

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**ROY R. THOMPSON, Appellant**

**and**

**DEPARTMENT OF THE NAVY, PEARL  
HARBOR NAVAL SHIPYARD,  
Pearl Harbor, HI, Employer**

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**Docket No. 05-1666  
Issued: November 25, 2005**

*Appearances:*  
*Roy R. Thompson, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge

**JURISDICTION**

On August 8, 2005 appellant filed an appeal from the Office of Workers' Compensation Programs' merit decisions dated May 12 and July 13, 2005, finding that appellant had received an overpayment of compensation in the amount of \$58,130.49, for which he was found to be at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>1</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$58,130.49 for the period September 1, 1997 through July 17, 1999; (2) whether appellant was at fault in the creation of the overpayment, such that he is not entitled to waiver of

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<sup>1</sup> The record on appeal contains evidence received after the Office issued the March 9, 2005 decision. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c). Appellant may submit such evidence to the Office with a request for reconsideration.

recovery of the overpayment; and (3) whether the Office properly required recovery of the overpayment.

### **FACTUAL HISTORY**

This case is on appeal to the Board for the second time. On the first appeal, the Board affirmed the Office's March 18 and November 25, 1997 decisions denying appellant's claim for a recurrence of disability due to his September 14, 1990 employment injury.<sup>2</sup>

The Office accepted appellant's September 17, 1990 occupational injury claim for bilateral knee strains, meniscus tear and bilateral arthroscopy.

On August 6, 1997 appellant signed an election of Civil Service Retirement System (CSRS) benefits in preference to benefits under the Federal Employees' Compensation Act, effective August 1, 1997. On August 6, 1997 appellant also signed an election of benefits under the Act in preference to CSRS benefits, effective January 3, 1997. Payment of benefits verification forms dated September 27, 1997 reflected that appellant began receiving compensation commencing September 1, 1997 at the pay rate of \$843.60 per week.<sup>3</sup> Appellant's gross compensation benefit for a 28-day period was \$2,530.80.

By letter dated November 19, 1997, the Office informed appellant that it was not possible to receive benefits from the Office of Personnel Management (OPM) and the Office concurrently.

A report dated May 24, 2000 from the U.S. Naval Criminal Investigative Service reflected that appellant had been employed since August 6, 1997 as a facilities technician at the National Astronomical Observatory of Japan in Hilo, Hawaii, receiving a monthly salary of \$2,927.00. On Form 1032 signed on February 11, 1999 appellant certified that he had not been employed during the previous 15-month period for which he claimed compensation benefits.

On February 15, 2001 the Office issued a preliminary determination that appellant had received an overpayment in the amount of \$60,540.63 for the period August 6, 1997 through July 17, 1999, due to the fact that he had received compensation payments from the Office while he was working with no loss of wage-earning capacity. Appellant was granted 30 days to respond.

By letter dated March 10, 2001, appellant disagreed with the preliminary determination, claiming that he had not reported his employment immediately because he feared that the Office would withhold money that was owed to him. Appellant alleged that he did not knowingly accept compensation benefits, in that he did not remember authorizing direct deposits and that the account was "infrequently utilized." Appellant claimed that he had made several good faith efforts to terminate compensation benefits. He requested a waiver, stating that a lump-sum payment would create a hardship.

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<sup>2</sup> Docket No. 98-630 (issued December 29, 1999).

<sup>3</sup> The \$843.60 weekly pay rate computes to a monthly pay rate of \$2,741.70.

Appellant also submitted an overpayment recovery questionnaire dated March 10, 2001, reflecting monthly expenses of \$6,754.00 and net monthly income of \$5,887.00. Appellant indicated that he had stocks and bonds valued at \$200,000.00 and combined balances in his savings and checking accounts in the amount of \$6,000.00. Appellant requested a hearing on the issue of fault.

At the February 18, 2005 hearing, appellant testified that he began working at the National Astronomical Observatory of Japan on August 6, 1997. Appellant further testified that he had sent forms requesting benefits under the Act from January 3 through August 1, 1997 and OPM benefits commencing August 1, 1997; that he had received a letter notifying him that he would begin receiving compensation benefits effective September 1, 1997; that he was aware that he was not entitled to receive the compensation; and that he made several attempts to “correct the problem.” Appellant contended that any overpayment should be adjusted by the amount that he should have been paid by OPM because it was his intent that he receive OPM benefits during the period in question.

By decision dated May 12, 2005, the Office hearing representative made a final determination that appellant had received an overpayment of compensation and that appellant was at fault with regard to the overpayment and, therefore, was not entitled to a waiver. However, finding that appellant began receiving benefits under the Act on September 1, 1997, rather than on August 6, 1997, the hearing representative instructed the Office to recalculate the amount of overpayment for the period September 1, 1997 through July 17, 1999. He also found that appellant’s assets were more than sufficient for repayment and that, therefore, recovery at the rate of \$1,600.00 per month would not defeat the purpose of the Act.

A report dated July 13, 2005 reflected the Office calculations of payments made to appellant from September 1, 1997 through July 17, 1999, in the total amount of \$58,130.49. The record reflects that appellant’s effective monthly pay rate ranged from \$2,741.40 (\$2,530.80 every 28 days) on September 1, 1997 to \$2,827.50 (\$2,610.00 every 28 days) on July 17, 1999.

By decision dated July 13, 2005, the Office found that the overpayment amount for the period September 1, 1997 through July 17, 1999 was \$58,130.49.

**LEGAL PRECEDENT -- ISSUE 1**

Compensation for total disability under the Act is payable when the employee starts to lose pay.<sup>4</sup> Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him from earning the wages earned before the work-related injury.<sup>5</sup> Compensation for partial disability is payable as a percentage of the difference between the employee’s pay rate for compensation purposes and the employee’s wage-earning capacity.<sup>6</sup>

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<sup>4</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>5</sup> 20 C.F.R. § 500(a) (2003).

<sup>6</sup> 20 C.F.R. § 10.403(b) (2003).

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office correctly determined that appellant received an overpayment in the amount of \$58,130.49.

Appellant was placed on the periodic rolls as of September 1, 1997 at a pay rate of \$843.60 per week or \$2741.70 per month. The evidence of record reflects that during the period in question, September 1, 1997 through July 17, 1999, appellant continued to receive compensation in the total amount of \$58,130.49.<sup>7</sup> However, the evidence of record also establishes that appellant was employed as of August 6, 1997 earning a gross monthly salary of \$2,927.00. Since appellant had actual earnings during this period, he is not entitled to compensation for total disability and thus received an overpayment. Appellant should only have received disability compensation for the difference between his wage earning prior to his disability and his current actual earnings.<sup>8</sup> Since appellant's actual earnings exceeded his pay rate, he was not entitled to receive any compensation benefits for the period at issue.<sup>9</sup> Accordingly, the Board finds that an overpayment was created in the amount of \$58,130.49.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of the 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.<sup>10</sup> However, section 8129(b) sets forth an exception to this requirement. 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>11</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>7</sup> The record reflects that appellant received OPM benefits through August 31, 1997. Appellant contended that it was his intent that he receive OPM benefits during the period in question and that any overpayment should be adjusted by the amount that he should have been paid by OPM. The Board does not have jurisdiction over this matter, which should properly be addressed by OPM.

<sup>8</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>9</sup> The record reflects that appellant received actual earnings in the amount of \$2,927.00 per month during the period at issue. The record also reflects that appellant's effective monthly pay rate ranged from \$2,741.40 on September 1, 1997 to \$2,827.50 on July 17, 1999.

<sup>10</sup> 5 U.S.C. § 8129(a).

<sup>11</sup> 5 U.S.C. § 8129(b).

In determining whether an individual is without fault, section 10.433(a) of the Office's federal regulations provide, in pertinent part:

A recipient who has done any of the following will be found 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. (This provision applies only to the overpaid individual).<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant accepted payments for the period September 1, 1997 through July 17, 1999 that he knew or should have known were incorrect. Appellant testified at the oral hearing that he was aware that he was not entitled to the payments he received during the period in question. Appellant also acknowledged that, despite this knowledge, he neither notified the Office of its error nor returned the payments. The evidence of record also reflects that appellant was advised to notify the Office of any change in status and of his return to work. There is no evidence of record that appellant informed the Office of his employment, instead appellant falsely certified on February 11, 1999 that he had not been employed during the period in question.

Appellant contended that he was not at fault because the Office owed him back pay. However, the record is clear that appellant knowingly accepted compensation payments to which he was not entitled and blatantly disregarded his obligation to notify the Office of his employment. In fact, appellant filed an election of benefits under the Act on the very day he commenced employment at the National Astronomical Observatory of Japan. Since appellant's claim was accepted, appellant set in motion the direct deposit payment of his compensation benefits on September 1, 1997 by his completion of the election of benefits form on August 7, 1997. The Board finds that appellant was at fault in accepting the overpayment in compensation and is, therefore, not entitled to waiver.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(a) of the 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.<sup>14</sup> However, where no further compensation benefits

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<sup>12</sup> 20 C.F.R. § 10.320(b).

<sup>13</sup> 20 C.F.R. § 10.433(a); *Grady A. Tubbs*, 53 ECAB 460 (2002).

<sup>14</sup> 5 U.S.C. § 8129(a).

are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>15</sup>

**ANALYSIS -- ISSUE 3**

As appellant is not receiving continuing compensation benefits, the Board does not have jurisdiction to consider the method of recovery of the overpayment.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$58,130.49. The Board also finds that the Office properly determined that appellant was at fault in creation of the overpayment and that, therefore, it was not subject to waiver.

The Board does not have jurisdiction over the issue of method of recovery, as appellant has no entitlement to continuing compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 13 and May 12, 2005 are affirmed.

Issued: November 25, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> See *Terry A. Keister*, 56 ECAB \_\_\_\_ (Docket No. 04-1136, issued May 23, 2005); see also *Albert Pineiro*, 51 ECAB 310 (2000).