

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. DODSON and DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEM FCI, Tallahassee, FL

*Docket No. 99-1145; Submitted on the Record;
Issued July 18, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$1,267.86 overpayment of compensation from December 22, 1997 through January 4, 1998; and (2) whether the Office properly determined that appellant was not "without fault" in the creation of the overpayment.

On April 22, 1996 appellant, then a 26-year-old electric and communications supervisor, filed a claim for a back injury, alleging that, on April 19, 1996, while attempting to maneuver the obstacle course, he fell from a rope and landed on his back. The Office accepted his claim for a herniated disc at L5-S1 and later authorized a lumbar laminectomy which was performed on December 5, 1997.

Appellant submitted a Form CA-7 claim for compensation on account of traumatic injury on December 17, 1997. He claimed compensation for the postoperative period of December 8 through 19, 1997. On January 8, 1998 the Office issued appellant a compensation check in the amount of \$2,535.72 for the period December 8, 1997 through January 4, 1998.

Additionally, appellant notified the Office on January 21, 1998 by fax that he was "paid for the time period of December 8, 1997 through December 4, 1998" and that "this should have been December 8 through 18, 1997." He inquired as to "what amount should I return to OWCP."

The Office was notified by appellant on January 27, 1998, that he returned to work on December 19, 1997, on full-time limited duty. He acknowledged in this telephone conversation that he was overpaid for the period December 20, 1997 through January 4, 1998.

By letter dated March 3, 1998, the Office notified appellant that he was sent a compensation check he was not entitled to receive which covered the period January 5 through 31, 1998. The check was returned by appellant.

On December 22, 1998 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$1,267.86. The Office noted that the overpayment occurred because appellant returned to work with no loss of wage-earning capacity on December 22, 1997 but continued to receive compensation for total disability through January 4, 1998. The Office also determined appellant was at fault as he knew or reasonably should have known that he was not entitled to compensation for total disability while earning wages at the same time. The Office indicated that appellant had the right to submit evidence or arguments which would affect the preliminary findings.

On January 14, 1999 appellant submitted a Form OWCP-20 overpayment recovery questionnaire. Appellant asserted that he was not at fault in creating the overpayment.¹

By decision dated January 25, 1999, the Office found that appellant received a \$1,267.86 overpayment of compensation from December 22, 1997 to January 4, 1998 for which he was at fault in creating.² In an accompanying memorandum, the Office indicated that appellant should have reasonably known that he was not entitled to receive compensation for lost wages while simultaneously working without a loss of wage-earning capacity. The Office noted that no additional evidence or argument was submitted by appellant and therefore the finding of fault was sustained.

The Board finds that appellant received an overpayment of \$1,267.86 in compensation from December 22, 1997 to January 4, 1998.

The record indicates that appellant returned to work on December 22, 1997 but that he continued receiving compensation based on temporary total disability until January 4, 1998. The Office determined that for the period December 22, 1997 through January 4, 1998 appellant received \$1,267.86. Appellant was not entitled to total disability compensation for that period. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment.³ Appellant does not dispute that he received a compensation payment that covered the period December 22, 1997 to January 4, 1998. Thus, the Office properly determined the amount and period of the overpayment.

The Board also finds that appellant is not without fault in the creation of the overpayment and that the overpayment cannot be waived.

¹ Appellant indicated in his appeal that he sent a supporting memorandum dated January 6, 1999 attached to the overpayment recovery questionnaire explaining his position and arguments. The memorandum was not in the record and not considered by the Office in its final decision. The memorandum accompanied the appeal; however, because the Office did not consider this evidence in reaching its final decision, the Board cannot consider this evidence for the first time on appeal; *see Glenn D. Paulsen*, 46 ECAB 741; 20 C.F.R. § 501.2(c).

² The Office's decision actually states that the overpayment was incurred through January 4, 1999. However, in the context of other evidence, it appears this was a typographical error and that the date should be January 4, 1998.

³ *See Sandra K. Neil*, 40 ECAB 924 (1989).

Section 8129(b) of the Federal Employees' Compensation Act⁴ provides as follows:

“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.”

Section 10.433(a) of the Office's implementing regulations provides:

“A recipient who has done any of the following will be found at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known was incorrect.” (This provision applies only to the overpaid individual).⁵

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

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 check in question, he knew or should have known the payments were incorrect.⁶ The record establishes such knowledge.

Appellant contends in his appeal that the Office is at fault for the overpayment of compensation. It is appellant's position, that he clearly stated on the Form CA-8, that he was claiming compensation for the period December 7 until 18, 1997. Nevertheless, he returned to work with no loss wage-earning capacity on December 22, 1997. Appellant continued to receive compensation for total disability until January 4, 1998 while working full-time light duty. In his January 20, 1998 fax to the Office and in his January 27, 1998 telephone conversation with the Office he acknowledged that he received the overpayment in question. His knowledge that he was not entitled to compensation payments for periods in which he worked is also shown by his returning to the Office the compensation check covering the period January 5 to 31, 1998. In view of this the Board finds that appellant reasonably should have known he was not entitled to

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(a)(1)-(3) (1999). Section 10.433(a) became effective January 4, 1999. Regulations pertaining to the three Office's standards for determining fault in effect at the time of the Office's preliminary overpayment finding are substantially similar; *see* 20 C.F.R. § 10.320(b)(1)-(3) (1998).

⁶ *See Claude T. Green*, 42 ECAB 174, 278 (1990).

this compensation as the evidence establishes that he accepted a payment which he knew or should have known was incorrect.⁷

The decision of the Office of Workers' Compensation Programs dated January 25, 1999 is affirmed.

Dated, Washington, D.C.
July 18, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

⁷ As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment; *see Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).