

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARLTON W. STEPHENS and DEPARTMENT OF THE NAVY,
NAVAL AIR PROPULSION CENTER, Trenton, NJ

*Docket No. 00-1170; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$9,530.58 was created; and (2) whether the Office properly found that appellant was with fault in the creation of the overpayment, thus precluding waiver of recovery of the overpayment.

On April 30, 1991 appellant, then a 58-year-old mechanic, filed a traumatic injury claim alleging that on that date he hurt his left ankle while in the performance of duty.

By letter dated June 14, 1991, the Office accepted appellant's claim for a sprain of the left ankle. Appellant received appropriate compensation for temporary total disability and wage loss.

The Office received a March 13, 1996 letter from appellant, who stated that he had not received a compensation check from the Office in the amount of \$9,530.58 for September 21, 1994 through July 28, 1995, that should have been issued on December 29, 1995. In a March 25, 1996 letter, the Office responded that a trace had been placed on the missing check and that another check would be reissued within two weeks. The Office also advised appellant that if he received the original check at a later date, cashing more than one of these checks would result in an overpayment that he would have to repay.

On March 26, 1996 the Office reissued a compensation check to appellant in the amount of \$9,530.58 for September 21, 1994 through July 28, 1995.

By letter dated June 19, 1998, the Department of Defense advised the Office that appellant had received and negotiated two checks in the amount of \$9,530.58 and requested that the Office declare an overpayment in appellant's case.

In a February 17, 1999 letter, the Office made a preliminary determination that an overpayment had occurred in the amount of \$9,530.58 because appellant received and cashed

two compensation checks for the same period of disability. The Office advised appellant that he was at fault in the creation of the overpayment.

In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days if he disagreed with the amount of the overpayment or if he believed that the overpayment occurred through no fault of his own or that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire and submit financial documents in support.

In a March 4, 1999 letter, appellant requested an oral hearing.

By decision dated December 2, 1999, the hearing representative finalized the Office's preliminary overpayment determination and finding of fault.

The Board finds that the Office properly determined that an overpayment in the amount of \$9,530.58 was created from September 21, 1994 through July 28, 1995.

As the record above reflects, the Office issued two checks to appellant in the amount of \$9,530.58 in payment of compensation for temporary total disability for the period September 21, 1994 through July 28, 1995. The first check was issued on December 29, 1995 and was endorsed by appellant on January 4, 1996. After appellant advised the Office that he did not receive the December 29, 1995 check, a replacement check was issued to appellant on March 26, 1996. Appellant testified at the hearing that he received the replacement check on April 2, 1998. Thus, the record clearly reflects that an overpayment was created in the amount of \$9,530.58 for September 21, 1994 through July 28, 1995.

The Board also finds that the Office properly found that appellant was with fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."² Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.³

In evaluating whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an

¹ 5 U.S.C. § 8129.

² 5 U.S.C. § 8129(b).

³ *Harold W. Steele*, 38 ECAB 245 (1986).

official source within the Office or another government agency, which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.⁴

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations 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 he or she knew or should have known to be incorrect; or

“(2) Failed to furnish 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 been expected to know was incorrect.”⁵

In this case, the Office applied the third standard -- appellant accepted a payment which he knew or should have been expected to know was incorrect. The evidence of record reflects that by check dated December 29, 1995, appellant was paid compensation for September 21, 1994 through July 28, 1995. The period of disability appears on the December 29, 1995 check, which was received, endorsed and deposited by appellant into his credit union account on January 4, 1996. Appellant was informed by the Office's March 25, 1996 letter of the period of compensation for which payment was being made and that he would be responsible for repayment if he cashed both the original check dated December 29, 1995 and the reissued check. Based on this information and receipt of the reissued check dated March 26, 1996, appellant should have known that he was not entitled to this check.

While appellant informed the Office that he had not received the December 29, 1995, check and that he did not deposit the check into his credit union account, he did not provide any supportive evidence. At the hearing, appellant indicated that he would attempt to obtain a copy of his 1995 records from the credit union to determine whether the December 29, 1995 check was deposited into his account and that he would submit these records to the Office. The record does not contain any records regarding appellant's credit union account.

Further, appellant contended that the signature on the back of the December 29, 1995 check was not his signature. Appellant submitted his signature for review at the hearing. The signature on the back of the December 29, 1995 check appears to be the same as the sample he submitted to the hearing representative. In addition, the signature on the back of the December 29, 1995 check appears to be the same as the signature that appears on a form, entitled claims against the United States for the Proceeds of a Government Check (Form FMS-1133), which was signed by appellant on July 2, 1996.

⁴ 20 C.F.R. § 10.435(b)(1) (January 1999).

⁵ 20 C.F.R. § 10.433(a) (January 1999).

In this form, appellant indicated that he received December and April checks, that he signed his name on these checks, cashed these checks and deposited these checks into a bank or credit union. Given the similarity of the signatures, appellant's contention that he did not sign the December 29, 1995 check is not persuasive. The Board finds, therefore, that appellant was not without fault in the creation of the overpayment⁶ and, therefore, the overpayment may not be waived under section 8129(b) of the Act.⁷

The December 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁶ The Board notes that in her December 2, 1999 decision, the hearing representative noted that appellant had failed to submit a completed overpayment questionnaire. The hearing representative directed the Office to verify appellant's testimony that he was in receipt of continued compensation benefits and to initiate recovery of the overpayment from such benefits. By letter dated February 16, 2000, the Office advised appellant that a review of its records revealed that he was still in receipt of compensation for a claim assigned number A2-721201 and that the amount of \$300.00 every 28 days would be withheld from his continuing compensation payment until September 7, 2002.

⁷ See *John L. Wolf*, 48 ECAB 148 (1996).