

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MERWYN M. CORPUZ and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND, Virginia Beach, VA

*Docket No. 00-2100; Submitted on the Record;  
Issued November 19, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$745.02 from July 1 through 17, 1999; and (2) whether the Office properly found that appellant was not without fault in creating the overpayment, thereby precluding waiver of recovery.

On January 23, 1999 appellant, then a 45-year-old engine utility technician, sustained left knee pain when he lifted a can of solvent and heard a pop in his left knee. The Office accepted appellant's claim for left knee strain, authorized physical therapy and paid compensation. Appellant underwent authorized arthroscopic surgery on April 19, 1999. He returned to work on July 1, 1999.

In a memorandum dated April 7, 1999, the Office noted that appellant requested by telephone that his compensation be increased to three-fourths of his regular pay. Appellant stated that he was currently stationed on a ship but that his home was with his family in Guam.

By letter dated April 7, 1999, appellant stated that he was married with three dependants and that he worked on a ship apart from his family. Regarding his claim for compensation, he stated: "If I marked the wrong block I made a mistake. I [a]m married and have three dependants. I put down that I am separated because I worked on board a ship and [I am] always separated or away from my family."

By letter dated July 2, 1999, the Office advised appellant that additional information was necessary to establish his entitlement to receive compensation at the 75 percent rate. It enclosed a questionnaire to be completed by his wife.

By decision dated October 7, 1999, the Office preliminarily found that appellant had received an overpayment of \$745.02 and that he was not without fault in creating the overpayment. The Office found that appellant returned to work on July 1, 1999 and received compensation through July 17, 1999.

By decision dated May 4, 2000, the Office affirmed its October 7, 1999 decision finding that appellant should have known that he was not entitled to receive compensation from July 1 through 17, 1999. The Office asserted that it advised appellant by letter dated July 7, 1999 that compensation would be paid through July 17, 1999 and that he was only eligible to receive such compensation while he was unable to perform his job duties. The letter also stated that, if appellant's compensation included a period when he worked, he should return that payment to avoid an overpayment of compensation. The Office noted that appellant was given 30 days within which to respond to its preliminary decision but did not do so.

On appeal, appellant stated that, at the time he received the compensation, he had financial difficulty and had initiated bankruptcy proceedings. He stated that he used the overpayment to pay bills. Appellant alleged that his compensation rate should have been 75 percent of his income; however, he received only 66 2/3 percent. He further alleged that he responded to the Office's questionnaire regarding his dependents and that he had not received the Office's correspondence while he was overseas. Appellant asserted that he was married and supporting his dependants "during that time."

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$745.02 from July 1 through 17, 1999.

The record shows and appellant admitted that he returned to work on July 1, 1999 and continued to receive compensation through July 17, 1999.

Regarding appellant's argument that he had dependants that entitled him to receive compensation at the 75 percent rate, in its July 2, 1999 letter, the Office requested additional evidence to establish appellant's entitlement to the 75 percent rate. However, the record does not contain a response to the Office's request or any other evidence showing that appellant had dependants.

The Board further finds that appellant was not without fault in creating an overpayment and, therefore, recovery was not subject to waiver.

Section 8129(b) of the Federal Employees' Compensation Act provides: "Adjustment of 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>1</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

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<sup>1</sup> 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide 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. (This provision applies only to the overpaid individual).”<sup>2</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Appellant knew or should have known that the compensation he received from July 1 through 17, 1999 was erroneous because he returned to work on July 1, 1999 and he continued to receive compensation through July 17, 1999. Moreover, by his own admission, appellant was aware that he received compensation to which he was not entitled.

Because appellant knew or should have known that he was not entitled to receive compensation from July 1 through 17, 1999, he is not without fault in the creation of the overpayment and, therefore, is not entitled to seek waiver of recovery of that overpayment.

The May 4, 2000 and October 7, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
November 19, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Priscilla Anne Schwab  
Alternate Member

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<sup>2</sup> 20 C.F.R. § 10.433(a).