

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDDIE BRANTLEY and DEPARTMENT OF DEFENSE,
Governors Island, N.Y.

*Docket No. 96-2142; Submitted on the Record;
Issued February 18, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual earnings as a commissary worker; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,333.09 for the periods of January 4 to 27, 1995, March 5 to April 1, 1995, and April 30 to October 14, 1995; (3) whether the Office properly found that appellant was at fault in the creation of the overpayment; (4) whether the Office properly required repayment at the rate of \$100.00 per month from continuing compensation payments; and (5) whether appellant has met his burden of proof to establish that he sustained a recurrence of disability causally related to his accepted December 9, 1995 employment injury.

The Office accepted that appellant sustained low back syndrome due to a traumatic injury on June 29, 1994. Appellant returned to modified employment as a commissary worker for six hours per day on January 4, 1995. The record indicates that the Office issued appellant compensation for total disability from January 4 to 27, 1995, from March 5 to April 1, 1995 and from April 30 to October 14, 1995.

By decision dated May 12, 1995, the Office reduced appellant's compensation effective January 4, 1995 based on his actual earnings as a commissary worker. The Office also issued an identical wage-earning capacity determination by decision dated September 21, 1995.

By notice dated December 28, 1995, the Office advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$8,333.09 which occurred because he received compensation for temporary total disability for the periods January 4 to 27, March 5 to April 1 and April 30 to October 14, 1995 while receiving actual earnings for working six hours per day. The Office further advised appellant that it had made a preliminary determination that he was at fault in the creation of the overpayment as it had notified him by Form CA-6031 dated November 1, 1994 that he was to return compensation checks received after he returned to work. The Office requested that appellant indicate whether

he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment and asked him to complete an attached overpayment recovery questionnaire in the event that the finding of fault was overturned.

Appellant did not respond to the Office's notice of preliminary determination of overpayment.

By decision dated February 5, 1996, the Office finalized its preliminary determination that appellant received an \$8,333.09 overpayment of compensation and was at fault in the creation of the overpayment. The Office found that repayment should be collected by withholding \$100.00 per month from his continuing compensation.

The Board finds that the Office properly determined appellant's wage-earning capacity based on his actual earnings as a commissary worker.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹ The Office has met its burden in the present case.

Under section 8115(a) of the Federal Employees' Compensation Act,² wage-earning capacity is determined by the actual earnings received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. The Board has held that, generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.³

In the present case, following his injury on June 29, 1994, appellant returned to modified work as a commissary worker for six hours per day under physical limitations imposed by Dr. Martin Wesely, a Board-certified orthopedic surgeon and Office referral physician. In a medical report and work restriction evaluation dated November 22, 1994, Dr. Weseley found no objective findings on physical examination and opined that appellant could return to work for eight hours per day with restrictions on excessive bending and lifting. Appellant received actual earnings for performing the position of commissary worker through September 21, 1995, the date the Office determined his wage-earning capacity. Appellant continued to receive earnings for more than three months in the commissary worker position and the record contains no evidence that the employment was seasonal, intermittent or not medically suitable to his physical limitations. The Office, therefore, properly determined that appellant's actual earnings as a commissary worker fairly and reasonably represented his wage-earning capacity effective January 4, 1995.

The Board finds that appellant received a \$8,333.09 overpayment in compensation.

¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

² 5 U.S.C. § 8115.

³ *James D. Champlain*, 44 ECAB 438 (1993).

The record establishes that appellant returned to work for six hours per day on January 4, 1994 but received compensation for total disability during the periods of January 4 to 27, March 5 to April 1 and April 30 to October 14, 1995. By decision dated May 12, 1995, the Office determined that the position of commissary worker fairly and reasonably represented appellant's wage-earning capacity effective January 4, 1995. Section 8155 of the Act provides that when the disability is partial, compensation may be determined by appellant's actual earnings.⁴ Appellant should have received disability compensation for the difference between his wage earning prior to his disability and his current actual earnings. Office computer records indicate that appellant received \$12,662.93 in compensation for temporary total disability for the above periods when he was only entitled to receive \$4,329.84 for these periods based on this loss of wage-earning capacity. Appellant has not submitted any evidence indicating that he did not receive an overpayment of compensation or contested the amount of the overpayment. Thus, the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,333.09.

The Board further finds that the Office improperly found that appellant was at fault in creating the overpayment for the period of January 4 to 27, 1995.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office 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."⁵ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁶

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."⁷

⁴ 5 U.S.C. § 8115.

⁵ 5 U.S.C. § 8129.

⁶ See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

⁷ 20 C.F.R. § 10.320.

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 in question, he knew or should have known that the payment was incorrect.⁸

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 payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which are not due and the ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).”⁹

In this case, there is no evidence that appellant knew when he accepted the compensation check covering the period of January 4 to 27, 1995 that the check included a payment for an amount of compensation to which he was not entitled. There are no copies of the check or documents accompanying it advising appellant of the inclusive period covered by such check, which would have put appellant on notice that he was receiving compensation for a period in which he worked. The Office determined that appellant was at fault in creating the overpayment because he had been informed by form letter dated November 1994 to return compensation checks after he returned to work. However, the Board has held that form letters cannot be used to establish what a claimant knew or should have known with regard to the receipt of a subsequent payment because it contains no information regarding the period covered by a specific subsequent check.¹⁰ Here, there is no evidence that appellant knew or should have known, at the time he received the check covering the period January 4 to 27, 1995, that the check was for an incorrect amount. Appellant did not return to work for six hours per day until January 4, 1995. He could have reasonably believed that the check was for a prior period in which he did not work. The Board finds that there is no evidence that appellant knew or should have known, at the time he received the check including the period January 4 to 27, 1995 that this check was for an incorrect amount. Therefore, the Office's February 5, 1996 decision must be remanded for a determination of appellant's eligibility for waiver during the period of January 4 to 27, 1995.

In regard to the overpayment created during the periods of March 5 to April 1 and April 30 to October 14, 1995, the Board finds that appellant was not without fault.

⁸ See *Robin O. Porter*, 40 ECAB 421 (1989).

⁹ 20 C.F.R. § 10.320(c)

¹⁰ *Claude T. Green*, 42 ECAB 174 (1990).

Appellant worked for six hours a day during the periods March 5 to April 1 and April 30 to October 14, 1995 yet received compensation for total disability. The Office erroneously paid appellant compensation for total disability from January 4 to 27, 1995, then correctly paid appellant compensation based on his loss of wage-earning capacity for the month of February 1995. In March 1995, the Office again began issuing appellant compensation for total wage-loss disability. The fact that appellant received several compensation checks which totaled a sizable amount of money while receiving wages for six hours per day of work should have alerted him that he was not entitled to this much monetary compensation. The lapse of time between appellant's January 4, 1994 return to work for six hours per day and his continued receipt of compensation checks, at the total disability rate, after March 1994 should reasonably have made him aware that he was receiving an incorrect payment. There is no evidence that appellant was entitled to a schedule award or any other monetary benefits from the Office that could reasonably lead him to believe that the compensation checks accepted after March 1995 were for a correct amount. Even though the Office may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed that he had returned to work, this does not excuse appellant's acceptance of such checks which he knew or should have been expected to know should have been returned to the Office.¹¹ Moreover, the Office advised appellant to return any checks received after his return to work by letter dated November 1994. While it may have been reasonable for appellant to believe that he was entitled to total disability compensation through the time he received the check covering January 4 to 27, 1995, the facts and circumstances of this case establish that, after that check, he reasonably should have known that he was not entitled to compensation at the total disability rate while also receiving wages, especially as he received the proper compensation for the month of February 1995. The combination of these factual circumstances shows that appellant accepted payments from March 5 to April 1 and April 30 to October 14, 1995 which he knew or should have been expected to know was incorrect; and thus the Office properly determined that appellant was at fault in creating the overpayment during this period. Therefore, the overpayment is not subject to waiver.

As this case must be remanded for the Office to consider appellant's eligibility for waiver on that portion of the overpayment occurring through January 27, 1995, it is premature for the Board to address the issue of repayment of the overpayment from appellant's continuing compensation payments.

The Board further finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability causally related to his accepted December 9, 1995 employment injury.

On December 13, 1995 appellant filed a claim for a traumatic injury occurring on December 9, 1995 when he slipped on ice. The Office assigned the claim office file number A2-706856 and accepted the claim for an aggravation of low back pain. Following the injury, appellant returned to light-duty employment.

¹¹ *Robert W. O'Brien*, 36 ECAB 541 (1985).

On April 24, 1996 appellant filed a notice of recurrence of disability on January 24, 1996 causally related to his December 9, 1995 employment injury. By decision dated May 30, 1996, the Office denied appellant's claim on the grounds that the evidence did not establish a causal relationship between the claimed condition or disability and the employment injury. The Office noted that appellant had preexisting chronic low back pain and severe degenerative joint disease at L5-S1.

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹²

In the present case, appellant sustained an aggravation of low back pain due to an injury on December 9, 1995, following which he returned to work in a limited-duty capacity. There is no evidence in the record establishing any change in the nature and extent of appellant's light-duty position as a cause of his claimed disability after January 24, 1996.

Appellant submitted numerous form reports from Dr. Ronald Chase, an orthopedic surgeon, dated January through May 1996. In his reports, Dr. Chase diagnosed either lumbosacral radiculopathy or low back pain syndrome and checked "yes" that the condition was caused or aggravated by an employment activity or the condition for which compensation was claimed. However, the Board has held that an opinion on causal relation which consists only of a physician checking "yes" to a question on a medical form report is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.¹³ In the absence of rationalized medical opinion evidence establishing a causal relationship between appellant's alleged recurrence of disability and his December 1995 employment injury, the Board finds that he has failed to meet his burden of proof.

¹² *Terry R. Hedman*, 38 ECAB 222 (1986).

¹³ *Lucrecia M. Nielson*, 41 ECAB 583 (1991).

The decisions of the Office of Workers' Compensation Programs dated May 30, 1996 and September 21, 1995 are affirmed and the decision dated February 5, 1996 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
February 18, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member