

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND GREEN and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND, Oakland, Calif.

*Docket No. 97-1410; Submitted on the Record;
Issued January 12, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether an overpayment was created in appellant's case in the amount of \$1,939.90; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

On December 4, 1995 appellant, then a 47-year-old merchant marine, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that his left middle finger tip was cut off on November 22, 1995 while he was cleaning a paint machine. The Office accepted appellant's claim for a left second finger crush injury on February 29, 1996 and paid continuation of pay from November 23, 1995 to January 6, 1996 and compensation from February 4 through March 10, 1996. On December 13, 1995 appellant filed a claim for a schedule award which was accepted and paid.

By letter dated August 6, 1996, the Office advised appellant that he had received compensation benefits for wage loss for the period January 31 through March 10, 1996 but had also been paid for annual leave for the same period. Appellant was advised that he had been overpaid compensation for the period February 4 through March 10, 1996¹ as he cannot be paid by both the employing establishment and the Office. The Office further advised appellant regarding the restoration of his leave and that the Office would be required to take action to recover the overpayment.

The case record contains a worksheet, which shows that appellant received a compensation check from the Office, which provided wage-loss benefits for the period February 4 through March 10, 1996. In a letter from the employing establishment dated July 30,

¹ The Board notes that the date was originally indicated as March 21, 1996, but the Office crossed out the "21" and put the number "10" instead.

1996, it was noted that appellant took annual leave for the period February 4 through March 10, 1996.

By letter dated September 26, 1996, the Office advised appellant that it had made a preliminary finding that an overpayment had occurred in his case in the amount of \$1,939.90 because he had received compensation benefits for the same period that he was paid annual leave benefits from the employing establishment, February 4 to March 10, 1996. The Office found that appellant was at fault in the creation of the overpayment because he knew or should have known the compensation checks were incorrect as the checks indicate the date, for which compensation is paid and he should have been aware that he had received wages from his employer for the same date. Appellant was asked to submit evidence if he disagreed with the preliminary finding of the Office.

Appellant requested a decision on the record and submitted an overpayment recovery form.

By decision dated December 24, 1996, the Office found that an overpayment had been created in appellant's case in the amount of \$1,939.90 for the reason that appellant accepted both compensation benefits from the Office and payment for annual leave from the employing establishment for the period February 4 to March 10, 1996. The Office found that appellant was at fault in the creation of the overpayment because he should have been aware that he was not entitled to both annual leave pay and compensation benefits for the same dates.

The Board finds that the Office properly determined that an overpayment was created in appellant's case in the amount of \$1,939.90 and that appellant was not without fault in the creation of the overpayment, thus precluding waiver of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act² 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."³ 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."⁴

No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

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.”⁵

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment, that appellant accepted a payment which he knew or should have been expected to know was incorrect.

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

In this case, the record shows that appellant requested and was granted annual leave from the employing establishment for the period February 4 to March 10, 1996 and that he also accepted a compensation check from the Office for lost wages for the same period. Appellant knew or should have been expected to know that he was not entitled to both annual leave benefits and compensation benefits for the period February 4 to March 10, 1996. The Board finds that, considering all the circumstances, appellant knew or should have been expected to know that he was not entitled to accept a check for compensation benefits commencing on February 4 to March 10, 1996 when he had already asked and received payment for annual leave for the same period. Since appellant was not without fault in the matter of the overpayment, waiver of recovery of the overpayment is precluded.⁷

⁵ 20 C.F.R. § 10.320(b).

⁶ 20 C.F.R. § 10.320(c).

⁷ See *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping

The December 24, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 12, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

to create the overpayment).