

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY D. YOUNG and GENERAL SERVICES ADMINISTRATION,
DISTRICT HEATING FIELD OFFICE, Arlington, Va.

*Docket No. 97-238; Submitted on the Record;
Issued November 24, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant was without fault in the matter of an overpayment of compensation in the amount of \$6,954.10; and (2) whether the Office of Workers' Compensation Programs properly required repayment of this overpayment by deducting \$125.00 from his continuing compensation payments every four weeks.

Appellant sustained several injuries to his low back, the most recent occurring on October 3, 1985. Appellant received continuation of pay from October 4 to November 17, 1985, and on November 21, 1985 the Office began payment of compensation for temporary total disability. On July 14, 1994 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$6,954.10 which arose because deductions were not made for appellant's health benefits insurance during the period June 22, 1986 to October 16, 1993. The Office also preliminarily determined that appellant was at fault in the matter of the overpayment for the reason that he reasonably should have been aware that deductions for health insurance coverage should have been taken from his compensation checks. Following a hearing held on September 18, 1995, an Office hearing representative made this preliminary decision final and also found that repayment should be made by deducting \$125.00 from his continuing compensation payments every four weeks.

The Board finds that appellant was not without fault in the matter of the overpayment of compensation in the amount of \$6,954.10.

Appellant does not dispute, and the record shows, that deductions for health benefits insurance premiums were not taken from appellant's compensation payments during the period June 22, 1986 to October 16, 1993, a period during which appellant continued to be covered by his health benefits plan. The amount of these premiums was \$6,954.10.

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. 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 the Act or would be against equity and good conscience."¹ No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment. Where the recipient of the overpayment is not without fault, the overpayment must be recovered, even though it was paid because of an error by the Office.²

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."³

The Office found appellant with fault under the third standard stated above: accepted a payment which he knew or should have been expected to know was incorrect. The evidence establishes that this finding was proper. On June 2, 1986 the Office sent appellant a letter advising him of the amount of his regular payments each four weeks. This notice listed a gross amount of \$1,594.80, health benefits of \$.00, and a net amount of compensation of \$1,594.80. In addition, appellant had written to the Office on March 12, 1986 advising it that a deduction in the amount of \$202.56 was taken out of his most recent compensation check for health insurance under the wrong code. The effect of appellant's March 12, 1986 letter and the Office's June 2, 1986 letter is that appellant knew or reasonably should have been expected to know that his periodic compensation payments, made without any deductions for health benefits insurance premiums, were incorrect.

The Board further finds that the Office properly required repayment of this overpayment by deducting \$125.00 from his continuing compensation payments every four weeks.

¹ 5 U.S.C. § 8129.

² *Clemon Spakes*, 31 ECAB 97 (1979)

³ 20 C.F.R. § 10.320(b).

The Office's regulation on the rate of repayment of overpayments provides:

“Whenever an overpayment 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, 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.”⁴

Appellant completed an Office overpayment recovery questionnaire on November 29, 1994, indicating that he had household income of \$3,266.00 per month, and monthly expenses of \$3,050.00. At a hearing held before an Office hearing representative on September 18, 1995, appellant testified that his household income and expenses remained about the same as when he completed the overpayment recovery questionnaire. The Office hearing representative invited appellant to submit a statement indicating any changes in his income or expenses since he completed the overpayment recovery questionnaire. In a statement dated October 12, 1995, appellant stated that he now had no savings account, and that the amount of his credit card and car payments had increased to about \$650.00 to \$700.00 per month (from the \$600.00 per month listed on the overpayment recovery questionnaire). The Office hearing representative found that appellant had monthly income of approximately \$3300.00, since he had received a cost-of-living increase since November 29, 1994, and that he had not documented expenses greater than the \$3050.00 listed on his November 29, 1994 overpayment recovery questionnaire. The Office hearing representative found that repayment at the rate of \$125.00 per month was appropriate, stating, “This will still leave the claimant some surplus after deducting his expenses from his income, and would ensure recoupment of the overpayment in somewhat more than six years.”

The Board finds that the Office hearing representative gave due regard to the relevant factors. Appellant's income at the time of the hearing on September 18, 1995, was actually substantially greater than it was when he completed the overpayment recovery questionnaire on November 29, 1994. Effective September 18, 1994, the Office had reduced appellant's compensation payments to \$1666.72 per four weeks, based on a loss of wage-earning capacity determination that was overturned on January 17, 1995. Appellant was receiving compensation in the net amount of at least \$2015.26 at the time of the September 18, 1995 hearing. Even accepting appellant's October 12, 1995 statement that his credit card and car payments had increased as much as \$100.00 per month, the increase in his compensation payments of over \$300.00 per four weeks from November 29, 1994 to September 18, 1995 indicates that a deduction of \$125.00 per compensation payment would not constitute an undue hardship.

⁴ 20 C.F.R. § 10.321(a).

The decision of the Office of Workers' Compensation Programs dated July 12, 1996 is affirmed.

Dated, Washington, D.C.
November 24, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member