

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BOBBY G. WINDHAM and DEPARTMENT OF JUSTICE,  
FEDERAL MEDICAL CENTER, Houston, Tex.

*Docket No. 97-693; Submitted on the Record;  
Issued May 6, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether appellant received an overpayment in the amount of \$9,672.75 and, if so, whether he was without fault in the matter of this overpayment.

The Board finds that appellant received an overpayment in the amount of \$9,672.75.

On April 26, 1995 the Office of Workers' Compensation Programs accepted that appellant sustained affective disorder and post-traumatic stress disorder causally related to his federal employment duties. On August 17, 1995 appellant filed a Form CA-7 claim for compensation for the period July 27, 1994 to March 6, 1995, the day he returned to work. By letter dated July 25, 1995, the Office informed appellant that he was eligible for compensation for this period, and advised him that if he either entered a leave-without-pay status or bought back leave which he used as a result of the injury he could receive the compensation. On June 13, 1995 appellant filed a Form CA-7 requesting compensation commencing May 19, 1995. The Office placed appellant on the periodic rolls effective September 17, 1995, and on September 19, 1995, the Office processed appellant's disability payments.

By letter dated August 15, 1996, the employing establishment informed the Office that appellant had been on sick and annual leave for the period May 19 through August 31, 1995, and therefore received regular pay checks for the same period for which he received compensation benefits. An employee who uses sick or annual leave may not receive compensation for any period covered by such leave.<sup>1</sup> Therefore, appellant received an overpayment of compensation as he utilized leave pay during a period for which he received total disability compensation.

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<sup>1</sup> *Vincent E. Washington*, 42 ECAB 636 (1991).

The Board further finds that appellant was not without fault in the matter of the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act 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. 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 the Act or would be against equity and good conscience."<sup>2</sup> No waiver of an overpayment 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 of Title 20 of the Code of Federal Regulations states 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
- (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>3</sup>

In this case, the Office applied the third standard in finding appellant to be at fault in creating the overpayment.

The evidence of record establishes that appellant knew or reasonably should have known that he was not entitled to leave pay and compensation simultaneously, and that he failed to take any action to resolve the error when he received compensation checks for periods which he had already received leave pay. Through prior letters from the Office, such as the July 25, 1995 letter outlining the terms under which appellant could receive compensation, appellant should have known that he was not entitled to receive leave pay and compensation for the period May 19 through August 31, 1995. In addition, in a letter dated August 31, 1995, appellant specifically acknowledged that he had been on sick and annual leave since May 19, 1995 and that the employing establishment had informed him that it would be necessary for him to repay the employing establishment for any period of time for which he received dual compensation. Finally, appellant's assertion that the Office and the employing establishment were at fault in creating the overpayment, because both institutions knew that he had been drawing leave since May 19, 1995, is without merit. The Board has held although the Office may have been

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<sup>2</sup> 5 U.S.C. § 8129.

<sup>3</sup> 20 C.F.R. § 10.320(b).

negligent in issuing a claimant a compensation check to which he was not entitled, this does not excuse the claimant from accepting such check to which he knew or should have been expected to know he was not entitled.<sup>4</sup> Despite the fact that appellant knew or should have known that he was receiving compensation in error, he never notified the Office of his receipt of dual payments or attempted to buy back leave used during this period.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the compensation he received during the period May 19 to August 31, 1995 was in error. Therefore, appellant is at fault in the creation of the overpayment and it is not subject to waiver.

The decision of the Office of Workers' Compensation Programs dated November 8, 1996 is affirmed.

Dated, Washington, D.C.  
May 6, 1999

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>4</sup> See *Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O'Brien*, 36 ECAB 541 (1985).