

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE R. FORNERO and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Page, AZ

*Docket No. 01-1679; Submitted on the Record;
Issued December 2, 2002*

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 appellant at fault in a \$1,768.50 overpayment of compensation.

This case is before the Board for the second time. Previously, the Board found that the Office properly calculated the amount of the overpayment and remanded the case for the Office to consider appellant's request for a telephone conference regarding a waiver of the overpayment.¹ The facts contained in that decision are incorporated by reference.

On remand, a telephone conference with appellant was held on March 2, 2001. By decision dated April 24, 2001, the Office found that appellant was not entitled to waiver of recovery of the overpayment and determined that he was financially capable of paying \$100.00 every 28 days. The Office also determined that appellant was at fault in creating the overpayment because he knew or should have known that he accepted incorrect compensation payments from October 16, 1996 through February 11, 1998.

Initially, the Board finds that the Office improperly determined that appellant was at fault in creating the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act² 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.³ The only exception to this requirement must meet the tests set forth in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payments has been made to an

¹ Docket No. 99-875 (issued January 16, 2001).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”⁴ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.⁵

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations provides in relevant part:

“(a) [The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of the benefits. A recipient who had 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 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 known to be incorrect. (This provision applies only to the overpaid individual).

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”⁶

In this case, the Office initially found appellant to be without fault in creating the overpayment. On June 9, 1998 the Office informed appellant of its preliminary determination that an overpayment of compensation \$1,768.50 had occurred from October 16, 1996 through February 11, 1998 and that he was without fault in creating the overpayment.⁷

In its November 19, 1998 decision, the Office explained that the overpayment occurred because appellant was being paid full total temporary disability for time lost from work due to

⁴ 5 U.S.C. § 8129(b).

⁵ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

⁶ 20 C.F.R. § 10.433 (1999).

⁷ Appellant was removed from the federal service on September 25, 1998 because of physical inability to perform his duties as a supply clerk. He filed a notice of recurrence of disability on September 24, 1998 and received appropriate compensation.

medical appointments while he was also receiving compensation for a loss of wage-earning capacity.

Subsequently, in response to appellant's inquiries, the Office further explained why appellant was not entitled to receive 100 percent total disability for wage loss due to medical appointments. The Office stated:

“Your wage loss for medical appointments is correctly calculated as the amount you would receive for total temporary disability minus what you have already been paid for the same period due to your loss of wage-earning capacity. While you may not be receiving remuneration from your employer for time lost while attending these appointments, you are receiving compensation for loss of wage-earning capacity during the time you are attending these appointments and, therefore, payment for total temporary disability during these periods would constitute an overpayment.”

Finally, the Board implicitly affirmed the finding of no fault when it remanded the case for the Office to determine whether waiver of recovery of the overpayment was justified. In a March 2, 2001 memorandum of the telephone conference, the Office stated that it “correctly determined that appellant was without fault regarding the overpayment.”

The record contains no evidence or explanation establishing the Office's contrary conclusion in its April 24, 2001 decision that appellant knew or should have known that the payments he accepted for time lost due to medical appointments were incorrect. Rather, as outlined above, the record supports appellant's lack of knowledge regarding the overpayment. Therefore, the Board will reverse the finding of fault.

While the Office conducted a telephone interview with appellant as directed by the Board, the Office's finding of fault on remand precluded its consideration of whether appellant was entitled to a waiver of recovery of the overpayment. The Office's April 24, 2001 decision contains no findings on this issue. Consequently, the Board will remand the case for the Office to determine whether recovery of the overpayment should be waived.⁸ Following such further development as it deems necessary, the Office shall issue an appropriate decision regarding whether appellant is entitled to waiver.

⁸ 20 C.F.R. § 501.2(c). See *Royal E. Smith*, 49 ECAB 516, 519 (1998) (finding that the Board's jurisdiction covers only those issues addressed by the Office in a final decision dated within one year of the filing of an appeal).

The April 24, 2001 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
December 2, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member