

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS M. BECKLER and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, Omaha, NE

*Docket No. 98-200; Submitted on the Record;
Issued December 15, 1999*

DECISION and ORDER

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

The issues are: (1) whether an overpayment occurred in appellant's case in the amount of \$4,993.00; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and therefore was not entitled to waiver of the overpayment; and (3) whether the Office properly determined the rate of adjustment.

On June 13, 1995 appellant, then a 47-year-old-maintenance worker, injured his right shoulder in the performance of duty. The Office accepted that claim for right shoulder strain and impingement syndrome. Appellant has not worked since October 15, 1995. He has received compensation for wage loss.

In a decision dated October 24, 1996, the Office granted appellant a schedule award for 14 percent permanent loss of the use of his right arm for the period September 19, 1996 to July 21, 1997. Appellant was to receive monthly checks in the amount of \$1,664.40.

By letter dated November 10, 1996, appellant requested a lump-sum payment of his schedule award.

On December 12, 1996 appellant signed an agreement to receive a lump-sum settlement of his schedule award in the amount of \$13,383.05 in lieu of further compensation payments for the duration of the schedule award payable from December 8, 1996 to July 21, 1997.

By letter dated March 24, 1997, the Office made a preliminary determination that an overpayment had occurred in the amount of \$4,993.00. The Office specifically noted that appellant had received three additional schedule award checks from December 8, 1996 to March 1, 1997, each in the amount of \$1,664.40 to which he was not entitled under the terms of his lump-sum settlement agreement. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because he was knew or should have

known that the lump-sum payment represented full and final payment of the schedule award through the period ending July 21, 1997.

Appellant requested a waiver of the overpayment on April 3, 1997.

In an overpayment questionnaire completed by appellant on April 3, 1997, he stated that he had kept the three monthly checks he received because it was his understanding that the lump-sum payment was only for an eight-month period.

In a letter dated September 1, 1997, appellant supplied the Office with a list of his monthly expenses.

In a September 30, 1997 decision, the Office finalized its preliminary determination that an overpayment occurred in the amount of \$4,993.00 and that appellant was at fault in the creation of the overpayment. The Office also advised appellant that the overpayment of compensation would be recovered by having the sum of \$200.00 withheld from continuing compensation benefits effective October 1997.¹

The Board finds that the Office properly determined that there was an overpayment in the amount of \$4,993.00.

Under the terms of his schedule award, appellant was entitled to receive monthly checks in the amount of \$1,664.40. When appellant entered into his schedule agreement, he waived his right to the monthly payments and accepted a one time payment of the total amount of schedule award for the period December 8, 1996 to July 21, 1997. The lump-sum payment received by appellant was for \$13,383.05. The record, however, establishes that after the lump-sum award, the Office mistakenly issued three monthly checks to appellant from December 8, 1996 to March 1, 1997. Because appellant was not entitled to receive the three monthly payments under the term of his lump-sum settlement, an overpayment has occurred in this case in the amount of \$4,993.00 ($\$1,664.40 \times 3 = \$4,993.00$).²

The Board further finds that the Office properly determined that appellant was not without fault in the creation of the overpayment of compensation and therefore appellant was not entitled to waiver of recovery of the overpayment of compensation.

¹ In a memorandum attached to the Office's decision, the Office noted appellant's expenses as follows: (1) utilities \$120.00; (2) insurance \$144.00; (3) IRS \$80.00; (4) car payment \$211.00; (5) rent \$510.00; (6) telephone \$29.00; (7) gasoline \$150.00; (8) clothes \$100.00; (9) medication \$30.00. The total monthly expenses were calculated to be \$1,374.00 while appellant's monthly income based on FECA compensation was listed as \$1,719.00. As the difference between monthly expenses and monthly income was calculated to be \$345.00, the Office determined that appellant could reasonably afford to repay the overpayment in the amount of \$200.00 per month.

² Although appellant alleged in the overpayment questionnaire that he thought he was entitled to more than the lump-sum award, the terms of the award were clearly spelled out in the lump-sum agreement.

Section 8129(a) of the Federal Employees' Compensation Act³ 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."⁴ If an employee is not "without fault" the overpayment is not subject to waiver.⁵

In determining whether an individual is "without fault" what constitutes "fault" must first be determined. 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 if he:

"(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."⁶

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment based on form letter CA-1049 sent to him. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁷

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

"Whether an individual is 'without fault' depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payment, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(b).

⁵ *Monroe E. Hartzog*, 40 ECAB 322 (1988).

⁶ 20 C.F.R. § 10.320(b).

⁷ 5 U.S.C. § 8129(b).

payments which were not due, and ability to comply with any reporting requirements....”

In this case, appellant specifically signed a lump-sum settlement agreement of his schedule award which stated that he would receive one lump-sum payment for the amount of \$13,383.05 in lieu of installments of compensation payable from December 8, 1996 to July 21, 1997, and that he would receive no further monetary compensation from the Office until the end of the schedule award period which was July 21, 1997. When appellant received three monthly payments totaling \$4,993.00 in addition to the lump-sum award, he knew or should have known that the payments were incorrect according to the terms of the lump-sum agreement. Thus, under 20 C.F.R. § 10.320(b)(3), appellant was at fault in the creation of the overpayment and waiver of the overpayment is not permitted in this case.

The Board, however, finds that the Office abused its discretion in determining the rate of adjustment in recovering the overpayment.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 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.”⁸

In calculating the total amount of appellant’s monthly expenses for purposes of determining the rate of adjustment, the Office failed to take into consideration how much appellant spends per month on food, which is an ordinary and necessary living expense. In a September 1, 1997 letter, appellant stated that he averaged \$350.00 per month for groceries. Because the Office determined that the difference between appellant’s total monthly expenses and his monthly income was only \$345.00, it appears that if appellant’s alleged monthly food costs were factored into the equation, appellant’s monthly income would not exceed his expenses. As such, the Board finds that the Office abused its discretion in determining the rate of adjustment as it failed to take into consideration all of appellant’s ordinary and necessary living expenses.

⁸ 20 C.F.R. § 10.321(a); *see Donald R. Schueler*, 39 ECAB 1056 (1988).

The decision of the Office of Workers' Compensation Programs dated September 30, 1997 is hereby affirmed with respect to the issues of fact and amount of the overpayment and waiver of recovery, but the case is remanded on the issue of rate of adjustment.

Dated, Washington, D.C.
December 15, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member