

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NORMAN CORN and DEPARTMENT OF THE NAVY,  
U.S. MARINE CORPS AIR STATION, Santa Ana, Calif.

*Docket No. 96-1006; Submitted on the Record;  
Issued June 25, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$18,393.88 occurred; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly determined that \$1,000.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for a lumbosacral sprain and a herniated nucleus pulposus at L5-S, permanent radiculopathy and surgery on April 18, 1995. Appellant received total disability benefits on an ongoing basis except for a period of time when he received schedule award payments and annuity payment simultaneously.

In a preliminary determination dated November 2, 1995, the Office found that appellant received an overpayment of \$18,393.88 during the period April 1, 1986 through May 1, 1987, because appellant was receiving temporary total disability benefits and had earnings during that time period of \$28,000.00 as shown in his 1986 and 1987 W-2 Forms. The Office found that appellant was at fault in the matter of the overpayment, because he knew or should have known that he was ineligible to receive payments for total disability during the same period of time he had actual earnings. The Office stated that appellant should have been aware that the checks issued to him were in error as the period of payment of each was printed on the check's face. The Office informed appellant that if he disagreed with the fact or the amount of the overpayment or that he was at fault in the creation of the overpayment or that recovery should not be waived, he had the right to submit new evidence in support of his contention. The Office described the specific information appellant should provide pertaining to his income and his expenses if he should seek a waiver of repayment. The Office also stated that appellant could request a telephone conference or a precoupment hearing.

By letter dated November 26, 1995, appellant responded to the Office's preliminary determination. Appellant stated that the government did not inform him that receiving income

from his self-employment would affect his compensation and if he had been told, he would have divested himself from the corporation. He also stated that he always provided complete factual information to the Office. Appellant submitted his Form OWCP-20 and Form CA-1032 dated August 10, 1987 explaining his financial status and work history.

By decision dated January 3, 1996, the Office affirmed the November 26, 1995 preliminary determination, stating that the evidence of record established that appellant had received an overpayment of \$18,393.88, because he accepted total disability payments, while he had actual earnings. The Office found that appellant was at fault in the creation of the overpayment because he knew or should have known that he should not simultaneously receive total disability benefits and actual earnings. The Office also noted that on the Form OWCP-20, appellant listed approximately \$120,000.00 in assets, his wife's monthly income of \$3,134.00 and monthly expenses of \$2,132.00. The Office noted that appellant failed to list his monthly income from the Office in the amount of \$2,147.17. The Office concluded that because appellant's family income totaled \$5,281.17 (\$3,134.00 plus \$2,147.17) and his monthly expenses were \$2,132.00, appellant and his wife would have approximately an income of more than \$2,000.00 a month after the \$1,000.00 overpayment deduction was made by this Office. The Office, therefore, stated that regular deductions of \$1,000.00 would be made from appellant's continuing compensation from the Office effective January 7, 1996.

The Board finds that the Office properly found that appellant received an overpayment of \$18,393.88 for the period from April 1, 1986 through May 1, 1987.

The Office based its finding of an overpayment on a Social Security record received by the Office on April 11, 1995 showing that appellant earned \$18,000.00 in 1986 and on his 1987 W-2 Form showing that appellant earned \$10,000.00 from Cal-market Mortgage Corporation where he was self-employed from June 23, 1985 through April 29, 1987. The Office obtained the figure of \$18,393.88 by adding the total of appellant's disability compensation during the relevant time period. Appellant does not dispute the amount of the overpayment or that he was self-employed while he was receiving total disability benefits.

The Board further finds that appellant was at fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act<sup>1</sup> 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.<sup>2</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. § 8129(b).

<sup>2</sup> *Philip G. Arcadipane*, 48 ECAB \_\_\_\_ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>3</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

The implementing regulation<sup>4</sup> 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 its preliminary determination dated November 2, 1995, the Office found that appellant was at fault in the matter of the overpayment because he knew or should have known that he was ineligible to receive total disability benefits, while he had actual earnings. Further, the Office determined appellant should have been aware that the checks issued to him during the relevant time period from April 1, 1986 through May 1, 1987 were in error as the period of payment of each check was printed on the check's face. The Office also noted that by CA-1049 letter dated June 26, 1990, the Office notified appellant that if he returned to work, he was required to notify the Office immediately to avoid an overpayment as an individual who has actual earnings is not eligible to receive total disability compensation. The Office properly determined that appellant was at fault in the matter of the overpayment because appellant knew or should have known he was not eligible to receive total disability benefits while receiving actual earnings and the period of payment of each check was printed on the check's face. Appellant is, therefore, at fault in the creation of the overpayment and no waiver of collection of the overpayment is possible under section 8129(b) of the Act.<sup>5</sup>

The Board further finds that the Office properly withheld \$1,000.00 from continuing compensation payments to recover the overpayment.

Section 10.321(a) of the regulations relating to recovery of overpayment states:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of the future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors so as to minimize any resulting hardship upon such individual.”<sup>6</sup>

In its January 3, 1996 decision, based on appellant's Form OWCP-20, the Office determined that appellant had approximately \$120,000.000 in assets, a monthly income of \$5,281.17 and monthly expenses of \$2,132.00 and, therefore, a deduction of \$1,000.00 per month to recover the overpayment effective January 7, 1996 was reasonable as appellant would still have income of more than \$2,000.00 per month. The Office determined that appellant would not need all or substantially all of his compensation wages to cover his regular living expenses. Since the evidence of record establishes that appellant had approximately

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<sup>4</sup> 20 C.F.R. § 10.320(b).

<sup>5</sup> See *Philip G. Arcadipane*, *supra* note 2.

<sup>6</sup> 20 C.F.R. § 10.321(a); see *Kattie L. Summers*, 47 ECAB \_\_\_\_ (Docket No. 93-2381, issued July 21, 1995).

\$120,000.00 in assets and that his monthly income of \$5,281.17 exceeded his monthly expenses of \$2,132.00 by \$3,149.17, the Office's monthly deduction of \$1,000.00 to recover the overpayment is proper.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 3, 1996 is affirmed.

Dated, Washington, D.C.  
June 25, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member