

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELWYN E. HOLTHUSEN, SR. and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Neopit, WI

*Docket No. 02-79; Submitted on the Record;
Issued October 9, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$12,194.36 during the period April 1, 1986 through April 9, 1990; (2) whether the Office properly found that appellant was with fault in the creation of the overpayment because he received compensation for temporary total disability at the same time he received income for his work as an advisory Board member for the Red Lake Fisheries Association; and (3) whether the Office abused its discretion by ordering repayment of the overpayment by stating it would deduct \$375.00 from each of appellant's continuing periodic compensation payments.

On February 11, 1977 appellant, then a 36-year-old supervisory police officer, suffered a back injury during the performance of his federal duties.

The Office accepted appellant's claim for a lumbar strain and herniated disc.

By decision dated April 17, 1990, the Office reduced appellant's compensation on the grounds that his earnings in the position of elected official, which he had been performing for the past 90 days or more and was currently performing, represented his actual wage-earning capacity.¹

In an August 31, 1990 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$12,194.36. The Office found that appellant received earnings as an elected official during the same time he received compensation for total disability. Based on appellant's actual earnings for April 1, 1986 through April 7, 1990, appellant should have been paid \$65,807.63 in benefits, but had received \$78,001.99. Accordingly, appellant was overpaid \$12,194.36. The Office advised appellant that he was at

¹ The record reveals that appellant served as an elected board member of the Red Lake Fisheries Association, Inc. from April 1986 to April 1990. He worked approximately one hour per month as an elected official.

fault in the creation of the overpayment because he had accepted payment from his position as an elected official which he knew or should have been expected to know was incorrect. In addition, the Office advised appellant that he could request a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant submit financial information to support income and expenses which would assist in the determination of whether or not to waive overpayment should the preliminary finding of fault be overturned.

By letter dated September 11, 1990, appellant requested a hearing before an Office representative. The Office scheduled an informal hearing to be held on Monday, October 21, 1991 at 12:30 p.m. at the Federal Building and U.S. Post Office in Fargo, N.D. In a letter dated October 9, 1991, appellant requested that his hearing be cancelled. He stated "I realize that even though I faithfully submitted reports and deductions were not made until four years later, that the overpayment on workmens' compensation will be deducted until the overpayment is paid." Appellant further advised that he resigned from the Board of Directors of the Red Lake Fisheries Association on July 20, 1991 due to the standing involved and his health. By letter dated November 13, 1991, the Office's Branch of Hearing and Review granted appellant's cancellation request. No financial information was received from appellant.

By decision dated August 21, 2001, the Office finalized its preliminary determination of August 31, 1990. In addition, the Office determined that the sum of \$375.00 would be withheld from appellant's continuing compensation effective September 8, 2001.²

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$12,194.36 during the period April 1, 1986 through April 9, 1990.³

In this case, the record reveals, and appellant admits, that he worked approximately one hour a month serving on the Board of Directors for the Red Lake Fisheries Association during the period April 1986 until his retirement in July 1991. During the period April 1, 1986 through April 7, 1990, the Office calculated that appellant received temporary total disability compensation in the amount of \$78,001.99 and subtracted \$65,807.63, the amount appellant should have received for partial disability during the period April 1, 1986 through April 7, 1990. The Office procedures indicate that earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's WEC (wage earning capacity) should be deducted from continuing compensation payments using the Shadrack formula. Past earnings must be

² The Board notes that, although approximately 11 years had passed since the Office issued its preliminary determination that an overpayment in compensation had occurred, the record is devoid of any evidence that any payments were ever deducted to resolve the overpayment. Although appellant's confusion regarding the reduction in compensation payments he received due to the loss of wage-earning capacity decision of April 17, 1990 is understandable, an overpayment determination is a distinct and separate issue.

³ Although the Office advised in its final decision that the overpayment period ended April 9, 1990, this appears to be a typographical error as the proper date should be April 7, 1990. The Board notes that the date of April 9, 1990 does not affect the amount of overpayment.

declared an overpayment.⁴ In this case, appellant who was being paid compensation for total wage loss reported sporadic earnings as an elected official with salary ranging from \$275.00 to \$420.00 per month from April 1, 1986 through April 7, 1990. The claims examiner noted that the adjustment to appellant's compensation was for actual earnings in 1986, 1987, 1988 and 1989 and did not represent appellant's actual earning capacity since the earnings were from an elected position, which was not available on a comparable basis. In an attached worksheet, the Office applied the *Shadrick* formula⁵ (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings) and deducted earnings only for the period in question. The accounting revealed that from April 1, 1986 through April 7, 1990, appellant should have received a total of \$65,807.63 but the Office had paid \$78,001.99. As past earnings must be declared an overpayment, the Office properly found that the difference between the amount of compensation appellant received and the amount he should have received was \$12,194.36 and therefore this is the amount of the overpayment. Therefore, the Office properly found that an overpayment existed in the amount of \$12,194.36.

The Board further finds that the Office properly determined that appellant was with fault in the creation of the overpayment because he received compensation for temporary total disability at the same time he received income for serving on the Board of Directors of the Red Lake Fisheries Association.

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.⁶ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."⁷ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁸ In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.⁹

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.8147(d)(3) (December 1995)

⁵ See *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ 5 U.S.C. § 8129.

⁷ 5 U.S.C. § 8129(b).

⁸ *Harold W. Steele*, 38 ECAB 245 (1986).

⁹ 20 C.F.R. § 10.435(b)(1) (January 1999).

In determining whether an individual is at fault, section 10.433(a) 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 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 been expected to know was incorrect.”¹⁰

In this case, the Office applied the third standard -- appellant accepted payments which he knew or should have known were incorrect -- in finding appellant to be at fault in the creation of the overpayment in the amount of \$12,194.36. In a letter dated March 5, 1987, appellant had advised that he served as an elected board member from April 1986 through March 1987 for Red Lake Fisheries Association, Inc. On July 23, 1987, August 11, 1988, July 24, 1989 and July 24, 1990 appellant signed a Form CA-1032s instructing him to report any employment in the 15-month period prior to the date of the form. In these Form CA-1032s, appellant indicated that he had worked as an advisory board member from April 1987 to “the present” for Red Lake Fisheries Association, Inc. Appellant indicated, in a letter dated September 11, 1990, that he had resigned from his position as an advisory board member on July 20, 1991 due to the standing involved and his health. Although the Office may have been negligent in continuing to issue appellant checks for total disability after it was informed appellant had returned to work and had earnings, this does not excuse appellant’s acceptance of such checks to which he should have been expected to know he was not entitled.¹¹

The Board finds that the signed Forms CA-1032, together with the reporting instructions contained in the front of each Form CA-1032, indicate that appellant should have known that the total disability compensation amounts he continued to receive while also receiving compensation for serving as an advisory board member for Red Lake Fisheries Association, Inc. contained an amount to which he was not entitled. After consideration of all the particular circumstances surrounding the overpayment, the Board finds that the facts of this case establish that appellant should have been expected to know that he accepted incorrect compensation payments in the amount of \$12,194.36 and, therefore, he was at fault in the creation of the overpayment during that period.

The Board, however, finds that the Office abused its discretion by ordering repayment of the overpayment by deducting \$375.00 from each of appellant’s continuing periodic compensation payments.

¹⁰ 20 C.F.R. § 10.433(a) (January 1999).

¹¹ *Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

Section 10.441(a) of the Code of Federal Regulations provides:

“Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship....”¹²

In making the determination that \$375.00 could be deducted from appellant’s continuing periodic compensation payments, the Office failed to show how it arrived at such a payment plan. More importantly, however, there is no indication that the Office attempted to secure current financial information from appellant in order to make a determination regarding a payment plan. The only request for financial information, which appellant never provided, was set forth in the Office’s preliminary finding of overpayment in its letter of August 31, 1990, which was almost 11 years from the date of its final determination. As the Office requested financial information approximately 11 years ago, the Office should have attempted to obtain current information regarding appellant’s income, expenses and assets. It is appellant’s current financial situation, at the time of the waiver determination, that must be considered, not information relevant to the period of the overpayment itself.¹³ As the Office never provided appellant an opportunity to provide any current financial information, the Office was precluded from exercising its regulatory responsibility to consider an equitable repayment rate which would minimize any resulting hardship upon appellant.¹⁴ The Board further notes that, although there is no issue with respect to waiver of the overpayment because the Office’s finding that appellant was at fault in creating the overpayment was incorrect under the circumstance of this case, the Office abused its discretionary authority under 20 C.F.R. § 10.441(a) by not allowing appellant an opportunity to provide current financial information.

Accordingly, the case will to be remanded to the Office to secure current financial information relevant to appellant’s current earnings and expenses to establish an appropriate payment plan to recover the overpayment. After such further development as the Office deems necessary, it should issue an appropriate decision.

¹² 20 C.F.R. § 10.441(a) (January 1999).

¹³ See *Ronald E. Smith*, 36 ECAB 652 (1985).

¹⁴ See *Iris E. Ramsey*, 43 ECAB 1075 (1992).

The decision of the Office of Workers' Compensation Programs dated August 21, 2001 is affirmed in part, set aside and in part and remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
October 9, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member