

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE A. DENT and DEPARTMENT OF THE AIR FORCE,
McCHORD AIR FORCE BASE, Wash.

*Docket No. 97-2739; Submitted on the Record;
Issued July 9, 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 found that an overpayment of \$6,577.25 existed; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$199.00 from appellant's continuing compensation payments.

In the present case, the Office accepted the claim for a rupture of the right long head biceps sustained on December 21, 1993 and awarded compensation for temporary disability beginning February 11, 1994.

On January 20, 1994 appellant filed a Form CA-7 for wage-loss compensation from February 11 through February 16, 1994. Appellant later filed a Form CA-7 for wage-loss compensation for the period May 20 through June 2, 1994.

On July 18, 1994 the Office advised appellant that it would issue payment of compensation from February 11 through July 18, 1994. By check dated July 29, 1994, appellant received compensation in the amount of \$10,879.66 for the period February 11 through July 23, 1994. On November 18, 1994 a supplemental check was issued in the amount of \$506.51 for the period February 11 through September 17, 1994 to adjust for a night pay differential.

On August 2, 1995 the employing establishment indicated that appellant had worked from February 21 through May 18, 1994. The employing establishment, however, did not note a return to work date on appellant's January 20, 1994 Form CA-7 and did not complete a Form CA-3 notifying the Office of appellant's return to work.

On August 31, 1995 the Office requested information from the employing establishment concerning appellant's return to work.

By letter dated June 26, 1997, the employing establishment indicated that appellant returned to work on February 21, 1994. It stated that appellant worked until he retired on May 19, 1994. It noted, however, that appellant received compensation for total temporary disability from February 21 through May 19, 1994.

The Office's daily computation log indicated that appellant received compensation for total temporary disability for the period February 21 through May 19, 1994.

On July 24, 1997 the Office made a preliminary determination that an overpayment in the amount of \$6,577.25 occurred and that appellant was at fault in the creation of the overpayment. Appellant was given 30 days to submit additional evidence or argument, to request a telephone conference, or to request a precoupment hearing. In an accompanying memorandum, the Office noted that appellant signed a Form CA-7 indicating that he should not accept compensation to which he was not entitled. It noted that appellant signed this Form CA-7 only a month prior to his return to work. The Office further indicated that in its July 19, 1994 decision it informed appellant of the dates for which he was receiving compensation and that appellant was reasonably aware of the time period covered. It therefore found that appellant was at fault in the creation of the overpayment. In a disability benefit payment work sheet, the Office indicated that the overpayment totaled \$6,577.25 based on a weekly pay rate of \$697.59 for the period February 21 through May 19, 1994 at a 75 percent compensation rate.

On July 27, 1997 appellant completed an overpayment recovery questionnaire. Appellant indicated that he received \$2,056.00 from the Veterans Administration benefits each month. He further stated that he had \$100.00 in a savings account and \$100.00 in a checking account. Appellant stated that he had \$10,000.00 in savings certificates or certificates of deposit. He listed his personal property other than household furnishings, primary automobile and clothing to include a 1994 jeep, a 1989 boat, and a 1993 recreational vehicle. Appellant stated that his monthly household expenses included \$450.00 for food, \$50.00 for clothing, \$866.00 for rent or mortgage, \$35.00 for gas and cable, \$52.00 for electric, \$80.00 for telephone, \$50.00 for house maintenance, \$352.00 for jeep payment, \$572.00 for recreational vehicle payment, \$150.00 for gas and oil, \$35.00 for primary vehicle maintenance, \$100.00 for auto insurance, \$50.00 for nonreimbursable medical expenses, and \$80.00 for commuting expenses. Appellant also noted that he had liabilities including monthly payments of \$45.00 to Visa, \$50.00 to Les Schwab tires, \$142.00 for a boat loan and \$108.00 to the Air Force Exchange. Appellant stated that he thought the employing establishment would notify the Office of his return to work. He stated that his supervisor told him that the Office would be informed. Appellant stated that he was unaware that an overpayment occurred and that he did not notice that his award included dates for which he was working.

On July 27, 1997 appellant requested a telephone conference.

Following the conference held on August 6, 1997 the Office issued a memorandum of conference. In the memorandum, it was noted that appellant thought his supervisor would notify the Office of his return to work. The Office determined that appellant had a monthly income of \$4,307.00 based on his disability compensation of \$2,067.00, his \$184.56 maintenance allowance, and \$2,056.00 in Veterans Administration benefits. He stated that appellant had monthly household expenses of \$2,099.00 based on \$300.00 per month for food, \$450.00 for

clothing, \$866.00 for mobile home payments and space rental, \$42.00 for garage/cable, \$52.00 for electric, \$23.00 for phone, \$50.00 for home maintenance, \$352.00 for Jeep, \$150.00 for gas/oil, \$25.00 for Jeep maintenance, \$100.00 for Jeep insurance, \$74.00 for medical expenses and \$15.00 for charity. The Office noted that an additional \$50.00 in expenses could be added for miscellaneous items leaving appellant with a surplus balance of \$2,208.06 per month. The Office noted that appellant had additional monthly liabilities of \$917.00 including \$45.00 for Visa, \$50.00 for Les Schwab Tires, \$142.00 for a boat loan, \$572.00 for a recreational vehicle, and \$108.00 for an Air Force Exchange loan. The Office, however, found that appellant had \$63,200.00 in assets including \$100.00 in a savings account, \$100.00 in a checking account, \$10,000.00 in a savings certificate, a \$4,000.00 boat, and a \$49,000.00 recreational vehicle.

In a letter dated August 11, 1997, appellant disagreed with the Office's description of his injury in its memorandum of conference and stated that he received survivor's benefits from the Navy Retired Pay Center in the amount of \$61.00. He stated that he his supervisor told him that he would notify the Office of his return to work. Appellant stated that until he received the overpayment notice, he had thought all the notification required had been completed. He stated that it was strange that it took three years for the issue to come up.

On August 22, 1997 the Office indicated that it noted the \$61.00 in survivor's benefits in its previous memorandum and that no corrections were necessary to that memorandum.

By decision dated August 22, 1997, the Office found that an overpayment in the amount of \$6,577.25 existed and that waiver of recovery of the overpayment was not warranted. The Office noted that \$199.00 would be withheld from appellant's continuing compensation benefits effective August 17, 1997. In an accompanying memorandum, the Office noted that appellant had acknowledged his responsibilities and that he had been notified of the payments.

The Board finds that the Office properly found that an overpayment of \$6,577.25 was created.

As noted above, appellant returned to full employment on February 21, 1994 and worked until his retirement on May 19, 1994. Appellant, however, received compensation for total temporary disability during this entire period. He was therefore not entitled to the \$6,577.25 he received during this period. Appellant does not dispute this amount. Accordingly, an overpayment of \$6,577.25 existed.

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

Section 8129(b) of the Federal Employees' Compensation Act¹ 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

¹ 5 U.S.C. §§ 8101-8196.

Act or would be against equity and good conscience.”² No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.³

Section 10.320(b) of the Office’s implementing regulations provides:

“In determining whether an individual is with fault the Office will consider all pertinent circumstances, including age, intelligence, education and physical and mental condition. 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.”⁴

The Board finds that appellant is at fault under 20 C.F.R. § 10.320(b)(3). In the present case, the Office advised appellant on July 18, 1994 that it would issue a payment of compensation covering the period February 11 through July 18, 1994. This represented appellant’s temporary total disability compensation. Appellant also received a July 29, 1994 check stating this period of compensation and a supplemental check for a night pay differential which indicated this period of compensation. There is no question that appellant was aware that he could not receive compensation for total disability during a period that he worked from February 21 through May 19, 1994. Appellant should have known that the payment was incorrect since it represented a total disability payment covering a period during which he had worked. He argues that he did not notice the overpayment and that he expected the employing establishment to notify the Office of his return to work. These arguments do not negate the fact that appellant received compensation payments he knew or should have known were incorrect based upon the notices he received. Accordingly, the Board finds that under 20 C.F.R. § 10.320(b)(3) the Office properly found that appellant was at fault in the creation of the overpayment in this case. Since appellant is at fault, no waiver of the overpayment is possible

The Board further finds that the Office did not abuse its discretion in requiring repayment by deducting \$199.00 from appellant’s continuing compensation payments.

Section 10.321(a) of the Code of Federal Regulations provides: 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

² 5 U.S.C. § 8129(b).

³ *Mary Valentine*, 33 ECAB 1419 (1982).

⁴ 20 C.F.R. § 10.320(b).

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 hardship upon such individual.”

In this case, appellant submitted information regarding his monthly income and expenses on an overpayment recovery questionnaire. Following a memorandum of conference, the Office noted that appellant’s monthly income exceeded his monthly household expenses by \$2,208.06. Although appellant had additional monthly liabilities of \$917.00, he still had a surplus of \$1,291.06. Moreover, the Office noted that appellant had assets exceeding \$63,200.00. Accordingly, because the Office considered appellant’s financial circumstances and the rate of recovery would clearly not impose a hardship on appellant, the Board finds that the Office did not abuse its discretion under 20 C.F.R. § 10.321(a).

The decision of the Office of Workers’ Compensation Programs dated August 22, 1997 is affirmed.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member