

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANCIL F. BENNETT and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 98-1814; Submitted on the Record;
Issued December 27, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$9,325.43 had occurred; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment.

In the present case, the Office accepted that appellant sustained a bronchospasm causally related to exposure to epoxy vapors in the performance of duty on October 11, 1995. Appellant stopped working on October 11, 1995 and did not return to work.

By letter dated April 14, 1998, the Office advised appellant that it had made a preliminary determination that an overpayment of \$9,325.43 had been created during the period April 22 to October 11, 1996, because appellant had received compensation during a period that he had worked in private employment. The Office also determined that appellant was at fault in the creation of the overpayment. By decision dated April 28, 1998, the Office finalized the overpayment determination.

The Board has reviewed the record and finds that the Office properly found that an overpayment of \$9,325.43 was created.

In the present case, appellant indicated in a Form CA-1032 dated November 5, 1996 that he had returned to work in private employment from April 23, 1996, and worked until October 11, 1996.¹ The record indicates that in July 1996 the Office issued a compensation payment covering the period November 27, 1995 to July 20, 1996 and appellant was notified that he would receive a regular compensation payment every 28 days. The form letter (CA-1049) advised appellant that he must return any payment if he worked during a portion of the period

¹ According to the private employer, the initial date of employment was April 22, 1996.

covered. Because appellant received compensation for total disability during a period in which he had actual earnings, an overpayment was created.²

Based on the information provided by appellant, the Office determined that appellant average weekly wage in private employment from April 22 to October 11, 1996 was \$685.52. Since this was greater than the pay rate of the date-of-injury position, the Office determined that appellant was not entitled to any compensation during the period April 22 to October 11, 1996. This is in accordance with Office procedure regarding entitlement to compensation during periods of actual earnings.³ The actual amount of compensation paid during the relevant period was \$9,325.43 and therefore this is the amount of the overpayment.

The Board further finds that the Office properly found appellant to be at fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act⁴ provides: "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."⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent 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."

In this case, the Office found that appellant accepted payments that he knew or should have known were incorrect. As noted above, appellant was advised that he must return compensation payments when he worked during a portion of the period covered by the payment. Appellant has not explained why he accepted the payments, other than to state that "I'm not sure why I thought the overpayments of compensation was due me at other than the medications that I was taking for the injury at [the employing establishment] were distorting my thinking." There is no probative evidence to establish that appellant was incapable of understanding that compensation payments were incorrect. After his return to work in April 1996, appellant accepted a large compensation payment in July 1996, and continued to accept continuing

² See *Claude T. Green*, 42 ECAB 274 (1990).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.8147(d)(4) (December 1995) (the average weekly earnings are compared with the current pay rate for the date-of-injury position).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129(b).

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

compensation payments for temporary total disability every 28 days. The record indicates that appellant did accept compensation payments that he knew or should have known were incorrect, and therefore he is at fault in the present case. As noted above, a claimant who is at fault is not entitled to waiver of the overpayment.

The Board notes that the issue of rate of repayment of the overpayment is not before the Board since the repayment is not to be made from continuing compensation.⁷

The decision of the Office of Workers' Compensation Programs dated April 28, 1998 is affirmed.

Dated, Washington, D.C.
December 27, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁷ See *Levon H. Knight*, 40 ECAB 658 (1989). Appellant's compensation for wage loss was terminated by decision dated April 18, 1998, although he remained entitled to medical benefits. Appellant did not request review of that decision on this appeal; his appeal letter and accompanying arguments were addressed solely to the April 28, 1998 overpayment decision.