

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY W. PRATT and DEPARTMENT OF THE NAVY,
NAVY AVIATION DEPOT, Cherry Point, NC

*Docket No. 99-1220; Submitted on the Record;
Issued July 13, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment in the amount of \$887.70, which, therefore, was not subject to waiver of recovery.

On April 26, 1995 appellant filed a notice of traumatic injury and claim for compensation alleging that he tripped on a cord while performing his work duties. Appellant returned to work on or about June 15, 1995. On June 29, 1995 the Office accepted appellant's condition of blunt trauma to the right knee and right patella fracture.

By decision dated March 12, 1996, the Office informed appellant that he was entitled to an award of compensation for a seven percent permanent impairment to his right lower extremity. The compensation award indicated that appellant would first receive a check in the amount of \$9,448.33 covering the period October 26, 1995 to March 2, 1996 and later a final check in the amount of \$887.70 covering the period March 3 to 15, 1996.

Appellant notified the Office in an undated letter, that he only received the first permanent impairment check in the amount of \$9,448.33 and that he did not have record of the second check of \$887.70, which the Office referred to in its award of compensation letter.

The Office initiated a trace of the missing check and on July 11, 1997 issued a replacement check in the amount of \$887.70 to appellant. The Office was subsequently notified that the original check that appellant alleged he never received had in fact been negotiated by appellant.

In a letter dated October 6, 1997, the Office made a preliminary determination that an overpayment occurred as appellant had received and negotiated two checks for the same period in the amount of \$887.70.

Appellant submitted a completed OWCP-20 form and requested a hearing on December 3, 1997, which was held on August 31, 1998.

At the hearing, appellant did not contest the amount of the overpayment determined by the Office. He testified that he had received both the check in the amount of \$887.70 and the replacement check for the same period in the amount of \$887.70.

On September 16, 1998 appellant submitted to the Office a copy of his income tax declaration, an order discharging his debts, his most recent leave and earnings and bank statements.

By decision dated November 18, 1998, the Office found that an overpayment in the amount of \$887.70 had occurred. The Office further found that appellant was not without fault in the creation of the overpayment as he had received and negotiated two checks for the same period March 3 to 15, 1996.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of compensation in the amount of \$887.70 and, therefore, the overpayment was not subject to waiver and had to be recovered.

Initially, the Board notes that appellant does not contest that an overpayment occurred in the amount of \$887.70 when he negotiated two checks for this amount in payment for his schedule award for the period March 3 to 15, 1996.

The Board also finds that appellant was at fault in this matter. The Federal Employees' Compensation Act at 5 U.S.C. § 8129(b) states that 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. Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.¹

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 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

¹ 5 U.S.C. § 8129(b).

(3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”²

In the present case, the Office applied the third standard -- acceptance of a payment, which the payee either knew or should have been expected to know was incorrect -- in finding appellant at fault in creating the overpayment. Appellant notified the Office that he only received the first check in the amount of \$9,448.33 and that he did not have record of having received the second \$887.70 check, however, the record establishes that he had, in fact, received and negotiated the second check, which had been determined by the Office to be the final payment in his award of compensation. When appellant subsequently negotiated for payment the third check issued by the Office to replace the final award of \$887.70, that he alleged he had not received, appellant accepted payment, which he knew or should have been expected to know was incorrect.

Because appellant accepted payments that he knew or should have been expected to know were incorrect, the Office properly found that appellant was with fault in the creation of the overpayment of \$887.70 by indicating that he had not received the award. As appellant was at fault in the creation of the overpayment, the overpayment is not subject to waiver.

The Board further finds that the Office properly determined to recover the \$887.70 overpayment by declaring the sum payable in full.

Section 10.321(b) of the Code of Federal Regulations provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to the same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.³

The Board notes appellant’s allegations that his overpayment debt may have been discharged by bankruptcy. As appellant is no longer in receipt of continuing compensation and the recovery of any overpayment falls under the Debt Collection Act, the Board has no jurisdiction to review the manner or means in which the Office undertake recovery of the overpayment.⁴

² 20 C.F.R. § 10.320(b).

³ 20 C.F.R. § 10.321(b).

⁴ *John M. Walsh*, 48 ECAB 474 (1997).

The decision of the Office of Workers' Compensation Programs dated November 18, 1998 is affirmed.

Dated, Washington, D.C.
July 13, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member