

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAM E. BEACH and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Charleston, S.C.

*Docket No. 97-82; Submitted on the Record;
Issued November 17, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant was at fault in the creation of an overpayment in the amount of \$650.52 for the period November 13, 1995 through January 6, 1996 which occurred because he was paid compensation for temporary total disability when he was working full time and part time.

The Office of Workers' Compensation Programs accepted that appellant, a 34-year-old firefighter, sustained a back strain and a herniated nucleus pulposus at L4-5 on September 3, 1990 when he stepped off a fire truck. Appellant subsequently underwent three back surgeries in November 1990, August 1991 and in March 1995. In 1995 appellant was receiving compensation for temporary total disability in the amount of \$1,147.88 every 28 days. Appellant was cleared to return to work on October 12, 1995. He actually returned to work as a property disposal technician 9 hours per day, 80 hours per pay period, on November 13, 1995 but had physical difficulty with the hours and, as per his physician, changed to 4 hour days 5 days per week as of December 12, 1995. However, appellant continued to receive compensation at the rate of \$1,147.88 every 28 days through January 6, 1996. Thereafter his compensation was reduced to reflect his wage-earning capacity. Appellant stopped work again on January 19, 1996 due to further surgery.

By letter dated May 14, 1996, the Office made a preliminary determination that an overpayment of compensation in the amount of \$650.52 had occurred in appellant's case because he received compensation based upon temporary total disability during the period November 13 through December 10, 1995 when he was working full time and had no wage loss and during the period December 13, 1995 through January 6, 1996 when he had earnings based on partial disability. A preliminary finding of fault was made as appellant should have been aware that he was not entitled to compensation for wage loss due to temporary total disability in the same amount as he had been receiving when totally disabled, when he was not totally disabled and had concurrent wages.

Appellant disagreed with the preliminary determination and claimed that he was owed at least \$1,000.00 by the Office. Appellant also claimed that he never received any pay for his half

days, claimed that the overpayment was totally wrong, restated that he was owed money by the Office, and claimed that health benefits deductions were taken out twice, once by the Office and once by the employing establishment for the same periods.

By decision dated September 6, 1996, the Office finalized its overpayment and fault determinations, finding appellant's responses unpersuasive. The Office restated that appellant was aware or reasonably should have been aware that he was not entitled to compensation based upon temporary total disability during periods when he had concurrent earnings. The Office noted that although appellant claimed that he never received the January 6, 1996 check for \$1,147.88, representing the period December 10, 1995 through January 6, 1996, he had declined to provide a written request for a tracer as requested by the Office.

The Board finds that the Office correctly determined that appellant was at fault in the creation of an overpayment for the period November 13, 1995 through January 6, 1996 which occurred because he was paid compensation for temporary total disability when he was working full time and part time.

Section 8129 of the Federal Employees' Compensation 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 would be against equity and good conscience." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320 of the implementing federal regulations² provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. 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."

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 establish that at the time appellant received the compensation checks, covering the periods November 13 to December 10,

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.1 *et seq.*

1995 and December 13, 1995 through January 6, 1996, he knew or should have been expected to know that these checks were incorrect. The Office established that throughout 1995 prior to returning to work appellant was receiving compensation for temporary total disability in the amount of \$1,147.88 every 28 days, that as of November 13, 1995 appellant returned to work full time without wage loss but still received compensation in the amount of \$1,147.88 per 28 days, and that as of December 13, 1995 appellant worked part time and had only partial wage loss but still received compensation in the amount of \$1,147.88 every 28 days. The Office concluded that appellant should have reasonably expected a cessation of compensation benefits for the period November 13 through December 10, 1995 as he had no loss of wages for that period, and a decrease in his compensation benefits corresponding to his partial disability wages for the period December 13, 1995 through January 6, 1996, which did not occur. The Office concluded that, as no cessation or decrease in compensation occurred, appellant should have been expected to know that the payments he received for those periods were incorrect. The Office found that the fact appellant accepted these incorrect compensation checks established that he accepted payments that he knew or should have been expected to know were incorrect. Accordingly, the Office found appellant to be with fault in the overpayment creation.

The Board finds that the Office's determination was correct. Appellant knew he had no loss of wages for the period November 13 through December 10, 1995, and only partial loss of wages for the period December 13, 1995 through January 6, 1996, but that no corresponding cessation or decrease in compensation payments occurred. The Board finds that appellant knew or should have been expected to know that the compensation payments he received and accepted covering those periods were incorrect. Consequently, the Office finding of overpayment and as to fault was correct.

The decision of the Office of Workers' Compensation Programs dated September 6, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 17, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member