated, Washington, D.C.
April 17, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member