

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TERRY C. HEATON and DEPARTMENT OF THE NAVY,  
COMMANDER-IN-CHIEF, PAC FLEET, Oak Harbor, Wash.

*Docket No. 96-2307; Submitted on the Record;  
Issued February 9, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are whether are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$2,085.55 overpayment of compensation for the period December 6, 1990 to September 16, 1995; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$150.00 from appellant's compensation payments every four weeks.

The Board finds that appellant received a \$2,085.55 overpayment of compensation for the period December 6, 1990 to September 16, 1995.

In the present case, the Office determined in an April 19, 1996 decision that appellant received a \$2,085.55 overpayment of compensation.<sup>1</sup> Appellant received compensation for the period December 6, 1990 to September 16, 1995 which did not include deductions for life insurance premiums. The record contains evidence which shows that the amount of these life insurance premiums was \$2,085.55; appellant was not entitled to this amount because he received life insurance coverage without making the necessary payments. Therefore, the Office properly determined that appellant received a \$2,085.55 overpayment.

The Board further finds the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

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<sup>1</sup> The Office had finalized its March 18, 1996 preliminary overpayment determination.

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> 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.<sup>3</sup> The only exception to this requirement is a situation which meets the tests 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 this subchapter or would be against equity and good conscience."<sup>4</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.320(b) of Title 20 of the Code of Federal 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."<sup>5</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

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 were not due, and ability to comply with any reporting

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.320(b).

requirements (e.g., age, comprehension, memory, physical and mental condition).”<sup>6</sup>

In the present case, appellant acknowledged in a statement that he was aware that beginning in December 1990 the Office improperly failed to deduct his life insurance.<sup>7</sup> The record contains a Form CA-102 received by appellant in January 1991 which shows that the Office did not deduct life insurance premiums from appellant’s compensation for the period December 16, 1990 to January 12, 1991. Moreover, appellant was sent a Form CA-1049 dated January 11, 1991 which informed him that he remained responsible for life insurance premiums and which advised him that the Office was not deducting life insurance premiums from his compensation.<sup>8</sup> Appellant argued that his accepted employment injury, an episode of major depression, prevented him from learning that an overpayment had been created, but he did not adequately articulate the basis for this argument. Even though the Office may have been negligent in failing to deduct life insurance premiums, this does not excuse appellant’s acceptance of such checks which he knew or should have been expected to know were not made out in correct amounts.<sup>9</sup>

The Board further finds that the Office properly required repayment of the overpayment by deducting \$150.00 from appellant’s compensation payments every four weeks.

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.”<sup>10</sup>

The record supports that, in requiring repayment of the overpayment by deducting \$150.00 from appellant’s compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on

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<sup>6</sup> 20 C.F.R. § 10.320(c).

<sup>7</sup> The record contains a Form CA-102 received by appellant which shows that the Office was not deducting life insurance premiums from appellant’s compensation.

<sup>8</sup> Appellant argued that he did not receive the Form CA-1049. However, the form was properly addressed to appellant and it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *George F. Gidicsin*, 36 ECAB 175, 178 (1984). The form indicated that deductions for life insurance premiums were not being made for the period December 16, 1990 to February 9, 1991.

<sup>9</sup> *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

<sup>10</sup> 20 C.F.R. § 10.321(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$150.00 from appellant's compensation payments every four weeks.<sup>11</sup>

The decision of the Office of Workers' Compensation Programs dated April 19, 1996 is affirmed.

Dated, Washington, D.C.  
February 9, 1999

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> The record contains a financial information questionnaire which shows that appellant's monthly income exceeded his monthly expenses by more than \$150.00.