

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD E. OVER and DEPARTMENT OF THE ARMY,
LETTERKENNY ARMY DEPOT, Chambersburg, PA

*Docket Nos. 98-1287 and 98-1929; Submitted on the Record;
Issued April 20, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded authorization of continuation of pay for the period March 15 through April 5, 1995 and payment of temporary total disability compensation for the period April 6 through July 22, 1995; (2) whether appellant sustained a back condition as a result of the February 7, 1995 employment injury; (3) whether the Office properly found that appellant received a \$6,518.58 overpayment in compensation; and (4) whether the Office properly determined that appellant was not without fault in the creation of the overpayment.

On February 7, 1995 appellant, then a 41-year-old welder, was walking from the employing establishment parking lot to the employing establishment when he slipped on ice and fell, with his weight coming down on his right hip. He stopped working on February 9, 1995. In a February 8, 1995 report, Dr. Robert N. Richards, Jr., a Board-certified orthopedic surgeon, indicated that appellant had pain on motion of the right hip. He noted that appellant had a history of degenerative arthritis in the right hip for which he had been treated for several years. He related that the most recent x-rays showed a definite progression in appellant's osteoarthritic problem in his hip. He concluded that appellant could return to work but with restrictions of no heavy lifting, stooping, climbing or climbing over vehicles. Subsequent medical notes indicated that appellant continued to complain of severe right hip pain. Dr. Richards indicated that appellant was being kept off work due to the pain. In a March 6, 1995 note, Dr. Richards indicated that appellant could return to light duty the next day. He commented that appellant would probably need to have total hip replacement surgery due to the pain.

The employing establishment indicated that appellant would perform hand welding duties at a workbench, using a tig welder with a foot control for heat. The employing establishment noted that appellant's duties included modifying heater cradles, weighing three to four pounds. The employing establishment stated that appellant would be free to move about the employing establishment as needed. He would not be required to bend, stoop, push or pull. Prolonged standing, walking or sitting was not required. The employing establishment indicated that

appellant would not lift over 10 pounds. It noted that appellant would be required to work eight hours a day, five days a week. It commented, however, that if Dr. Richards felt the hours to be too much, a reduced workday with restrictions could be arranged.

Appellant returned to work on March 7, 1995 but stopped again on March 8, 1995. In a March 15, 1995 note, Dr. Richards stated that appellant's hip pain was at the point that he was unable to sit for any length of time due to pain. He related that appellant tried to do his job at work which seemed very reasonable as it involved primarily sitting and working at a bench doing welding. Dr. Richards reported that appellant complained he could not sit for more than 15 to 20 minutes at a time. He commented that the complaint was unusual because most patients with osteoarthritis had pain with walking but felt better with sitting.

In an April 7, 1995 report, Dr. Richards stated that the pain in appellant's hip had gradually become worse since the employment injury. He noted appellant had preexisting osteoarthritis of the hip. Dr. Richards commented that he could not be sure why appellant was having so much difficulty with his hip since the fall, but could only surmise that the fall may have made appellant's preexisting condition worse. He indicated that since the fall appellant had considerable trouble getting around due to pain and was unable to work. Dr. Richards noted that he had hoped the pain would subside spontaneously but concluded that the only recourse was to perform a total hip replacement due to the extensive nature of the degenerative arthritis.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. James Hamsher, a Board-certified orthopedic surgeon, for an examination and second opinion. In a June 23, 1995 report, Dr. Hamsher noted that appellant reported he did not fall directly on the hip but twisted his right hip in the fall. Appellant indicated he began to hurt almost immediately and had constant pain since that time. Dr. Hamsher reported that appellant had limited motion of his right hip with pain at the extremes of motion. He diagnosed degenerative joint disease of the right hip and concluded that the current severity of appellant's problems were caused by the fall at work which twisted his preexisting degenerative joint disease. Dr. Hamsher stated that the injury was an aggravation of appellant's preexisting condition which had not yet ceased. He concluded that only a right hip arthroplasty would give any chance for successful relief of the right hip pain.

In a June 27, 1995 letter, the Office accepted appellant's claim for aggravation of osteoarthritis and authorized right hip arthroplasty. The Office began payment of temporary total disability compensation, effective April 6, 1995.

The employing establishment submitted a report and videotape from surveillance conducted of appellant. The employing establishment indicated that on several occasions appellant was seen using a crutch or two crutches on going to or coming from a doctor's office. It noted, however, that appellant did not use crutches when working around the outside of his house. The surveillance report indicated that on March 17, 1995 appellant was seen taking a bucket of material to the trash can. On March 27, 1995 appellant was observed using a pick near the top of his driveway with a shovel and wheelbarrow nearby. Appellant detected the surveillance and stopped working. He went into his house and his wife put the tools away, after observing the surveillance. The surveillance report indicated that on two occasions appellant was seen pushing his father in a wheelchair, helping his father either get in or get out of a car and

lifting the wheelchair to either put it in or get it out of a car trunk. On April 15, 1995 appellant was observed mowing his lawn with a riding mower. He then carried white fencing and placed it around the area he had worked on March 27, 1995. On April 25, 1995 he was watched for over two hours as he pushed a wheelbarrow of dirt, dumping the wheelbarrow, shoveling the dirt, carrying lawn chairs and working in his garden.

An official from the employing establishment showed the surveillance videotape to Dr. Richards. In an August 7, 1995 report, Dr. Richards indicated that he had seen the videotape showing appellant performing different activities around his house, without ever using crutches. He commented that appellant did not appear to have much pain in his hip and hardly limped. Dr. Richards concluded that appellant would have been able to work at the employing establishment at the time of the videotaping. He stated that, if appellant was able to perform those activities at home, he saw no reason why appellant could not have worked and was certain that he could have performed a light-duty job. Dr. Richards further concluded that appellant did not require a total hip replacement at that time but commented that he might need such surgery at some point in the future due to his osteoarthritis of the hip.

The employing establishment again offered appellant light duty. In an August 14, 1995 note, appellant declined the offer of light duty. However, on August 16, 1995, after viewing the videotape, appellant accepted the light-duty position. Appellant also signed an agreement with the employing establishment in which he agreed to reimburse the employing establishment at the rate of \$60.00 a pay period up to \$3,000.00 for full restitution of the compensation paid to him, was considered to have been suspended without pay for the period June 1 through August 15, 1995 and stated that he would withdraw his claim for compensation for the period June 1 through August 15, 1995.

In a September 26, 1995 report, Dr. Roger J. Robertson, a Board-certified orthopedic surgeon, noted that appellant had an antalgic gait using one crutch. He indicated that appellant had limitation in motion of the hip and pain in the inguinal area and the right lower back region. He related that the February 20, 1995 x-rays showed advanced arthritis of the right hip with joint space narrowing, cystic formation and hypertrophic spur formation. He noted that appellant had good sensation distally but with questionable numbness in the foot. He diagnosed advanced arthritis in the right hip and questionable radiculopathy of the right spine.

In an October 16, 1995 letter, the Office informed appellant that it had made a preliminary determination that appellant had received an overpayment of \$3,222.08 because he was collecting compensation for temporary total disability but medical evidence showed he was capable of performing light duty for the period June 1 through September 16, 1995. The Office further concluded that appellant was at fault in the overpayment because he agreed to reimburse the Office for the money he received during the period, which supported a finding that he was not without fault in the creation of the overpayment. The Office calculated the overpayment for the period June 1 through July 22, 1995 because appellant had returned the compensation check for the period beginning July 23, 1995 and subsequent payments had been canceled. In an October 25, 1995 decision, the Office denied appellant's claim for compensation for the period June 1 through September 16, 1995 because the evidence of record failed to support temporary total disability or wage loss for the period in question.

In a November 17, 1995 letter, appellant, through his representative, requested a hearing before an Office hearing representative of the October 25, 1995 decision. Appellant submitted a November 14, 1995 report from Dr. Robertson who related appellant had given a history of trying to do light work around his house such as putting mulch around his trees and bushes and mowing. Dr. Robertson reported that a magnetic resonance imaging (MRI) scan showed a central disc herniation at L4-5 which was slightly larger on the right. He indicated that the disc herniation touched the left and right L5 nerve roots as they exited the thecal canal. Dr. Robertson also noted that appellant had a Grade I anterior spondylolisthesis of L4 and L5 secondary to degenerative facet disease. He reported appellant had a small but broad based right posterior central disc protrusion at L5-S1 and a hemangioma of the L2 vertebral body. Dr. Robertson indicated that he had referred appellant for additional examinations. He concluded that most of appellant's symptoms could be significantly improved by a right hip arthroplasty. In a November 15, 1995 note, Dr. Robertson stated that appellant's right hip pain was related to the February 7, 1995 employment injury. He indicated that appellant had preexistent osteoarthritic disease which was significantly aggravated by the fall. He pointed out that appellant's clinical course had deteriorated since the fall.

Appellant also submitted an October 14, 1995 report from Dr. John R. Frankeny, II, a Board-certified orthopedic surgeon, who reviewed the results of the MRI scan. He stated that appellant's primary symptoms were from the lumbar spine. Dr. Frankeny recommended conservative treatment to treating the sciatica symptoms. He indicated that appellant's hip pain might be contributing to his condition by causing an altered gait which aggravated the sciatica. Dr. Frankeny suggested that a total right hip arthroplasty, followed by physical therapy, would improve his gait and thereby resolve his sciatica and low back symptoms.

On May 6, 1996 appellant underwent a right hip arthroplasty. He returned to light-duty work on June 10, 1996. On June 21, 1996 his employment was terminated on the grounds that he had not complied with the settlement agreement in that he had not withdrawn his compensation claim.

In an August 5, 1996 decision, issued without a hearing, an Office hearing representative criticized the Office for accepting appellant's claim. He found, however, that the employing establishment had no right to require appellant to waive his claim for compensation. He further found that an adverse decision on the merits of a claim, leading to an overpayment decision, should precede any preliminary determination of an overpayment, and should not be issued subsequent to the letter announcing the preliminary determination. He noted that the employing establishment had required \$3,000.00 be withheld from appellant's pay check, with a suspension from June 1 through August 15, 1995 while the Office declared an overpayment of \$3,222.08 for the period June 1 through July 22, 1995. He indicated that the employing establishment was seeking to recover directly from appellant the compensation that appellant had received from the Office. He stated that the authority for recovering an overpayment rested with the Office, not the employing establishment. He noted that there was an appearance of double recovery of the overpayment. He also questioned the use of June 1, 1995 as the date the overpayment began when appellant stopped working on March 15, 1995. He set aside the Office's October 25, 1995 decision and the October 16, 1995 preliminary determination of an overpayment. The hearing representative withdrew the authorization for appellant's right hip surgery. He directed the

Office, on remand, to address appellant's entitlement to continuation of pay for the period March 15 through April 5, 1995 and issue a decision on his right to compensation for the period April 6 through July 22, 1995. He stated that, if the Office determined that appellant was not entitled to continuation of pay or compensation, the employing establishment should be directed to recover any payment of continuation of pay and the Office should issue a preliminary determination of overpayment.

In an April 21, 1997 decision, the Office denied appellant's claim for compensation for the period March 15 through July 22, 1995 on the grounds that the evidence of record failed to demonstrate that appellant was temporarily totally disabled due to the February 7, 1995 employment injury. The Office indicated that the previously paid continuation of pay for the period March 15 through April 5, 1995 would be charged to appellant's sick or annual leave balance.

Appellant was reinstated in a light-duty position at the employing establishment. He agreed to serve a 75-day suspension beginning October 4, 1996 and to not seek back pay for any period after February 7, 1995.

In an April 28, 1997 letter, the Office informed appellant that it had made a preliminary determination that he had received a \$6,518.58 overpayment in compensation because medical records indicated he was not totally disabled during the period April 6 through July 22, 1995 and therefore was not entitled to compensation for wage loss. The Office further found that appellant was at fault in the creation of the overpayment because he provided inaccurate information to his attending physician regarding his medical condition. The Office stated that as a result of this information the physician found appellant unable to work. It noted that, upon review of additional information, the physician rescinded his initial opinion and determined that he would have been able to perform sedentary work during the period in question.

In a May 2, 1997 note, appellant requested waiver of recovery of overpayment and a hearing on his request. In a May 20, 1997 letter, appellant, through his attorney, requested a hearing before an Office hearing representative. He submitted a September 12, 1996 report from Dr. Robertson who indicated that he had reviewed the employing establishment's videotape of appellant working outside his house. Dr. Robertson stated that the natural history of osteoarthritis is to have recurrent but intermittent symptomatology. He indicated that appellant was encouraged to perform physical activities to his tolerance and to try to stay as active as possible. Dr. Robertson commented that he did not know what the tape was intended to prove. He stated that appellant had a defined pathological entity which was corrected by a total hip arthroplasty which gave significant relief from the pain and discomfort of the hip. Dr. Robertson noted that appellant still had the documented disc protrusion at L5-S1 which could cause recurrent back symptoms, especially aggravated by bending, twisting or heavy lifting activities. In a May 23, 1997 report, Dr. Robertson reviewed appellant's medical history. He stated that it was very clear appellant sustained an injury to his right hip which, at a minimum, was an aggravation of a preexisting osteoarthritic disease of the right hip and potentially was an aggravation of his low back pain with herniated discs at L4-5 and L5-S1. Dr. Robertson commented that the surveillance tapes did not demonstrate that appellant could have worked full time on a sustained basis in his occupation as a welder. He indicated that appellant performed

intermittent activities, which he would have encouraged any patient with arthritis to do, to maintain physical activities. Dr. Robertson stated that the hip replacement was solely to rectify the right hip problem arising from the employment injury. He noted that appellant had preexisting arthritic disease but concluded, to a reasonable degree of medical certainty, that the February 7, 1995 fall significantly aggravated it and caused a significant progression of the overt symptomatology to warrant total hip replacement.

At the December 9, 1997 hearing, appellant indicated that he returned to the tig welder position on March 7, 1995 but he had to work standing with considerable twisting to perform the job. He stated that the pain grew worse to the point where he could not tolerate it, causing him to stop working. Appellant noted that work he performed as seen on the videotape was not arduous to him. He testified, however, that he could only perform the work for one to two hours before he would have to stop due to the pain. Appellant stated that he would have to lie down after working and sometimes the pain would not stop until the next day. He indicated that on April 25, 1995 he did yard work for three hours but was in great pain into the next day. Appellant commented that he intended to water plants the next day but he could only drag his water hose to one plant before he had to lie down again due to pain. He stated that when he returned to work on August 15, 1995 he was given a job as a toolroom attendant. Appellant was removed from the employing establishment on June 21, 1996 but returned as a library assistant in December 1996. He reported that, as a result of his new position, he had moved from a GS-10, step 5 salary to a GS-5, step 10 salary. He noted that his pain was greatly relieved after the right hip arthroplasty.

In a February 17, 1998 decision, the Office hearing representative found that appellant was not entitled to continuation of pay for the period March 15 through April 5, 1995 or compensation for temporary total disability for the period from April 6 through August 15, 1995. He stated that the Office had the burden of proof to rescind acceptance of appellant's claim for compensation for the period in question by the introduction of new evidence. He noted that the videotape of appellant's activities and Dr. Richards' report provided sufficient new evidence to justify rescinding appellant's claim for compensation. He stated that appellant had not submitted any new evidence to show that he was incapable of performing the duties of bench welding for the period March 15 through August 15, 1995. The hearing representative concluded that appellant received an overpayment of compensation for the period April 6 through July 22, 1995. He further found that appellant was not without fault in the creation of the overpayment because he failed to furnish information to Dr. Richards on his physical activities which he knew or should have known were the material to the issue whether he was partially or totally disabled. He concluded that appellant was not entitled to waiver of the overpayment. He noted that the employing establishment had recovered from appellant some funds in repayment of the compensation. He directed that the Office ascertain the amount recovered by appellant and then offset the amount of the overpayment by the amount recovered by the employing establishment.

In a February 17, 1998 letter, the Chief of the Branch of Hearings and Review indicated that the Office needed to adjudicate appellant's claim for loss of wage-earning capacity after December 17, 1996 when he returned to work as an assistant librarian. He commented that, since appellant was not fit for duty as a welder as of December 17, 1996, he was entitled to compensation for a loss of wage-earning capacity. He also noted that appellant was claiming

that he sustained a low back injury due to the February 7, 1995 employment injury, a claim that had to be adjudicated. He stated that appellant was entitled to compensation for time lost from work due to his right hip surgery on May 6, 1996. He indicated that the employing establishment withdrew appellant's light-duty position on June 21, 1996 by terminating appellant's employment. He stated that, since the employing establishment subsequently agreed to reinstate appellant and no finding was made that the termination of employment was justified, appellant was entitled to compensation effective June 24, 1996 for wage loss on the basis of a change in the nature and extent of his light-duty position. He pointed out, however, that, since appellant agreed to serve a suspension for the period October 4 through December 17, 1996, he was not entitled to compensation for that period. The Office subsequently determined that appellant had paid \$2,342.47 to the employing establishment and therefore had a remaining overpayment of \$4,176.11.

In a March 16, 1998 report, Dr. Robertson noted that, when he first examined appellant on September 26, 1995, he noted that he had back pain extending down to the left foot and requested an MRI scan. He restated the results of the MRI, primarily an L4-5 disc herniation, a Grade I spondylolisthesis of L4 and L5 and a disc protrusion of L5-S1. He concluded that appellant's back condition was aggravated by the February 7, 1995 fall. In regard to appellant's ability to perform the modified welding job from March 16 to August 15, 1995, Dr. Robertson indicated that he could only rely on appellant's history since he did not examine appellant until after the period in question. He related that appellant stated that he developed significant back pain while welding in the light-duty position and had pain after performing yard work around his house. He stated that according to appellant he was unable to perform these duties.

In a May 1, 1998 letter, appellant's attorney requested that the Office reconsider its position that appellant was not entitled to compensation for the period October 4 through December 17, 1996, contending that the employing establishment had not established that there was a light-duty position available for appellant during the period in question. The Office treated the letter as a request for reconsideration of the February 17, 1998 decision. In a May 15, 1998 merit decision, the Office denied appellant's request for modification of the February 17, 1998 decision.

In a separate May 15, 1998 decision, the Office denied appellant's claim for a back condition due to the February 7, 1995 employment injury on the grounds that the evidence of record failed to establish that the claimed back condition was causally related to the employment injury.¹

The Board finds that the Office properly rescinded acceptance of appellant's claim for continuation of pay for the period March 15 through April 5, 1995 and for temporary total disability compensation for the period April 6 through August 15, 1995.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. Under such circumstances, the Office must establish

¹ In a third May 15, 1998 decision, the Office found that appellant had a 21 percent loss of wage-earning capacity effective May 17, 1997 based on his actual earnings as a library assistant. Appellant did not appeal this decision.

either that its original determination was erroneous or that the employment-related disability has ceased. In order to rescind prior acceptance of a claim, the Office must establish that its prior acceptance was erroneous through new or different evidence.²

In *Daniel E. Phillips*,³ the Board held that, in order to rescind its prior acceptance of a claim, the Office “must establish that its prior acceptance was erroneous through new or different evidence and that it is not merely second guessing the initial set of adjudicating officials.”⁴ In *Roseanna Brennan*,⁵ the Board indicated that the Office was obliged to introduce “new evidence, legal arguments and rationale which justify its rescission” of the prior acceptance of a claim.⁶ In *Beth A. Quimby*,⁷ the Board stated that, in order “to justify a rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.”

In this case, the Office introduced new evidence in the form of a videotape surveillance of appellant working around his house and a subsequent report of Dr. Richards. The videotape showed appellant engaged in vigorous physical activity around his house on at least three occasions, performing activities such as digging up a driveway, mowing the yard, and spreading mulch. It also showed him helping his father into or out of a car and placing his father’s wheelchair into or out of a car. The videotape also contrasted appellant’s use of crutches while visiting doctors with his lack of use of crutches while working around his house. The Office showed the videotape to Dr. Richards. In his August 7, 1995 report, Dr. Richards stated that, based on the videotape, appellant was not exhibiting much pain. He concluded that appellant should have been able to work at the time of the videotaping and was capable of performing at least light-duty work. This new report is sufficient to show that appellant was not totally disabled during the period of March 15 through August 15, 1995. The Office therefore had sufficient medical basis to rescind acceptance of appellant’s claim for continuation of pay and compensation during this period.

Appellant submitted reports from Dr. Robertson who stated, after viewing the videotape, that appellant’s work was consistent with osteoarthritis in that the arthritic condition would increase or decrease in its effect on a patient. He indicated that he would recommend a patient with arthritis to remain physically active up to the limits of endurance and commented that appellant’s behavior was consistent with this type of recommendation. Dr. Robertson stated that the videotape did not establish that appellant could perform the duties of a welder. However, when he addressed the issue of whether appellant could have performed light-duty work during the period March 15 through August 15, 1995, he deferred to appellant’s own assessment that he

² *Laura J. Womack*, 42 ECAB 528 (1991).

³ 40 ECAB 1111 (1989), *petition for recon. denied*, 41 ECAB 201 (1989).

⁴ *Id.* at 1117-18.

⁵ 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

⁶ *Id.* at 92, 96 (1989).

⁷ 41 ECAB 683 (1990).

could not perform the light-duty welding position. Dr. Robertson declined to present his own opinion on whether appellant could have performed the light-duty position during the period in question. His reports, therefore, are not sufficient to overturn the Office's decision to rescind acceptance of appellant's claim.

The Board further finds that appellant has not met his burden of proof in establishing that his back condition is causally related to the February 7, 1995 employment injury.

A person who claims benefits under the Federal Employees' Compensation Act⁸ has the burden of establishing the essential elements of his claim. Appellant has the burden of establishing by reliable, probative, and substantial evidence that his medical condition was causally related to a specific employment incident or to specific conditions of employment.⁹ As part of such burden of proof, rationalized medical opinion evidence showing causal relation must be submitted.¹⁰ The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.¹¹ Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.¹²

Dr. Robertson and Dr. Frankeny both indicated that an MRI scan showed appellant had a herniated L4-5 disc that was impinging on the L5 nerve roots bilaterally, spondylolisthesis and a disc protrusion at L5-S1. In the March 16, 1998 report, Dr. Robertson stated that the back condition was aggravated by the employment injury. However, he did not explain the physiological mechanism by which the employment injury caused or aggravated appellant's back condition. He also did not discuss whether the back condition, combined with the accepted aggravation of appellant's right hip condition, would have prevented appellant from performing the light-duty welding position. Dr. Frankeny stated that appellant's altered gait due to hip pain may have contributed to his low back pain. His opinion is equivocal and speculative and therefore has little probative value. These reports are insufficient to establish that appellant's back condition is causally related to the employment injury.

The Board finds that appellant received a \$6,518.58 overpayment in compensation.

Appellant was receiving compensation for the period April 6 through July 22, 1995 on the basis that he was unable to perform the duties of the light-duty position of tig welder. However, the medical evidence shows that appellant was capable of performing light-duty work that had been made available by the employing establishment. He therefore received compensation for a period in which he was not entitled to compensation because he was capable

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

¹⁰ *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

¹¹ *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

¹² *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

of working at a position available at the employing establishment. The Office therefore properly found that appellant had received an overpayment of compensation.

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

Section 8129(a) of the Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."¹³ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office's regulations provide 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."¹⁴

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

The Office based its decision to accept appellant's claim for compensation for the period March 15 through August 15, 1995 on the reports of Dr. Richards who indicated that appellant was unable to work due to pain, even though he raised questions as to the extent of appellant's pain. Appellant failed to inform Dr. Richards that he was using crutches only to go to and from medical visits and was performing significant physical labor around his house. This information was material to a determination of whether appellant was able to perform light-duty work or was totally disabled for work. Appellant was not without fault in the creation of the overpayment.¹⁵

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.320(b).

¹⁵ On appeal, appellant's attorney contended that appellant was entitled to compensation for the period October 4 through December 17, 1996. While the Office was directed to issue a final decision on this aspect of the case, it had not done so at the time of appellant's appeal to the Board. The jurisdiction of the Board extends only to final decisions of the Office. 20 C.F.R. § 501.2. The Board, therefore, does not have jurisdiction to consider this aspect of appellant's case.

The decisions of the Office of Workers' Compensation Programs, dated May 15 and February 17, 1998 and April 21, 1997, are hereby affirmed.

Dated, Washington, D.C.
April 20, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member