

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. REEVES and DEPARTMENT OF THE NAVY,
MARINE CORPS AIR STATION, Beaufort, SC

*Docket No. 99-1131; Submitted on the Record;
Issued March 5, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,018.84 for December 16, 1997 through January 3, 1998; and (2) whether the Office properly determined that appellant was at fault in creation of the overpayment.

On April 29, 1997 appellant, a 24-year-old housing maintenance worker, injured his lower back while trying to support a falling refrigerator. Appellant filed a claim for benefits on May 7, 1997 which the Office accepted for temporary aggravation of degenerative disc disease at L3-4 and lumbar laminectomy, L3-4 fusion surgery. Appellant was placed on the periodic rolls.

By letter dated October 8, 1997, the Office notified appellant that "compensation benefits for total disability are payable only while you cannot perform the duties of your regular job because of your injury at work." The letter advised appellant that in the event he continued to receive payment for total disability compensation after returning to work, he should return the check to the Office. Appellant returned to work on December 16, 1997. However, an Office memorandum dated February 17, 1998 indicated that appellant continued to receive compensation for total disability through January 3, 1998.

By letter dated April 21, 1998, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$1,018.84, covering December 16, 1997 through January 3, 1998. The Office found that appellant was at fault in creating the overpayment because the October 8, 1998 letter advised him to return any check he received after he returned to work and he should have known that he could not earn wages and receive compensation for total disability for the same period. The Office, therefore, found that appellant had accepted payments which he either knew or should have been expected to know were incorrect and was, therefore, at fault in creating the overpayment of compensation.

The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a preresumption hearing with the Branch of Hearings and Review. Appellant did not respond.

By decision dated January 12, 1999, the Office found that appellant was at fault in creating the overpayment of compensation from December 16, 1997 through January 3, 1998, which amounted to \$1,018.84.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,018.84 from December 16, 1997 through January 3, 1998.

The record shows the Office incorrectly issued checks for temporary total disability compensation to appellant covering December 16, 1997 through January 3, 1998. During that time he had returned to a work and was, therefore, no longer totally disabled. Appellant argues that he worked only light duty and the Office informed him he would continue to receive compensation because he had not reached maximum medical improvement. The record shows that appellant was informed on October 8, 1997 that each disability check showed the period covered and that if he worked during that period he should return the check to the Office, “to minimize the possibility of an overpayment.”

The Board further finds that the Office that appellant was not without fault in creation of the overpayment.

Section 8129 of the Federal Employees’ Compensation Act¹ provides that an overpayment must be recovered 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.” (Emphasis added.) No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.²

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provides in relevant 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 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 known to be incorrect. (This provision applies only to the overpaid individual.)”

¹ 5 U.S.C. § 8129(a)-(b).

² *Bonnye Mathews*, 45 ECAB 657 (1994).

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have been expected to know he was not entitled.³ Because appellant returned to full-time employment on December 16, 1997 and was, therefore, no longer totally disabled, he knew or should have known that he was no longer entitled to the amount of weekly compensation he had been receiving. Upon his receipt of the first disability check from the Office, following his return to work, issued for payment of total disability compensation, appellant had a duty to contact the Office and inquire whether acceptance of this payment was appropriate. Instead, appellant continued to accept these checks, until the Office informed him in its April 21, 1998 letter that he had received an overpayment in the amount of \$1,018.84.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the checks issued by the Office subsequent to appellant's return to work on December 16, 1997 were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,018.84 may not be waived.

The January 12, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 5, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

³ See *Russell E. Wageneck*, 46 ECAB 653 (1995).