

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JEFFREY S. PEAK and DEPARTMENT OF THE ARMY,  
U.S. ARMY RESERVE CENTER, Milwaukee, WI

*Docket No. 02-1716; Submitted on the Record;  
Issued February 26, 2004*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation for the period June 19, 1994 to September 11, 1999 in the amount of \$99,424.62; (2) whether the Office properly determined that appellant was not without fault in the creation of the overpayment; and (3) whether the Office properly withheld \$1,000.00 from appellant's monthly compensation to recover the overpayment.

On March 23, 1994 appellant, then a 33-year-old maintenance technician, filed a claim for a traumatic injury occurring on March 22, 1994 in the performance of duty. The Office accepted appellant's claim for low back strain and facet syndrome with a subsequent internal fixation.<sup>1</sup> Appellant underwent an L4 to the sacrum decompression fusion on July 13, 1994. The Office paid appellant compensation for total disability beginning June 19, 1994. The Office included deductions for health insurance premiums in the amount of \$52.40 for the period June 13 to July 23, 1994. In a letter dated September 14, 1994, the employing establishment notified the Office that it should not deduct health insurance premiums as appellant elected to cancel his health insurance effective March 28, 1987.

Appellant returned to light-duty part-time employment on February 13, 1995 but stopped work on February 14, 1996 and did not return.<sup>2</sup> The Office expanded acceptance of appellant's claim to include depression and placed him on the periodic rolls beginning July 20, 1997. The Office included deductions for health benefits in the amount of \$430.21 from September 29, 1996 to July 19, 1997 but stopped deductions for health benefits beginning July 20, 1997.

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<sup>1</sup> The Office previously accepted that appellant sustained a lumbar strain due to an October 26, 1993 employment injury, assigned file number A10-427499.

<sup>2</sup> The Office paid appellant compensation for disability from January 7, 1996 to July 19, 1997.

On April 23, 1995 appellant requested compensation for reserve drills missed due to his October 26, 1993 and April 9, 1994 employment injuries. By letter dated May 8, 1995, the Office requested information from the employing establishment regarding appellant's reserve pay for one year prior to his March 22, 1994 employment injury.

By letter dated May 15, 1999, appellant again requested compensation from the Office for loss of reserve pay. Appellant enclosed copies of his wage and tax statements showing his reserve pay for five years prior to his October 1993 injury. In another letter of the same date, appellant questioned the Office's deduction of health benefits from his compensation for the periods June 19 to July 23, 1994, February 6 to 9, 1995 and September 26, 1996 through July 19, 1997.

In a letter dated June 16, 1999, an official with the employing establishment informed the Office that it was uncertain whether it had maintained records of appellant's reserve pay for the year prior to his employment injury. In a memorandum dated September 10, 1999, the Office noted that, as the employing establishment could not obtain appellant's reserve pay, it would calculate the amount based on the figures provided by appellant for 1993. The Office calculated the total amount owed to appellant from June 19, 1994 to September 11, 1999, with the addition of his reserve pay, as \$121,144.63, and the total actual paid to appellant as \$111,705.46. Due to a subtraction error, the Office determined that appellant was entitled to receive \$109,439.17. On May 12, 2000 the Office issued appellant two checks in the amount of \$54,719.59.

By letter dated June 15, 2000, appellant informed the Office that "there was a calculation error on the recent back pay checks" that he received. He further stated that an official with the employing establishment informed him that he would receive around \$9,000.00 for his lost reserve pay. Appellant argued that he should receive "close to twice that amount..."

On July 30, 2001 the Office notified appellant of its preliminary determination that he had received an overpayment in the amount of \$100,000.00 because it had incorrectly calculated the amount owed to him as reserve pay for the period June 19, 1994 to September 11, 1999. The Office, in an accompanying memorandum, related:

"A total of \$121,144.63 was calculated as the total compensation due the claimant, which included the back pay, owed him. The claimant was already paid compensation that totaled \$111,705.46 and, therefore, a total of \$9,439.17 was the amount due the claimant. Unfortunately, instead of \$9,439.17 of back pay to the claimant, two checks each of \$54,719.59 for the period from June 19, 1994 to September 11, 1999 was paid due to an error in calculations. The checks totaled \$109,439.17, which resulted in an overpayment of compensation in the amount of \$100,000.00."

The Office further informed appellant of its preliminary determination that he was at fault in the creation of the overpayment. The Office noted that even appellant's own calculations of the amount that he should be reimbursed did not equal \$100,000.00. The Office advised appellant that he had 30 days within which to submit additional evidence or arguments. The Office further requested that appellant submit an enclosed financial questionnaire.

On August 28, 2001 appellant submitted an overpayment recovery questionnaire listing his monthly income as \$3,773.00 and monthly expenses as approximately \$2,160.00. He further listed assets of \$68,200.00. In an accompanying letter, appellant challenged the fault finding, noting that he had informed the Office within 30 days of receiving the checks that he “believed there was a problem with the payment.” Appellant further stated that he calculated the money to which he was entitled as \$18,760.00 and questioned why the Office used June 19, 1994 as the date to begin compensating him for lost reserve pay. Appellant noted that he was originally injured on October 26, 1993 under File Number A10-427499. Appellant further requested that the Office review its periodic deduction of health benefits from his compensation. Appellant requested that the Office decide his case based on the written evidence.

By decision dated April 11, 2002, the Office finalized the overpayment determination. The Office found that the amount of the overpayment was \$99,424.64, which it calculated by subtracting \$575.36, the amount owed to appellant for erroneous health benefit deductions, from the total overpayment of \$100,000.00.<sup>3</sup> The Office further finalized its determination that appellant was not without fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. The Office indicated that it would deduct \$1,000.00 from appellant’s continuing compensation beginning April 21, 2002 to recover the overpayment.

In a decision dated May 14, 2002, the Office amended its deductions of \$1,000.00 from appellant’s continuing compensation to begin May 19, 2002 rather than April 21, 2002.

The Board finds that appellant received an overpayment in the amount of \$99,424.64.

In this case, appellant requested compensation for lost reserve pay due to his October 26, 1993 and March 22, 1994 employment injuries. The Office should have included appellant’s reserve pay in its calculation of his pay rate for compensation purposes.<sup>4</sup> However, in this case the overpayment of compensation arose from calculations of the amount of compensation owed appellant as a result of disability sustained due to his March 22, 1994 employment injury. The Office has not addressed the issue of appellant’s pay rate for time lost due to his October 26, 1993 employment injury and therefore it is not an issue in the present case. The employing establishment was unable to provide the Office with appellant’s reserve pay for the year prior to his March 22, 1994 employment injury. The Office, consequently, properly utilized the 1993 figures provided by appellant on his wage and tax statements. The Office used June 19, 1994, the date it began paying appellant compensation for his March 22, 1994 employment injury, as the appropriate date to begin calculating its underpayment to appellant. The Office determined that, after factoring in appellant’s reserve pay, he was owed a total of \$121,144.63 in compensation but had received only \$111,703.46. However, the Office, in subtracting \$111,705.46 from \$121,144.63, erroneously determined that it owed appellant \$109,439.17

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<sup>3</sup> The Office found that it had deducted \$52.40 for health benefits from June 19 to July 23, 1994, \$50.83 for health benefits from January 8 to February 9, 1995, \$430.21 for health benefits from October 7, 1996 to August 19, 1997 and \$41.92 for health benefits after August 19, 1997.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b) (December 1995).

rather than \$9,439.17. On May 12, 2000 the Office issued appellant two checks in the amount of \$54,719.59 each. Appellant, therefore, received an overpayment of compensation in the amount of \$100,000.00.

The Office subtracted \$575.36, the amount owed to appellant for erroneous health benefit deductions, from the \$100,000.00 that the Office improperly paid him, to find that he received an overpayment of \$99,424.64. Generally, the Office should not offset amounts owed to employees against amounts of overpayments, as this precludes the employee from obtaining waiver of the entire amount of the overpayment.<sup>5</sup> However, in this case, appellant was found to be at fault and, consequently, waiver is not possible. Therefore, appellant was not harmed by the action of the Office.

The Board finds that appellant was not without fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act<sup>6</sup> provides that "[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Section 10.433 of the Office's implementing regulations<sup>7</sup> provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

"(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

"(2) Failed to provide information which he or she knew or should have known to be material; or

"(3) Accepted a payment which he or she knew or should have known to be incorrect."

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.<sup>8</sup> In this case, by letter dated June 15, 2000, appellant informed the Office that he believed that the checks he received for lost reserve pay contained a calculation error. He noted that he had spoken with an official at the employing establishment who told him he would receive around \$9,000.00 as compensation for lost reserve pay. Appellant stated that he believed that the Office owed him approximately double that amount, or around \$18,000.00.

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<sup>5</sup> See *Diana L. Booth*, 52 ECAB 370 (2001); *Michael A. Grossman*, 51 ECAB 673 (2000).

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> 20 C.F.R. § 10.433.

<sup>8</sup> See *Robin O. Porter*, 40 ECAB 421 (1989).

Appellant, therefore, knew or should have known, as evidenced by his own statement, that he was not entitled to receive two checks in the amount of \$54,719.59 as this amount greatly exceeded any reasonable expectation he may have had for payment of his reserve duty wage supplement. He nevertheless accepted and cashed the checks. As appellant was not without fault in the creation of the overpayment, he is not entitled to waiver.

The Board further finds that the Office properly withheld \$1,000.00 from appellant's monthly compensation to recover the overpayment.

"Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.<sup>9</sup> If no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship."

In this case, appellant indicated that he had assets valued at \$68,200.00 and monthly income that exceeded his expenses by around \$1,613.00. Hence, the Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case and, thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$1,000.00 every four weeks from appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated April 11, 2002, as modified by the decision dated May 14, 2002, is affirmed.

Dated, Washington, DC  
February 26, 2004

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> 20 C.F.R. § 10.441(a).