

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR P. PAWLOWSKI and VETERANS ADMINISTRATION,
MEDICAL CENTER, Buffalo, N.Y.

*Docket No. 97-2021; Submitted on the Record;
Issued April 14, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that there was an overpayment of compensation in the amount of \$979.24 during the period July 17 through August 3, 1997 because appellant had returned to work during this period; and (2) whether appellant was at fault in the creation of the \$979.24 overpayment of compensation and therefore not subject to waiver.

On September 12, 1994 appellant, then a 39-year-old housekeeping aid, filed a claim alleging that he had sustained a back injury as a result of lifting heavy boxes. The Office accepted appellant's claim for a herniated nucleus disc pupous at L4-5 and a subsequent spinal surgery which was performed on April 7, 1995. Payment of all appropriate benefits were authorized.¹

The record indicates that appellant was placed on period payment rolls on February 16, 1995 and in a letter to appellant dated March 7, 1995 the Office advised appellant "In order to avoid an overpayment of compensation, *NOTIFY THIS OFFICE IMMEDIATELY AFTER YOU RETURN TO WORK*. Return to us any compensation check received after you return to work." Appellant subsequently returned to work on July 17, 1995 and stopped work again on July 20, 1995 due to a new injury to his back.

In a December 2, 1996 letter, the Office advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$979.24. The Office noted that appellant returned to work on July 17, 1995, but received and cashed two

¹ Including the September 12, 1994 injury (claim number A2-0686546), the record indicates that appellant has a total of five claims for low back injuries. The four additional claims which the Office accepted include: an April 16, 1993 injury for a low back strain (claim number A2-663145); a July 20, 1995 injury for a LS strain (claim number A2-0700854); a December 13, 1995 injury for a left lumbar strain (claim number A2-07079940); and a June 3, 1996 injury for right leg sciatica (claim number A2-0715790).

checks after that date that showed compensation payable for wage loss through August 3, 1995. The Office found appellant at fault in the creation of this overpayment because he reasonably should have been aware that the checks received after his return to work, showing the period of compensation payable on the front of the check, represented an overpayment of compensation. Appellant was advised that he had 30 days to request a precoupment hearing or submit additional evidence or arguments before a final decision would be issued. An overpayment recovery questionnaire (Form OWCP-20) was attached.

An Office worksheet indicates that the \$979.24 overpayment for the period July 17 to August 3, 1995 was calculated by subtracting \$1,196.96 (appellant's gross compensation for the period from June 25, 1990 to July 16, 1995) from \$1,523.40 (appellant's normal gross compensation for a two-week period) to obtain \$326.44 for the period of July 17 to July 23, 1995; the amount of \$326.44 was then added to \$652.80 (appellant's gross compensation for the period July 23 to August 3, 1995) to obtain a total amount of \$979.24.

Appellant responded to the Office's letter of December 2, 1996 stating "As shown I was not at work I was still under Dr. (sic) care." Appellant attached medical documentation to substantiate his allegation. Appellant did not return the overpayment questionnaire.

On April 4, 1997 the Office scheduled a conference call with appellant in an effort to obtain financial information. The Office called appellant as scheduled, however, appellant's answering machine answered the call. The Office left a message asking appellant to return the call. Appellant never returned the Office's call.

By letter decision dated April 14, 1997, the Office finalized its preliminary decision, finding that an overpayment was created in the amount of \$979.24² and that appellant was at fault in creation of the overpayment. In an accompanying memorandum, the Office noted that appellant had not returned the overpayment questionnaire and did not return its call requesting financial information. The Office stated that within its letter of December 2, 1996 (Form CA-2201), appellant was advised that under the provisions of section 10.324 of Title 20 of the Code of Federal Regulations, the failure to furnish the financial information requested on the Form OWCP-20 (or other information required by the Office in connection with a request for waiver) within 30 days will result in a denial of waiver of the overpayment, and no further request for waiver will be considered until the requested information is furnished.

The Board finds that the Office's calculations are correct as to the period and amount of overpayment. The record reflects that appellant returned to work on July 17, 1995, and cashed a check for the period of July 23 to August 3, 1995 while receiving normal pay from his employing establishment. Thus an overpayment resulted for the period July 17 through August 3, 1995 when appellant should have been receiving normal pay only and not disability compensation. Appellant does not contest the amount of the overpayment and there is no evidence that the period or amount of overpayment were improperly determined.

² It is noted that the Office erroneously stated that the overpayment of compensation was in the amount of \$1,424.96. The Board notes that the amount of \$1,424.96 was obtained from the Office's Debt Management System worksheet for that of another claimant.

The Board further finds that the Office has established that appellant was at fault in the creation of this overpayment for the period of July 17 through August 3, 1995.

Section 8129(a) of the Federal Employees' Compensation Act 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 tests as set forth 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. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment.³

In determining whether an individual is without fault, what constitutes fault depends on whether the facts show that the incorrect payment resulted from: (a) an incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) failure of the payee to furnish information which the payee knew or should have known to be material; or (c) acceptance of a payment which the payee either 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.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have known he was not entitled to.⁵ In the instant case, appellant should have been aware that any checks received after his return to work date that showed compensation payable on the front of the check for periods after his return to work represented an overpayment of compensation. Appellant returned to work on July 17, 1995. Upon his return to work, all compensation checks generated as a result of appellant's September 12, 1994 work injury should have ceased. Appellant had an obligation to return such checks to avoid an overpayment. Appellant was clearly advised of his obligation by the Office in its March 7, 1995 letter. The August 4, 1995 compensation check clearly noted that it covered the period July 23 to August 3, 1995. Thus, when appellant returned to work on July 17, 1995, he had an obligation to return the August 4, 1995 check to avoid an overpayment. The fact that appellant had sustained a new injury to his back on July 20, 1995 and was no longer working is not relevant to this overpayment determination as his new injury is a separate claim from the September 12, 1994 injury for which he was receiving compensation.⁶

The Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the check issued by the Office on August 4, 1995 was

³ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁴ *Id.*

⁵ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

⁶ The record reflects that appellant received continuation of pay for his July 20, 1995 injury.

in error as it pertained to his September 12, 1994 injury. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$979.24 may not be waived. Moreover, it is noted that even after the Office's attempt to contact him, appellant failed to disclose any financial information within the requisite 30 days. Thus, his denial of waiver is automatic under section 10.324.⁷

The decision of the Office of Workers' Compensation Programs dated April 14, 1997 is hereby affirmed for the amount of a \$979.24 overpayment.

Dated, Washington, D.C.
April 14, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ 20 C.F.R. § 10.324.