

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM P. BIKOWSKI and DEPARTMENT OF THE NAVY,
AIR SYSTEMS COMMAND, San Diego, Calif.

*Docket No. 96-2257; Submitted on the Record;
Issued October 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment in the amount of \$1,509.17 for the period August 7, 1992 through March 11, 1994.¹

Appellant's claim was accepted for right carpal tunnel syndrome and mild de Quervain's tendinitis of the right thumb. On October 22, 1992 he was notified that he would be paid compensation for the period in question and continuing. However, appellant received compensation payments for the period August 7, 1992 through March 11, 1994 without Federal Employees Health Benefits and Federal Employees Group Life Insurance premiums being deducted.

By letters dated November 9, 1992, May 13, June 8, September 3, 1993 and September 3, 1994, appellant's representative notified the Office that such health and life insurance benefit premiums were not being deducted from appellant's compensation. However, through the entire period from August 7, 1992 through March 11, 1994 appellant kept and cashed the incorrect compensation checks he had received but knew, as evidenced by his representative's letters, that the compensation payments were incorrect.

By decision dated June 14, 1996, the Office found appellant to be not without fault in the creation of the overpayment as he had kept and cashed compensation checks that he knew to be incorrect, as evidenced by his letters, such that he was not entitled to waiver of recovery of the overpayment.

¹ Appellant did not contest the fact or amount of overpayment, or the amount of withholding from his continuing compensation benefits.

On appeal appellant urges that he was without fault and entitled to waiver because the Office negligently failed in its duty to timely correct its mistake and to resolve his complaint as brought to its attention as early as November 9, 1992.

The Board, however, finds that appellant was not without fault in the creation of the \$1,509.17 overpayment and is therefore not entitled to waiver.

Section 8129(a) of the Federal Employees' Compensation Act² provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "Adjustment 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 the Act or would be against equity and good conscience."³ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provide 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

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 period August 7, 1992 through March 11, 1994, he knew or should have known that the payment was incorrect. The record in this case clearly establishes such knowledge.

Appellant, in this case, was advised by decision of the Office dated October 22, 1992 that he would be receiving compensation for the period in question and continuing. As soon after

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.320(b).

that decision as November 9, 1992 appellant and his representative were aware that health and life insurance benefits premiums were not being deducted from his ongoing compensation payments, and so notified the Office by letter that date. They reiterated their knowledge of this fact to the Office on May 13, June 8 and September 3, 1993 and September 3, 1994. Therefore, the record clearly supports that both appellant and his representative had knowledge that the compensation payments appellant was receiving for the period in question were incorrect. However, appellant accepted the incorrect payment, and kept and cashed the incorrect checks, instead of returning the incorrect payments to the Office or keeping them in an account to await Office instructions. Therefore, under 10.320(b) of Title 20 of the Code of Federal Regulations, the Office properly found that appellant was not without fault in creating the \$1,509.17 overpayment. As appellant was at fault in creating the overpayment, no waiver of the overpayment is possible, and the overpayment was properly recouped as detailed in the Office's June 14, 1996 decision.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 14, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 6, 1998

Michael J. Walsh
Member

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member