

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WAYNE C. FORTH and DEPARTMENT OF THE NAVY,  
NAVAL SEA SYSTEMS COMMAND, Portsmouth, VA

*Docket No. 99-834; Submitted on the Record;  
Issued January 26, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether an overpayment occurred in appellant's case in the amount of \$3,333.12; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and, therefore, was not entitled to waiver of the overpayment; and (3) whether the Office abused its discretion by deciding to recoup the overpayment by deducting \$500.00 per month from appellant's continuing compensation.

On December 1, 1980 appellant, then a 36-year-old photographer, injured his right leg and knee in the performance of duty and filed a traumatic injury claim for compensation. The Office accepted the claim for osteochondral fractures of the right patella and lateral femoral condyle and further authorized a patellectomy. Appellant has been receiving compensation benefits since his injury on the periodic rolls.

The record includes several (Form-1032) questionnaires completed by appellant, indicating that he was claiming his son, Donald, born July 2, 1972, as a dependent for augmentation of benefits. Appellant noted that Donald was a full-time college student. The most recent questionnaire relevant to the issue of overpayment was signed by appellant on October 14, 1995.

By letter dated August 1, 1996, the Office informed appellant that he had been "receiving augmented compensation probably in error since at least some time in 1995." Appellant was requested to provide information concerning the dependent status of his son.

In a September 11, 1996 letter, appellant set forth the chronology of his son's college attendance beginning September 1990 to June 1996. Attached to the letter were college transcripts. Appellant alleged that he was never informed by the Office that there was a "cutoff date for a dependent who was a full-time student."

On January 7, 1997 the Office made a preliminary determination that an overpayment occurred in the amount of \$3,333.12 because appellant had improperly received augmented

compensation from June 1, 1994 through July 20, 1996 for a dependent son.<sup>1</sup> The Office informed appellant that he had a right to submit additional evidence and/or request a preresoupment hearing before a representative of the Branch of Hearings and Review as to whether the overpayment occurred, whether he was at fault in the creation of the overpayment and whether the overpayment should be collected. The Office also requested that appellant complete an enclosed overpayment questionnaire.

In a September 23, 1998 decision, the Office finalized its preliminary determination and directed the recoupment of the overpayment via deductions in the amount of \$500.00 from appellant's monthly periodic roll check until the full amount of the overpayment, including interest, was absorbed.

The Board finds that the Office properly determined that appellant was at fault in creating the overpayment in compensation and, therefore, the overpayment for that period was not subject to waiver.<sup>2</sup>

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."<sup>3</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>4</sup>

Section 10.320 of the implementing federal regulations provides the following:

"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

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<sup>1</sup> The Office stated: "Claimant's son attended a community college from September 1990 to June 1991, did not attend from September 1991 to January 1992 because certain classes were not offered until the fall semester and compensation at the augmented rate was paid. He continued as a full-time student from September 1992 through May 31, 1994. No further entitlement was due after May 31, 1994."

<sup>2</sup> Although appellant submitted additional evidence on appeal, the Board's jurisdiction is limited to a review of the evidence in the case record that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

<sup>3</sup> 5 U.S.C. § 8129.

<sup>4</sup> See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>5</sup>

In the instant case, the question is whether appellant knew or should have known that he was receiving compensation benefits on or after May 31, 1994 that were greater than the amount he was entitled to based on his number of claimed dependents.

In a series of questionnaires (Form CA-1032) sent to appellant on an annual basis, the Office sought information necessary for the proper calculation of his benefits including whether claimant was earning wages, claiming dependents, in receipt of a federal benefit or third-party payment for the period in question. The questionnaire (Form CA-1032) specifically states with respect to “Dependents” the following:

“You may claim compensation for a dependent if you have one or more of the following: (a) a husband or wife who lives with you: (b) an unmarried child, who lives with you an[d] is under 18 years of age (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; (d) an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level; (e) a parent who totally depends upon you for support.”

Appellant completed a (Form CA-1032) questionnaire on October 14, 1995 indicating that he had a dependent son “Donald James Forth” who was born July 2, 1972 and was a full-time student. Upon further investigation by the Office, however, it was found that appellant’s son completed “four years of school beyond the high school level” effective May 31, 1994. Because the record supports the Office’s finding that appellant’s son finished his fourth year of college by May 31, 1994, the Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$3,333.12 for the period June 1, 1994 to July 26, 1996. Under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that he was receiving greater compensation than he was entitled to under the regulations. Appellant was, therefore, at fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$3,333.12 is not subject to waiver.<sup>6</sup>

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<sup>5</sup> 20 C.F.R. § 10.320.

<sup>6</sup> Appellant contends on appeal that he did not receive the Office’s preliminary determination and, therefore, was unable to complete an OWCP Form 20 (overpayment questionnaire). The Board, however, finds insufficient evidence to establish that appellant did not receive the documents in question as they were correctly addressed to appellant and mailed by the Office in the ordinary course of business. It is presumed, in the absence of evidence to the contrary, that notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee; *see Mike C. Geffre*, 44 ECAB 942 (1993).

The Board also finds that the Office acted properly in deciding to recoup the overpayment by deducting \$500.00 per month from appellant's continuing compensation.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, section 10.321(a), provides as follows:

“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....”<sup>7</sup>

In the present case, the Office requested that appellant provide financial information to enable it to determine the rate of recovery of the overpayment having due regard to the factors noted above. Appellant, however, did not provide any information as requested to indicate that his financial circumstances were such that recovery of the overpayment from his continuing compensation would cause him undue financial hardship. The Board, therefore, finds that the Office did not abuse its discretionary authority in determining that appellant's continuing compensation should be deducted by \$500.00 per month in order to recoup the overpayment.<sup>8</sup>

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 23, 1998 is hereby affirmed.

Dated, Washington, DC  
January 26, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> 20 C.F.R. § 10.321(a).

<sup>8</sup> See *Nina D. Newborn*, 47 ECAB 132 (1995).