

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES P. JOHNSON and DEPARTMENT OF THE AIR FORCE,
AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, CA

*Docket No. 00-567; Submitted on the Record;
Issued January 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined; that appellant received an overpayment of compensation in the amount of \$36,489.97; (2) whether the Office properly determined that he was not entitled to waiver of recovery of the overpayment; and (3) whether the Office properly determined that the overpayment would be recovered by collecting \$500.00 every four weeks from appellant's continuing compensation and salary.

The Office accepted that on March 3, 1988 appellant, then a 30-year-old aircraft mechanic, slipped on hydraulic fluid and sustained lumbar strain. Appellant thereafter underwent an authorized laminectomy and appropriate medical and wage-loss benefits were paid.

On September 25, 1997 the Office issued a decision reducing appellant's compensation for temporary total disability to reflect his actual earnings as a full-time online technician,¹ effective April 10, 1995. On October 1, 1997 the Office found that appellant's employment at the employing establishment represented his wage-earning capacity.

On January 15, 1998 the Office issued a preliminary determination that appellant had been overpaid by \$36,489.97, because he had been reemployed full time on April 10, 1995 but had continued to be paid compensation for total disability until September 14, 1997. A preliminary finding of fault was made, as after appellant started work and the amount of his compensation checks did not change, he should have been reasonably aware that he was being overpaid and return the incorrect checks, or reserve a portion to repay the Office for the overpaid amount.

¹ Appellant returned to work full time as a production operator I with Packard Bell Electronics on April 10, 1995 earning \$9.25 per hour. He was promoted to a technician on October 6, 1995 and to an engineer on August 9, 1989 with salary increases.

Appellant requested a prerecoumpment hearing, which was held on January 27, 1999. He contended that he was not at fault in the creation of the overpayment, that he needed substantially all of his income for regular expenses and that the overpayment should be waived, because repayment would cause undue hardship and defeat the purpose of the Federal Employees' Compensation Act and because it would be against equity and good conscience.

On March 13, 1999 the Office issued appellant a proposed reduction in compensation due to an increase in his earnings at Packard Bell and recommended that the September 25, 1997 decision be so modified.

On July 12, 1999 the Office issued appellant a notice of proposed reduction of compensation because the factual and medical evidence of record established that he was no longer totally disabled but rather was partially disabled, as he had the capacity to earn wages as an Engineer I, at the rate of \$34,521.22 per annual. The Office modified the September 25, 1997 decision to reflect an increase in appellant's actual earnings and found that the position of Engineer I fairly and reasonably represented appellant's wage-earning capacity. The Office noted that appellant's date-of-injury salary was \$582.00 per pay period, that the current pay rate for that position was \$692.80 and that his reemployment job pay rate was \$663.87. The Office then calculated that appellant was entitled to compensation of \$85.00 every four weeks.

By decision dated September 28, 1999, the hearing representative found that an overpayment of \$36,489.97 occurred because appellant continued to receive compensation for temporary total disability after he had begun working full time as an online technician. The hearing representative found that appellant was with fault in the creation of the overpayment as he continued to receive and keep checks that he knew or should have been expected to know were incorrect, such that he was not entitled to waiver. Further, the hearing representative found that appellant had sufficient excess income, after paying his ordinary and necessary monthly expenses, to be able to afford to repay the overpayment at the amount of \$500.00 every four weeks.

The record supports that appellant began full-time work on April 10, 1995 but also continued to receive compensation checks for temporary total disability through September 14, 1997. An overpayment of compensation was created in the amount of \$36,489.97.

The record also demonstrates that on September 28, 1999 the Office hearing representative found that appellant was with fault in the creation of the overpayment and, therefore, was not eligible for consideration of waiver.

Section 8129 of the Act² 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." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

² 5 U.S.C. §§ 8101-8193.

Section 10.433 of the implementing federal regulations³ provides the following:

“[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, which may affect entitlement to or the amount of benefits. 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 known to be incorrect.”

In this case, the Office properly determined that appellant was at fault in the creation of the overpayment under the third category, as he “accepted a payment which he knew or should have known to be incorrect.”

Although the Office continued to pay appellant compensation for temporary total disability after he had returned to work full time, it remained appellant’s responsibility to either return the incorrect checks, or to set aside a portion of them from which to repay the overpayment.⁴ The record supports that appellant knew or should have known that he was not entitled to the same amount of compensation he was receiving prior to his return to full-time employment. In fact, the record supports that appellant told his rehabilitation counselor that he was being overpaid, but did nothing about it. The checks contain the dates for which payment was made. Further the June 27, 1991 letter advising appellant of the conditions under which he would receive compensation from the periodic rolls states: “If you have worked for any portion of this period [for which payment is being made], you must return the check to this Office. Otherwise, an overpayment of compensation may result.”

Appellant was notified of his responsibilities to return checks issued after he returned to work and there is ample evidence in the record that he was aware or should have been aware that he was not entitled to receive compensation for total disability after he returned to full-time work. As appellant is with fault in the creation of the overpayment, recovery is mandatory.

³ 20 C.F.R. § 10.1 *et seq.*

⁴ While the Office may have been negligent in continuing to issue appellant checks for total disability after his return to work, this does not excuse appellant’s acceptance of such checks which he knew or should have known was incorrect. *See Larry D. Strickland*, 48 ECAB 669 (1997).

Section 8129(a) of the Act provides that where an overpayment of compensation 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 of compensation, 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. In specifying a method of recovery, a claimant's entire financial situation is considered. It is the claimant's responsibility to provide the relevant financial information.

Section 10.441 of Title 20 of the Federal Code of Regulations provides that in situations both where the individual is entitled to further payments and where the individual is not entitled to further payments, the individual shall refund the overpayment as soon as the error is discovered or his attention is called to the same.

In this case, appellant's current income is \$34,521.22 per year, or \$2,876.77 per month. He lists his spouse's monthly income as \$2,200.00. Total household income is thus \$5,075.76 per month. Appellant's continuing compensation payments are \$85.00 per every four weeks. Appellant testified that his current monthly expenses totaled \$4,360.00; however, those expenses are not well documented and some, such as \$900.00 per month for food and household supplies would appear to exceed Bureau of Labor and Statistics average expenses for appellant's household. Notwithstanding this, appellant's current monthly income is more than \$700.00 over the expenses claimed. Therefore, recovery of the overpayment should not cause undue financial hardship to appellant.⁵

⁵ The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. To the extent the Office seeks recovery in excess of appellant's continuing compensation, the Board does not have jurisdiction with respect to that portion of recovery under the Debt Collection Act. *See Lewis George*, 45 ECAB 144 (1993).

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 28, 1999 is hereby affirmed.

Dated, Washington, DC
January 22, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member