

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR W. SHEASLEY and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Troutdale, OR

*Docket No. 98-669; Submitted on the Record;
Issued December 2, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$3,512.00 for the period June 10 through September 14, 1996; and (2) whether the Office properly determined that appellant was not without fault in the creation of the overpayment.

On August 11, 1986 appellant, a 57-year-old maintenance worker, injured his left knee, and filed a claim for benefits based on traumatic injury. The Office accepted appellant's claim for left knee strain and commenced payment for temporary total disability. Appellant was placed on the periodic rolls.

On June 10, 1996 appellant returned to full-time duty working eight hours per day. By letters dated June 18 and July 10, 1996, the Office notified appellant that he was no longer entitled to compensation following his return to work. However, an Office memorandum dated September 30, 1996 indicated that appellant continued to receive compensation for total disability through September 14, 1996.

By letter dated October 8, 1996, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$3,512.00, covering the period from June 10 through September 14, 1996. The Office found that appellant was at fault in creating the overpayment because the June 18 and July 10, 1996 letters clearly indicated that no compensation was payable to him subsequent to his return to work, and that since he returned to work on June 10, 1996, he was aware that he was not entitled to any further total disability compensation. The Office therefore found that appellant had accepted payments which he either knew or reasonably should have been expected to know were incorrect, and was therefore at fault in creating the overpayment of compensation. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review. Appellant did not respond to this notice within 30 days.

By decision dated October 30, 1997, the Office found that appellant was at fault in creating the overpayment of compensation for the period from June 10 through September 14, 1996, which amounted to a total overpayment of \$3,512.00.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$3,512.00 for the period from June 10 through September 14, 1996. The record shows the Office incorrectly issued checks for temporary total disability compensation to appellant covering the period from June 10 through September 14, 1996, when he had returned to a full-time job and was therefore no longer totally disabled, and that therefore an overpayment had occurred in the amount of \$3,512.00.

The Board further finds that appellant was not without fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act¹ provides that an overpayment must be recovered 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.²

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides 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.³

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 been expected to know he was not entitled to.⁴ In the instant case, appellant should have been aware that as of June 18 and July 10, 1996 that he was not entitled to temporary total disability compensation,

¹ 5 U.S.C. § 8129(a)-(b).

² *Bonnye Mathews*, 45 ECAB 657 (1994).

³ 20 C.F.R. § 10.320(b).

⁴ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

which was contained in the checks he continued to receive until September 14, 1996, creating an overpayment in the amount of \$3,512.00. Because appellant returned to full-time employment on June 10, 1996 and was therefore no longer totally disabled, he knew or should have known that he was no longer entitled to the amount of weekly compensation he had been receiving, and that therefore an overpayment had occurred. Upon his receipt of the first disability check from the Office following his return to work, issued for payment of total disability compensation, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, appellant continued to accept these checks, until the Office informed him in its October 8, 1996 letter that he had received an overpayment in the amount of \$3,512.00.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office subsequent to appellant's return to work on June 10, 1996, which contained an overpayment in the amount of \$3,512.00, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$3,512.00 may not be waived. Thus, the Office's October 30, 1997 decision is affirmed.

The decision of the Office of Workers' Compensation Programs dated October 30, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 2, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member