

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHEN V. CARKNARD, JR. and DEPARTMENT OF THE ARMY,  
WATERVLIET ARSENAL, Watervliet, NY

*Docket No. 00-1440; Submitted on the Record;  
Issued February 25, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that a \$1,143.21 overpayment of compensation was created for the period October 18 to December 11, 1993, as he received compensation for total disability while working; (2) whether the Office properly found appellant at fault in creation of the overpayment and that, therefore, the overpayment was not subject to waiver; (3) whether the Office properly found a \$1,342.39 overpayment of compensation was created for the period December 28, 1997 to October 10, 1998, as he received augmented compensation for that period although he had no eligible dependents; and (4) whether the Office properly found appellant at fault in creation of the overpayment and that, therefore, the overpayment was not subject to waiver.

This is the second appeal in this case. By decision and order issued January 13, 1998,<sup>1</sup> the Board set aside a January 13, 1995 Office decision regarding appellant's wage-earning capacity and remanded the case for further development. The Board found that the "determination of appellant's weekly pay" was based on a 20-hour per week schedule, whereas effective June 12, 1994, the employing establishment instituted a compressed workweek schedule resulting in an average 18-hour workweek. The Board found that the Office's determination based on actual earnings for 20 hours per week did not fairly and reasonably represent his actual earnings since appellant actually worked 16-hour weeks approximately 50 percent of the time beginning June 12, 1994. The Board remanded the case to the Office for a proper determination of appellant's loss of wage-earning capacity during the claimed period. The law and the facts of the case as set forth in the Board's prior decision and order are hereby incorporated by reference.

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<sup>1</sup> Docket No. 95-2190 (issued January 13, 1998).

Following issuance of the Board's decision and order, the Office requested that the employing establishment provide appellant's work schedule and earnings for the period June 13, 1994 to October 30, 1995.

Employing establishment memoranda dated May 17 and June 20, 1994 indicate that beginning June 12, 1994, a compressed workweek schedule was instituted. Appellant worked 20 hours the first week of each pay period and 16 hours in the second week, averaging 18 hours per week.<sup>2</sup> Appellant worked this schedule intermittently through October 30, 1995. He was terminated from the employing establishment on October 31, 1995 due to a reduction-in-force and there was no other work available for which he qualified.<sup>3</sup>

By decision dated May 22, 1998, the Office found that, effective June 12, 1994, appellant's wage-earning capacity should be based on average actual earnings of 18 hours per week instead of 20 hours per week. The Office modified its January 13, 1995 wage-earning capacity determination, which was based on a 20-hour per week schedule. The new compensation rate was to begin on March 1, 1998. The Office noted that it was in the process of computing the retroactive compensation due appellant from June 12, 1994 to May 23, 1998, pending appellant's completion of an affidavit of earnings and employment (Form CA-1032) for that period.

Appellant submitted information regarding his wages and earnings from January 1, 1993 to December 31, 1997. An October 22, 1993 Report of Termination of Disability (Form CA-3) establishes that appellant was off work from June 16, 1980, until he returned to work on October 18, 1993 for four hours per day. A January 25, 1994 daily computation log worksheet indicates that appellant was issued a compensation check at the total disability rate for the period October 18 to December 11, 1993.

In a June 8, 1998 Form CA-1032, appellant noted that his wife passed away on December 28, 1997 and that he had no other dependents.<sup>4</sup>

In an October 8, 1998 memorandum, the Office noted that after appellant's wife passed away on December 28, 1997 he had no eligible dependents. However, he was paid compensation at the augmented 75 percent rate from December 28, 1997 to October 10, 1998. The Office recommended calculation of the overpayment of compensation.

In a December 10, 1998 letter, the Office advised appellant that his wife's death on December 28, 1997 and his marriage to Mary Elizabeth West on November 21, 1998, affected

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<sup>2</sup> Effective June 12, 1994, appellant was a WG-10 step 5, earning \$16.17 per hour, or \$646.80 per week.

<sup>3</sup> Appellant submitted periodic reports from Dr. David Herman, an attending orthopedist, finding him totally disabled for work due to left sciatica and trochanteric bursitis. Appellant also submitted reports from Dr. Joseph F. Emrich, an attending Board-certified neurosurgeon, finding appellant totally and permanently disabled for work due to sequelae of the accepted spinal injuries.

<sup>4</sup> A July 1998 Social Security Administration report states that appellant earned \$1,633.60 in 1993, \$7,475.96 in 1994 and \$1,155.60 in 1995 at the employing establishment and received \$2,675.92 in compensation in 1995.

the amount of compensation to which he was entitled. The Office requested that appellant submit his former wife's death certificate and a current certificate of marriage.<sup>5</sup>

Appellant submitted a December 29, 1997 certified death certificate for Barbara A. Carknard and a certified certificate of his November 21, 1998 marriage to Ms. West.

Effective October 11, 1998, the Office changed appellant's compensation rate to 66 2/3 percent from 75 percent, due to his wife's death on December 29, 1997. Effective September 7, 1999, the Office changed appellant's compensation rate to 75 percent, pursuant to his November 21, 1998 remarriage.

By notice dated September 17, 1999, the Office advised appellant of its preliminary determination that a \$2,485.60 overpayment of compensation had occurred. The Office explained that, from October 18 to December 11, 1993, appellant continued to receive total disability compensation after he had returned to work and an overpayment in the amount of \$1,143.21 was created for that period. The Office found that appellant received compensation at the augmented 75 percent rate after his wife passed away on December 28, 1997 and continued to receive compensation at the augmented rate from December 29, 1997 through October 10, 1998, while he had no eligible dependents. The Office calculated an overpayment in the amount of \$1,342.39 for that period. The Office noted that appellant signed a Form CA-1032 on October 15, 1993 indicating his awareness of the responsibility for him to report his return to work to the Office and to report any change in the status of his claimed dependents. The Office found that appellant was at fault in creation of both overpayments of compensation. The Office enclosed an overpayment recovery questionnaire and a form for appellant to request a prerecoupment hearing or waiver of the overpayment.

In a September 28, 1999 letter, appellant requested that the total overpayment be deducted from compensation owed to him and that a payment be issued to him for the difference. Appellant did not contest the fact or amount of either period of overpayment, or the preliminary findings of fault. Also, appellant did not request a prerecoupment hearing or waiver of the overpayment, or complete and return the overpayment recovery questionnaire.

By decision dated December 28, 1999, the Office found a \$1,143.21 overpayment of compensation for the period October 18 to December 11, 1993, as appellant received compensation for total disability while working; and a \$1,342.39 overpayment of compensation for the period December 29, 1997 to October 10, 1998, as appellant received augmented compensation for that period although he had no eligible dependents. The Office further found that appellant was at fault in the creation of both overpayments, as he knew or should have known of his responsibility to report his return to work and the death of his wife, but failed to do so.

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<sup>5</sup> In a December 10, 1998 letter and attached checklists, the Office advised appellant of the type of medical and factual evidence needed to support his assertions that he sustained a recurrence of disability on August 12, 1994, June 30 and October 31, 1995.

In a letter dated February 9, 2000, the Office stated that it had deducted the \$2,485.60 overpayment from \$4,373.84 of compensation due appellant for the period November 21, 1998 to September 7, 1999 while married and entitled to receive augmented compensation. The Office noted that appellant was issued a \$1,888.24 payment on January 13, 2000, the difference between the underpayment and the overpayment.

The Board finds that the Office properly found a \$1,143.21 overpayment of compensation in appellant's case for the period October 18 to December 11, 1993, as he received compensation for total disability while working.

The record demonstrates that appellant returned to work on October 18, 1993 for four hours per day. However, a January 25, 1994 daily computation log worksheet indicates that appellant was issued a compensation check at the total disability rate for the period October 18 to December 11, 1993, in the amount of \$3,567.14. The Office calculated that appellant was entitled to receive only \$2,423.93 in wage-loss compensation, a difference of \$1,143.21. The Board has reviewed the Office's calculations and found them correct. Also, appellant does not contest the accuracy of these calculations or the amount of the overpayment. Thus, the finding of a \$1,143.21 overpayment of compensation was proper.

The Board finds that the Office properly found appellant at fault in creation of the \$1,143.21 overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>6</sup> 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.<sup>7</sup> 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 this subchapter or would be against equity and good conscience."<sup>8</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> 5 U.S.C. § 8129(b).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 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 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 known to be incorrect.”<sup>9</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Section 10.433(a) of Title 20 of the Code of Federal Regulations, finding that appellant accepted a payment which he “knew or should have known to be incorrect.”

Section 10.433(b) of the Office’s regulations provides: “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.”<sup>10</sup>

On October 15, 1993 four days before appellant returned to work on October 18, 1993 he signed a Form CA-1032 affidavit of earnings and employment, indicating his understanding that he “must immediately report to [the Office] ... any employment” and “any change in the status of claimed dependents....” The Board finds that appellant accepted a payment that he knew or should have known to be correct as he failed to report his return to work to the Office a mere four days after he signed the Form CA-1032 regarding his duty to report such employment.

Also, the record contains a February 3, 1994 letter from appellant to the Office advising of a 31-cent per hour increase in his salary and inquiring as to why the employing establishment had ceased deducting health and life insurance benefits from his salary checks. This indicates that appellant carefully reviewed his pay stubs and was aware of the necessity to report his increase in earnings to the Office. Appellant’s actions indicate he is a careful, meticulous individual, who was well able to interpret detailed financial information and should have been able to recall the advisement he signed on October 15, 1993 of the necessity of reporting a return to work to the Office. Thus, the Office’s finding of fault was correct under the facts of this case.

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<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> 20 C.F.R. § 10.433(b).

The Board finds that the Office properly found a \$1,342.39 overpayment of compensation for the period December 28, 1997 to October 10, 1998, as he received augmented compensation for that period although he had no eligible dependents.

Appellant's wife passed away on December 28, 1997 and he had no other dependents. The record demonstrates that appellant continued to receive compensation at the augmented 75 percent rate from December 28, 1997 through October 10, 1998. However, as appellant did not have a eligible dependent during this period, he was only entitled to compensation at the statutory rate of 66 2/3 percent.<sup>11</sup> The Office calculated that appellant received a \$1,342.39 overpayment of compensation during that period. The Board finds that the Office's mathematical calculations are accurate. Also, appellant does not contest the amount of the overpayment. Therefore, the Office properly determined that appellant received a \$1,342.39 overpayment of compensation for the period December 28, 1997 to October 10, 1998.

The Board finds that the Office properly found appellant at fault in creation of the \$1,342.39 overpayment.

In this case, as explained above regarding the first overpayment, the Office applied the third standard under section 10.433(a) of Title 20 of the Code of Federal Regulations, finding that appellant accepted a payment which he "knew or should have known to be incorrect," in determining that appellant was at fault in creating the overpayment.

On October 15, 1993 appellant signed a Form CA-1032 affidavit of earnings and employment, indicating his understanding that he "must immediately report to [the Office] ... any change in the status of claimed dependents...." Appellant signed a Form CA-1032 containing the same advisement on December 27, 1994. Thus, appellant accepted augmented compensation which he knew or should have been expected to know should have been returned to the Office and the Office's finding of fault is correct under the law and facts of this case.<sup>12</sup>

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<sup>11</sup> A partially disabled employee without a dependent receives compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability. 5 U.S.C. § 8106(a). A partially disabled employee with at least one dependent is entitled to have his compensation augmented at the rate of 8 1/3 percent of the difference between his monthly pay and his monthly wage-earning capacity. 5 U.S.C. § 8110(b)(2).

<sup>12</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

The December 28, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 25, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member