

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROY S. TRIPALDI and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Newark, NJ

*Docket No. 98-1433; Submitted on the Record;
Issued April 21, 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 determined that appellant received an \$11,114.46 overpayment of compensation benefits from June 1 to September 18, 1993; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment at the rate of \$200.00 per month.

On May 6, 1991 appellant, then a 41-year-old internal revenue officer, sustained a herniated disc in the performance of duty. By letter dated October 15, 1991, the Office advised appellant that he would be placed on the periodic compensation rolls to receive compensation benefits for temporary total disability. The Office further advised that, appellant should notify the Office immediately upon his return to work to avoid an overpayment of compensation.

The record shows that appellant returned to work on June 1, 1993.

By letter dated September 30, 1994, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in his case in the amount of \$11,114.46 and that the overpayment occurred because appellant returned to full-time work on June 1, 1993 but continued to receive compensation payments through September 18, 1993. The Office stated that a preliminary finding had been made that appellant was at fault in the creation of the overpayment because he accepted compensation payments after returning to work which he knew or should have known he was not entitled to receive. The Office advised appellant to submit any evidence or argument if he disagreed with the determination that an overpayment had occurred, the amount of the overpayment, the determination that the overpayment occurred due to his fault or if he felt that recovery of the overpayment should be waived.

By letter dated October 31, 1994, appellant acknowledged that he returned to work at the employing establishment on June 1, 1993 but stated his disagreement with the Office's finding

that an overpayment had occurred. He stated that when he received checks from the Office in August and September 1993 he assumed that this was back pay which he felt the employing establishment owed him because he had returned to duty at a position with a lower grade and pay than he previously held. Appellant stated that the employing establishment had owed him increases in salary as a result of a settlement of an Equal Employment Opportunity (EEO) complaint. He stated that he tried to confirm whether the checks represented back pay by contacting his claims examiner and other Office employees but his telephone calls were not returned. Appellant requested waiver of recovery of the overpayment of compensation.

By letter dated September 17, 1997, an Office senior claims examiner noted that the EEO settlement agreement appellant signed in April 1993 specifically stipulated that upon his return to work on June 1, 1993 his compensation checks would stop.¹ The claims examiner stated:

“The file contains a settlement agreement signed by [appellant] about April 15, 1993.... The agreement specifically stipulates that upon your return to work on June 1, 1993, your compensation checks would stop. In light of this, how do[es] [appellant] explain why you accepted checks through September 16, 1993 without knowing they were due you? As an intelligent person in a responsible position, how do you explain that you neither knew nor should have known the continuing payments were not due you?”

“Since compensation payments are for wage loss and there was no wage loss after [appellant] returned to work, on what basis did you believe that you were entitled to the checks? How do you reconcile this with the settlement agreement which clearly addressed the cessation of checks upon your return to work? Now that [appellant] have been advised of the fault criteria, I will allow you 30 days to submit your written informed reply with respect to the aforementioned fault issue.”

By letter dated October 20, 1997, appellant repeated his belief that the checks from the Office represented back pay owed him by the employing establishment.

By decision dated December 22, 1997, the Office found that an overpayment of compensation in the amount of \$11,114.46 had occurred in appellant's case and that the overpayment occurred because appellant returned to full-time work on June 1, 1993 but was paid compensation benefits for total disability through September 1993. The Office stated that the third fault criteria applied in his case as he accepted payments which he knew of should have been expected to know were incorrect. The Office noted that a settlement agreement that appellant signed in April 1993 specifically indicated he knew that he was not entitled to

¹ The settlement agreement states: “By June 1, 1993, the Office ... will have terminated its payment of benefits to [appellant] because it has determined that he has fully recovered from his ... disability and can perform [his job] duties....” Appellant signed the settlement agreement on April 15, 1993.

compensation benefits after he returned to work. The Office advised that appellant would be required to remit \$200.00 per month in repayment.²

The Board finds that the Office properly determined that an overpayment of compensation benefits occurred in this case in the amount of \$11,114.46.

The record establishes that appellant returned to work at the employing establishment on June 1, 1993 but that he continued to receive compensation checks from the Office for total disability through September 18, 1993 and that these checks totaled \$11,114.46. As he had returned to work on June 1, 1993, he was not entitled to receive compensation benefits on and after that date and therefore, the Office properly determined that an overpayment of compensation benefits occurred in his case in the amount of \$11,114.46 for the period June 1 to September 18, 1993.

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office unless "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."³ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides in relevant part:

"An individual is with fault in the creation of the 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

² The Board notes that the record contains additional evidence which was not before the Office at the time it issued its December 22, 1997 decision. The Board has no jurisdiction to consider this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952). The Board also notes that this case record contains a document belonging to another claimant. Upon return of the case record this document should be placed in the correct file.

³ 5 U.S.C. § 8129.

⁴ 20 C.F.R. § 10.320.

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁵

After consideration of all the particular circumstances in this case, the Board finds that the evidence establishes that appellant knew or should have been expected to know that he accepted incorrect compensation payments from the Office for the period June 1 to September 18, 1993. The record shows that on April 15, 1993 appellant signed a settlement agreement with the employing establishment which clearly noted that compensation benefits from the Office would cease upon appellant's return to work on June 1, 1993. The record further shows that appellant did return to work on June 1, 1993 but continued to accept compensation benefits for total disability from the Office through September 18, 1993. By letter dated October 31, 1994, appellant stated that he believed that checks he received from the Office represented back pay from the employing establishment because he had returned to duty at a job with a lower grade and pay than previously held and the employing establishment owed him increases in salary as a result of a settlement of an EEO complaint. However, appellant failed to explain why it was reasonable for him to believe that the employing establishment would provide him with back pay in the form of Office compensation checks. Additionally, although he alleged that the employing establishment owed him back wages as a result of a settlement of an EEO complaint, the EEO settlement agreement does not include in its provisions any statement that the employing establishment owed appellant back pay. Considering all the circumstances of this case, the Board finds that appellant knew or should have been expected to know that he was not entitled to compensation benefits for total disability from the Office for the period June 1 to September 18, 1993 because he returned to work on June 1, 1993. Therefore, the Office properly determined that appellant was at fault in creating the overpayment of compensation benefits. Since appellant is at fault, he is not entitled to waiver of recovery of the overpayment.

The Board additionally finds that it does not have jurisdiction over the method of recovery of the overpayment in this case.

In the present case, the Office required appellant to remit \$200.00 per month from his own funds in repayment of the overpayment of compensation benefits. The Board's jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing benefits under the Act. This is not the situation with respect to the required payment of \$200.00 per month from appellant's funds.⁶

⁵ See *Robin O. Porter*, 40 ECAB 421 (1989).

⁶ *Lewis George*, 45 ECAB 144, 154 (1993); *Levon H. Knight*, 40 ECAB 658, 665 n.6 (1989).

The decision of the Office of Workers' Compensation Programs dated December 22, 1997 is affirmed.

Dated, Washington, D.C.
April 21, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member