

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ADAM GARCIA and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Tampa, FL

*Docket No. 00-2285; Submitted on the Record;  
Issued June 26, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,602.39; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment and, therefore, he was not entitled to waiver of the overpayment.

On September 14, 1999 appellant, then a 27-year-old nursing assistant, sustained a work-related back injury when he was lifting and moving patients. The Office accepted his traumatic injury claim for a herniated nucleus pulposus (HNP) at L5-S1. Appellant stopped work on September 14, 1999 and received continuation of pay and compensation for lost wages from October 30 through December 4, 1999. Thereafter, he was placed on the periodic rolls for total disability.<sup>1</sup>

Appellant was treated for his work injury by Dr. Lorenzo Bongolan, an orthopedic surgeon. In a "[c]ertificate to [r]eturn to [w]ork" dated December 6, 1999, Dr. Bongolan diagnosed a lumbar HNP and opined that appellant could work light duty with lifting restrictions of 5 to 10 pounds.<sup>2</sup> When the physician retired in December 1999, appellant's treatment was transferred to Dr. Frederick McClimans, an osteopath.

On January 4, 2000 the Office requested a medical report from Dr. McClimans that outlined appellant's anticipated course of treatment and expected date of return to limited duty.

On February 3, 2000 Dr. McClimans signed a work status form indicating that appellant was able to return to light duty effective January 6, 2000.

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<sup>1</sup> On December 3, 1999 the Office sent a Form CA-1009 to appellant, advising him of his responsibility to notify the Office when he returned to work. The Office also directed appellant to return any check he received from the Office for compensation during any period that he worked.

<sup>2</sup> This evidence was date-stamped as received by the Office on December 13, 1999.

In a report dated February 15, 2000, the Office confirmed with the employing establishment that appellant had returned to limited-duty work on December 7, 1999.

In a letter dated February 15, 2000, the Office informed appellant that he was being taken off the periodic rolls because he had returned to work. He continued to receive compensation for total disability until February 26, 2000.

On May 19, 2000 the Office made a preliminary determination that an overpayment occurred in appellant's case in the amount of \$3,602.39. This amount was calculated based on appellant's receipt of weekly payments for compensation in the amount of \$434.80 from December 7, 1999 to February 26, 2000 as set forth in an Office computerized case history inquiry report. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because he was aware or should have reasonably been aware that he was not entitled to compensation after his return to full-time, limited-duty employment.

Appellant completed an overpayment questionnaire on May 24, 2000 stating as follows:

"I notified the Office of when I returned to work and had Doris Collins of the V[eterans] A[dministration] also notify them. I also forwarded the copy of my return to work status on light duty to your office by mail. Copies of my return to work status were sent on two occasions from myself, once from [Dr. Bongolan] and again from Dr. McClimans."

In a decision dated June 6, 2000, the Office determined that appellant was not entitled to waiver of the overpayment in the amount of \$3,602.39 because he was found to be with fault in the creation of the overpayment. The Office directed appellant to repay the debt in monthly installments of \$100.00.

The Board finds that the Office properly determined the amount of the overpayment as \$3,602.39 based on appellant's receipt of weekly compensation in the amount \$434.80 from December 7, 1999 to February 28, 2000. The Office's calculation of the overpayment is corroborated by the Office's computerized case history inquiry report. The amount also is not challenged by appellant on appeal.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that repayment of the overpayment, therefore, cannot be waived.

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. 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."<sup>3</sup> No

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<sup>3</sup> 5 U.S.C. § 8129.

waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

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;
- (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.”<sup>4</sup>

In this case, appellant’s overpayment occurred because appellant returned to work full time on December 7, 1999, but he continued to receive compensation based on total disability through February 26, 2000. He points out that the Office was notified by Dr. Bongolan in December and Dr. McClimans in January that he was approved for light duty. It is appellant’s contention that, because he properly notified the Office of his return to work, he should not be held responsible for repaying the compensation that was paid by mistake and despite of his notification attempts.

The Board is not persuaded by this argument. The record contains no corroborative evidence that appellant called the office and told them that he had in fact returned to work. The Office was only put on notice by Dr. Bongolan that appellant had been approved for a return to light duty in December, not that there was limited-duty work available and that he had returned to his employment. Because appellant accepted payments, when he knew or should have reasonably known that he was not entitled to such compensation, the Board concludes that appellant was at fault in the creation of the overpayment and, therefore, is not entitled to waiver of the overpayment.<sup>5</sup>

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<sup>4</sup> 20 C.F.R. § 10.320(b).

<sup>5</sup> Although appellant alleges that he called the Office and told certain personnel to have the direct deposits to his bank account stopped because he returned to work, there is no evidence such as a call report to corroborate appellant’s allegation. Moreover, assuming appellant tried to have the direct deposits stopped, then he was at least aware that he was not entitled to the compensation payments he received.

The decision of the Office of Workers' Compensation Programs dated June 6, 2000 is hereby affirmed.

Dated, Washington, DC  
June 26, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member