

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN A. BERNDT and DEPARTMENT OF THE ARMY,
MINNESOTA NATIONAL GUARD, Camp Ripley, MN

*Docket No. 98-2226; Submitted on the Record;
Issued March 27, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$3,131.14 during the period May 12, 1996 through March 2, 1997; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment and, therefore, was not entitled to waiver of recovery.

On March 15, 1994 appellant, then a 47 year-old automotive mechanics supervisor, filed a notice of traumatic injury alleging that, on February 23, 1994, he developed pain in his lower back after attempting to free a trailer mounted hitch stand while in the performance of duty. On August 29, 1994 the Office accepted that appellant sustained a herniated disc L4-5 with subsequent L4-5 laminectomy with discectomy. Appellant stopped work on February 24, 1994. Appellant received compensation for temporary total disability from February 24, 1994 until January 9, 1996, when he returned to work in a part-time limited-duty position as a maintenance records clerk. On May 13, 1996 appellant increased to a full-time work schedule in the limited-duty position.

By decision dated July 27, 1996, the Office found that appellant's actual earnings as a full-time maintenance records clerk fairly and reasonably represented his wage-earning capacity. As appellant's injury-related restrictions prevented him from participating in the National Guard, he was entitled to compensation based on the loss of his National Guard pay.¹

In response to an inquiry from the employing establishment, the Office learned that appellant was still receiving National Guard pay. On November 22, 1996 appellant, requested reconsideration of the Office decision so that the matter could be clarified. In support, appellant contended that he realized a net loss of \$1,400.55 due to his inability to perform basic training.

¹ The Office obtained information from the employing establishment establishing that appellant had National Guard pay of \$5,187.61 during the year prior to his injury. This equates to \$99.76 per week.

By letter dated February 5, 1997, the Office requested additional information from appellant regarding his National Guard service. In response, appellant provided a list of the dates of required and actual training that was verified by his military supervisor. Appellant also submitted pay stubs for drills on May 18 to 19, June 21 to 23, August 16 to 18, September 7 to 8, September 23 to 27, October 12 to 13 and November 2 to 3, 1996.

By decision dated February 27, 1997, the Office found that the newly submitted evidence was sufficient to warrant modification of the July 27, 1996 wage-earning capacity decision and consequently vacated it. The Office found that the Office's loss of wage-earning capacity determination was in error since appellant had been receiving National Guard pay. The Office found that the only loss of pay occurred during the period of his annual training from July 14 to 27, 1996.

By preliminary decision dated May 12, 1998, the Office found that an overpayment of compensation had occurred in the amount of \$3,131.14 because appellant had received both compensation and guard pay from May 12, 1996 through March 2, 1997. The Office found that appellant was at fault in the creation of the overpayment because he did not furnish accurate information to the Office. On June 11, 1998 appellant, requested a review of the written record and challenged the amount of the overpayment, indicating that the overpayment occurred only from May through July 1996.

In a decision dated June 15, 1998, the Office finalized its preliminary determination that appellant was at fault in creating the overpayment, which resulted when he did not furnish material and accurate information to the Office.

The Board has reviewed the record and finds that appellant received a \$3,131.14 overpayment of compensation during the period May 12, 1996 through March 2, 1997.

When an employee returns to work and ceases to have any loss of wages, compensation for wage loss is no longer payable.² In calculating appellant's loss of wage-earning capacity,³ the Office considered that appellant's back injury would prevent him from performing active duty in the National Guard.⁴ The Office found that appellant's National Guard pay was \$5,187.61 annually or \$99.76 weekly. The Office added this to appellant's base pay at the time of injury, compared with his current pay rate for the job and step when injured, noted appellant's actual earnings and calculated that appellant had a loss of wage-earning capacity entitling him to \$312.00 in compensation over four weeks. In response to a February 5, 1997 letter from the Office, appellant provided a statement indicating that he had attended weekend training sessions on May 18 to 19, June 21 to 23, July 13, August 17 to 18, September 7 to 8, October 12 to 13, November 2 to 3 and December 14 to 15, 1996, January 4 to 5 and February 4 to 5, 1997, and

² *Kenneth E. Rush*, 51 ECAB ___ (Docket No. 98-321, issued October 6, 1999).

³ As the Office's February 27, 1997 decision vacating the July 27, 1996 loss of wage-earning capacity decision was issued more than one year before the filing of this appeal on July 13, 1998, the Board has no jurisdiction over that decision. 20 C.F.R. § 501.2(c).

⁴ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate* 2.900.7(b)(13) (December 1995) (provides that National Guard pay is included in an employee's pay rate when membership in the National Guard is a condition of the employee's civilian employment).

received paychecks from the National Guard for these drills. Based on the fact that appellant received both compensation and drill pay for the period May 12, 1996 through March 2, 1997, the Office properly found that an overpayment of compensation existed.

In calculating the overpayment from May 12, 1996 to March 2, 1997, the Office determined that appellant received \$3,276.00 during this period.⁵ The Office deducted from this amount compensation, to which appellant was entitled during the 13 days from July 14 to 26, 1996, \$144.86, when he was unable to engage in National Guard training and for which he sustained wage loss.⁶ This resulted in an overpayment of \$3,131.14.

Consequently, the Office properly found that appellant received a \$3,131.14 overpayment of compensation.

The Board, however, finds that the Office's determination of fault was not proper.

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." Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.

Section 10.320 of the implementing federal regulations provides as follows:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition. 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."⁷

⁵ This is a period of 42 weeks. Appellant was receiving \$312.00 in compensation every four weeks, or \$78.00 per week. Multiplying \$78.00 by 42 equals \$3,276.00.

⁶ This amount is calculated by dividing the weekly compensation rate of \$78.00 by the 7 days in a week to equal a daily rate of \$11.14. When this is multiplied by the 13 days in which appellant had wage loss, the resulting amount is \$144.86. While appellant alleges that he also sustained wage loss for earlier periods in which he was unable to perform National Guard training and drills, the record indicates that he received compensation for these earlier periods.

⁷ 20 C.F.R. § 10.320(b).

These regulations further provide:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).”⁸

In the present case, the Office found that appellant was at fault in the creation of the overpayment under the second standard described in section 10.320(b) above, as it found that appellant had failed to furnish material information regarding his receipt of pay from the National Guard for drills in 1996 and 1997. The Board notes, however, that there is insufficient evidence that appellant failed to furnish information he knew or should have known was material thereby creating the overpayment. Additionally, there is no evidence in the record that appellant was advised at any time by the Office that he was required to report any change in his National Guard status. To the contrary, the record reveals that appellant attempted to resolve this problem in a timely and reasonable manner.⁹ On November 11, 1996 the Office was informed by the employing establishment that appellant may have been receiving both National Guard pay and compensation during the same period of time. It was suggested that appellant contact the Office regarding this matter and request reconsideration so that the matter could be resolved quickly. On November 22, 1996 appellant requested reconsideration of the July 27, 1996 decision and provided earnings statements not previously requested by the Office. Appellant further stated:

“Please keep in mind that a net loss of \$1,400.55 has still been realized due to the fact that I was unable to perform annual training this past year. I wish to clear this matter up as soon as possible to prevent any financial hardship on myself and my family.”

The record further contains contemporaneous evidence from a rehabilitation counselor who stated that appellant had reported in July 1996 for the annual training but was not allowed to participate due to his back injury. Appellant believed that he had lost money as a result. Moreover, the rehabilitation counselor noted that appellant’s National Guard status was uncertain until a military examination in October 1996, only one month before appellant reported the overpayment to the Office.

Office regulations provide that an individual will be found at fault in the creation of an overpayment if there is evidence which shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to or the amount of benefits.¹⁰ The Board has examined the circumstances of appellant’s failure to report

⁸ 20 C.F.R. § 10.320(c); *Henry P. Gillmore*, 46 ECAB 709 (1995).

⁹ See *Marcia L. Wright*, 37 ECAB 435, 437 (1986)

¹⁰ 20 C.F.R. § 10.320(d).

his National Guard pay and finds that the evidence fails to establish that appellant exhibited a lack of good faith or an insufficient degree of care such that he would be considered at fault in the creation of the overpayment in this regard.

Since it has been determined that appellant is without fault in the creation of the overpayment, the Office may only recover the overpayment, in accordance with section 8129(b) of the Act, if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹¹ Therefore, the case will be remanded to the Office for further development with respect to the issue of whether appellant is entitled to waiver of the \$3,131.14 overpayment. After such further proceedings as it deems necessary, the Office should issue a *de novo* decision.

The June 15, 1998 decision of the Office of Workers' Compensation Programs is affirmed with respect to the finding that appellant received a \$3,131.14 overpayment of compensation during the period May 12, 1996 through March 2, 1997. The decision is set aside with respect to the fault finding and the case is remanded for the Office to consider appellant's eligibility for waiver.

Dated, Washington, D.C.
March 27, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹¹ 20 C.F.R. §§ 10.322, 10.323.