

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD M. BRASHER and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Otisville, N.Y.

*Docket No. 96-109; Submitted on the Record;
Issued April 14, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in appellant's case as he received temporary total disability compensation while working; (2) whether the Office properly determined that the overpayment was in the amount of \$13,340.96, covering the period August 20, 1988 to February 6, 1993; (3) whether the Office properly found that appellant was at fault in creation of the overpayment and that therefore the overpayment was not subject to waiver; and (4) whether the Office properly required repayment of the overpayment at the rate of \$400.00 per month from his continuing compensation payments.

The Office accepted that appellant sustained a left knee sprain in the performance of duty on February 9, 1982 when he slipped on ice, requiring a March 12, 1982 surgical repair of the left lateral meniscus. The Office also accepted an August 8, 1982 recurrence of disability after which appellant did not return to work, permanent aggravation of degenerative arthritis of the left knee and chondromalacia of the left patella. He received benefits on the daily rolls, and on the periodic rolls beginning March 24, 1983.

In a Form CA-1049 dated May 5, 1983, appellant was notified that regular periodic roll payments had begun as of March 24, 1983. Appellant was advised that when he was no longer totally disabled due to the accepted injury, he must seek suitable employment. The Office further advised that if appellant returned to his former job or obtained any other employment, he must submit to the Office the date of his return to work, the name and address of his employer, his pay rate, hours worked per week, and if self-employed, what he would have had to pay someone else to perform those duties. The Office specifically instructed appellant that "[i]n order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work. Also, advise us immediately of any change in address or of any change in the status of your dependents." (Emphasis in original.) Appellant signed this form, indicating his understanding of its instructions and advisements, on May 12, 1983.

Appellant submitted affidavits of earnings and employment (Form CA-1032) as requested by the Office from September 6, 1983 to June 2, 1988 indicating that he was not employed from August 22, 1982 through June 2, 1988.¹ In a November 2, 1988 letter, appellant advised the Office that he completed law school, had passed the Florida bar exam and was to be admitted shortly to the Florida bar.

In a Form CA-1032 signed May 25, 1989, appellant stated that he was employed as a part-time instructor at Oscaloosa-Walton Community College, Niceville, Florida, working from August 20 to 27, 1988 earning \$700.00; October 12 to 19, 1988; earning \$950.00; January 7 to 14, 1989 earning \$950.00; and April 9 to 16, 1989 earning \$950.00.

In a September 1, 1989 letter, the Office requested that appellant provide additional information regarding statements made on his May 25, 1989 Form CA-1032. The Office requested a description of appellant's "self-rehabilitation" efforts, regularity of his employment as an instructor, anticipated work during the next year; and copies of tax returns covering periods of employment. The letter did not advise appellant of the occurrence of an overpayment of compensation, or that he was not entitled to receive compensation for total disability while working. The record indicates that appellant provided the information requested.

In a Form CA-1032 signed May 30, 1990, appellant stated that from May 1989 to the present, he was self-employed as an attorney, earning \$7,500.00 per year, working an average of 45 hours per week average.

In a Form CA-1032 signed August 31, 1991, appellant stated that he was self-employed as an attorney May 1, 1990 through September 1991, 40 hours per week, actual earnings of \$4,500.00, and a rate of pay of \$7,500.00.

In a Form CA-1032 signed May 20, 1992, appellant stated that he was self-employed as an attorney from February 1 to September 16, 1991; with actual earnings of approximately \$4,000.00, and had ceased work due to a mental condition.

In a June 2, 1992 letter, the Office requested that appellant provide additional information regarding earnings and employment as reported in his May 20, 1992 Form CA-1032. Appellant responded by July 2, 1992 letter, in which he described the financial expenses of operating his law office, discussed leases, suppliers, his payroll, and included a list of clients he had represented.

In a March 5, 1993 letter, the Office acknowledged that appellant had ceased work on September 16, 1991 due to a nervous breakdown. The Office noted that appellant had concurrent, nonoccupational disabilities of schizoaffective disorder and post-traumatic stress disorder apparently related to naval service predating his federal employment.

¹ The forms were signed on September 6, 1983, August 9, 1984, July 24, 1985, September 2, 1986, March 11, 1987 and June 2, 1988.

By decision dated February 25, 1994, the Office reduced appellant's compensation benefits based on his actual earnings of \$128.21 per week as a self-employed attorney, finding that \$128.21 per week fairly and reasonably represented his wage-earning capacity.

By notice dated February 25, 1994, the Office advised appellant of its preliminary determination that an overpayment of compensation had occurred in his case in the amount of \$13,340.96 as he received temporary total disability compensation from August 20, 1988 to February 6, 1993 although he worked as an attorney and instructor from 1988 to 1991. The Office found that appellant was at fault in creation of the overpayment because he should have known that he was not entitled to receive compensation for temporary total disability while working. In an attached memorandum, the Office explained that an error in appellant's pay rate required correction, in that the effective date of compensation had been listed erroneously as August 8, 1982, whereas it should have been February 9, 1982. The Office noted that this error resulted in appellant not receiving the first cost-of-living increase to which he was entitled, resulting in a "slight increase" of compensation due from March 24, 1983 to February 6, 1993. The Office then explained that appellant's entitlement to compensation from August 20, 1988 to February 6, 1993 "was reduced to reflect [his] wage-earning capacity based on [his] reported actual earnings as a college instructor (August 20, 1988 through April 20, 1989) and as a self-employed attorney (April 21, 1989 through February 6, 1993)." The Office calculated that after the above two adjustments, appellant's entitlement to compensation for the period March 24, 1983 through February 6, 1993 was \$144,959.64, but that he was paid \$158,300.600 for that period. The Office then subtracted \$144,959.64 from \$158,300.60, resulting in a difference of \$13,340.96, representing an overpayment of compensation.

On March 20, 1994 appellant requested a precouplement hearing before a representative of the Office's Branch of Hearings and Review, which was held on December 12, 1994.

At the hearing, appellant asserted that while he understood how the overpayment was calculated, he was not at fault in creation of the overpayment as he timely and accurately reported all employment to the Office, thus fully complying with all reporting regulations. Appellant noted that he assumed the Office did not find his employment "relevant ... because they did nothing" even though he reported working as a college instructor and attorney. Appellant stated that as the Office did not respond to several forms noting his employment and earnings, other than to ask for supporting documentation which he provided, and did not advise him that he could not work while receiving compensation for total disability, he therefore assumed he was permitted a trial period of employment in which to rehabilitate himself, set up his law practice and become self-supporting. Appellant asserted that he "did what [he] was told to do, and they [the Office] kept sending the checks."

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20), receipts, bills, and other financial documents supporting his monthly income and expenses. He noted a monthly income of \$1,039.80 in compensation benefits, \$138.00 from his ex-wife, and \$2,007.00 in veterans' benefits, for a total of \$3,184.80 per month. He listed monthly expenses as follows: rent \$454.00; food \$400.00, clothing \$50.00; utilities \$220.00; home maintenance \$100.00; recreation \$83.00; debt payments and miscellaneous expenses of \$1,360.00, for a total of \$2,667.00 per month. Appellant noted that one of the debts would expire in December 1995,

which would decrease his monthly expenses by \$490.00. He listed assets of \$195.00 in a checking account and \$3.00 in cash.

By decision dated July 5 and finalized July 10, 1995, an Office hearing representative found that the Office had properly determined that appellant received an overpayment of compensation in the amount of \$13,340.96 for the period August 20, 1988 to February 6, 1993. The hearing representative further found that appellant was at fault in creation of the overpayment, and that therefore the overpayment was not subject to waiver. The hearing representative directed that the overpayment be collected by deducting \$400.00 per month from appellant's continuing compensation payments.

Regarding the first issue, the Board finds that an overpayment of compensation occurred in appellant's case as he received compensation for temporary total disability while employed. Appellant received compensation for temporary total disability for the period August 20, 1988 to September 16, 1991, during which he was employed as a part-time college instructor and later as a self-employed attorney. However, regarding the second issue, the Board finds that the case is not in posture regarding the period and amount of the overpayment.

The Office determined that there was an overpayment of compensation in the amount of \$13,340.96 for the period August 20, 1988 to February 6, 1993. However, appellant stopped work on September 16, 1991, not February 6, 1993, almost 17 months later. The Office acknowledged in a March 5, 1993 letter that appellant had stopped work as of September 16, 1991. It is therefore unclear from the record why the Office determined the date February 6, 1993 as an endpoint for the period of overpayment.

Thus, the amount of the overpayment has not been established as correct. The case shall be returned for the Office for a new determination of the period and amount of the overpayment of compensation, including preparation of a detailed memorandum explaining the Office's choice of beginning and ending dates, the rate of pay used, the method of calculation, the calculation itself, and any other relevant information. Following this and other development as the Office deems appropriate, the Office shall conduct appropriate disposition of the issue.

Regarding the third issue, the Board finds that appellant was without fault in creation of the overpayment of compensation, and that the Office's determination of fault was in error.

The Office's regulations² provide that the Office must consider the unique circumstances of each claimant's case in determining whether a claimant is with fault in creation of an overpayment of compensation. Factors considered by the Office include a claimant's understanding of any reporting requirements, the agreement to report events affecting payments, the claimant's knowledge of the occurrence of events that should have been reported to the Office, ability to comply with reporting requirements (*e.g.*, age, comprehension, memory,

² 20 C.F.R. § 10.320(c).

physical and mental condition), efforts and opportunities to comply with the reporting requirements, and understanding of the obligation to return payments which were not due.³

The only notice appellant received from the Office regarding his obligation to return compensation checks received after he returned to work is the Form CA-1049, dated May 5, 1983 and signed by him on May 12, 1983. The form states generally that appellant was obligated to return to the Office “any compensation check received after [he] return[ed] to work.” The Office did not send appellant any other form or correspondence of record after May 5, 1983 advising him of his obligation to return compensation checks received following his return to work, or that he was not entitled to receive compensation for temporary total disability while employed. The Board has held that a Form CA-1049 and similar form letters cannot be used to establish what a claimant knew or should have known with regard to the receipt of a subsequent payment, because it contains no information regarding the period covered by the subsequent check.⁴ Here, there is no evidence that appellant knew or should have known at the time he received payments covering the period August 20, 1988 to February 6, 1993 that they were for an incorrect amount.

Furthermore, the Office’s conduct in this case was misleading. After appellant submitted his May 25, 1989 Form CA-1032 noting his employment as a college instructor, the Office responded by September 1, 1989 letter requesting further information about his earnings and employment. However, the Office’s letter did not state that appellant was not entitled to work while receiving compensation for temporary total disability, or that the Office contemplated that an overpayment of compensation had occurred.

Appellant then filed Forms CA-1032 dated May 30, 1990 and August 31, 1991 stating that he was self-employed as an attorney earning approximately \$4,500.00 per year. However, despite appellant’s accurate and timely reporting of his employment, the Office did not respond, other than to continue appellant’s periodic roll payments.

Subsequently, appellant filed a Form CA-1032 dated May 20, 1992, noting his self-employment as an attorney from February 1 to September 16, 1991, at which time he stopped work due to a preexisting mental condition. The Office responded by June 2, 1992 letter requesting more detailed financial information regarding appellant’s earnings and business expenses, but again made no mention that he was not entitled to work while receiving compensation for temporary total disability, or that this employment had created an overpayment of compensation. Appellant promptly responded by July 2, 1992 letter, describing the financial workings of his law practice.

The Office did not correspond further on this issue until March 5, 1993, some eight months later, at which time it was acknowledged that appellant had stopped work on September 16, 1991 due to a nervous breakdown. It was not until February 25, 1994, nearly one year after the Office acknowledged that appellant had stopped working, that the Office alleged

³ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁴ *Claude T. Green*, 42 ECAB 274, 279 (1990).

that an overpayment of compensation had occurred. Thus, appellant first reported employment to the Office on May 25, 1989 and the Office first mentioned the existence of an overpayment of compensation on February 25, 1994, more than four-and-a-half years later. Appellant's assumption, as stated at the December 12, 1994 hearing, that the Office permitted his employment as it did not mention the existence of an overpayment and merely asked for further financial information for over four years, was reasonable. Therefore, coupled with the lack of adequate notice as discussed above, the Board finds that the Office has not shown that appellant knew or should have been expected to know that he was receiving incorrect compensation payments.

Regarding the fourth issue, as the case is not in posture regarding the amount and period of the overpayment of compensation, or consideration of waiver, the Office's decision regarding recovery of the overpayment is moot.

The decision of the Office hearing representative dated July 5 and finalized July 10, 1995 is affirmed in part regarding fact of overpayment, remanded in part regarding amount and period of overpayment, reversed in part regarding the Office's finding of fault, and set aside in part regarding recovery of the overpayment.

Dated, Washington, D.C.
April 14, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member