

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CRAIG E. RECTOR and DEPARTMENT OF THE NAVY,
NAVY SHIPYARD, Charleston, SC

*Docket No. 99-2396; Submitted on the Record;
Issued November 22, 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 had received an overpayment of compensation in the amount of \$20,640.75 during the period from October 13, 1996 to February 27, 1999 because appellant received compensation for total disability after the Office made a loss of wage-earning capacity determination; and (2) whether the Office properly found appellant at fault in the creation of the overpayment; and (3) whether the Office properly withheld \$200.00 per month from appellant's continuing compensation benefits.

The Board has duly reviewed the case on appeal and finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$20,640.75 during the period from October 13, 1996 to February 27, 1999.

The Office accepted that appellant sustained right knee strain and meniscus tear due to his federal employment. The Office granted appellant a schedule award for 20 percent loss of use of his right lower extremity on July 30, 1993. This award ran from July 25, 1993 to September 1, 1994. By decision dated September 30, 1994, the Office determined that appellant's actual earnings as a fitness director represented his wage-earning capacity and reduced his compensation benefits to reflect his earnings. The Office determined that appellant should receive \$897.00 every four weeks. The Office issued appellant a check in the amount of \$505.23 covering the period from September 2 to 17, 1994. The Office issued appellant a check on October 15, 1994 covering the period of September 18 through October 15, 1994 in the amount of \$879.78.¹

¹ By decision dated March 7, 1995, the Office waived an overpayment in the amount of \$1,387.80 finding that appellant's monthly expenses exceeded his earnings and that recovery of the overpayment would result in financial hardship.

On October 15, 1996 appellant contacted the Office and stated that he had not received payment after September 2, 1996.² On October 25, 1996 he received a check in the amount of \$1,246.63 covering the period from September 3 to October 12, 1996. On November 9, 1996 appellant received a check in the amount of \$1,521.18 covering the period from October 13 to November 9, 1996.

On January 22, 1998 the employing establishment contacted the Office and asked why appellant was currently receiving \$1,557.28 every four weeks rather than compensation for his loss of wages in the amount of \$878.78. By letter dated February 25, 1999, the Office informed appellant that when he was reinstated on the periodic rolls in October 1996, the Office neglected to take into account his previously established wage-earning capacity. The Office stated that it was correcting his compensation payments effective February 28, 1999.

The Office issued a preliminary determination of overpayment on March 10, 1999 finding that appellant had received an overpayment of compensation in the amount of \$20,640.75 as he received compensation payments for total disability for the period from October 13, 1996 to February 27, 1999, but was entitled to compensation for partial disability based on the wage-earning capacity determination. The Office determined that appellant was at fault and allowed appellant 30 days to respond. Appellant did not respond and by decision dated June 9, 1999 the Office finalized its preliminary overpayment findings and determined that the overpayment would be recovered by withholding \$200.00 per month from appellant's continuing compensation benefits.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$20,640.75 and that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act³ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 the Act or would be against equity and good conscience."⁴ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

² The record indicates that appellant received payments in the amount of \$877.18 from April 27, 1996 to August 17, 1996 and that on September 6, 1996 he received a check for \$462.30.

³ 5 U.S.C. §§ 8101-8193, 8129(a).

⁴ 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations⁵ provides 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.”

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 at 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 that the payment was incorrect.⁶ In this case, appellant received compensation based on his wage-earning capacity beginning September 18, 1994. He contacted the Office and stated that his compensation payments had ceased on September 2, 1996. The Office then issued appellant a check covering the period of September 3 to October 12, 1996 in the amount of \$1,246.63. On November 9, 1996 appellant received a check in the amount of \$1,521.18 covering the period from October 13 to November 9, 1996. He had received compensation at the appropriate rate from September 18, 1994 to September 2, 1996. Therefore he knew or should have known that he was not entitled to compensation for total disability beginning on October 13, 1996.

The Board further finds that the Office properly withheld \$200.00 per month from appellant's continuing compensation benefits.

Section 10.321(a) of the regulations⁷ provides:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

⁵ 20 C.F.R. § 10.320(b).

⁶ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

⁷ 20 C.F.R. § 10.321(a).

In this case, appellant failed to complete the overpayment recovery questionnaire. The Board has held that the overpaid individual has the responsibility for providing the financial information as the Office may require.⁸ As he failed to document his monthly earnings and expenses, the Office was unable to fully determine what appellant could afford to repay out of his continuing compensation benefits. The Office considered the overpayment and determined that \$200.00 should be withheld from appellant's continuing compensation in order to recover the overpayment found. The Board finds that, in view of appellant's receipt of an additional \$500.00 per month for three years the withholding of \$200.00 from continuing compensation benefits is not an abuse of discretion.

The June 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 22, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁸ *Burnett Terry*, 46 ECAB 457, 471 (1995).