

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL R. MADDOX and DEPARTMENT OF THE ARMY,
TRANSPORTATION DIVISION, Fort Knox, KY

*Docket No. 03-1582; Submitted on the Record;
Issued September 12, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$43,217.90 for the period November 13, 2000 through August 10, 2002; and (2) whether the Office properly determined that appellant was not without fault in the creation of the overpayment, thus precluding waiver of recovery.

On November 23, 1998 appellant, then a 48-year-old temporary materials handler, filed a notice of occupational disease alleging that he sustained bilateral carpal tunnel syndrome as a result of his federal employment duties. The Office accepted appellant's claim for bilateral carpal tunnel syndrome, bilateral shoulder impingement and bilateral thoracic outlet syndrome. Appellant began light-duty work on October 23, 1998 and worked until February 3, 2000 when his term appointment expired.

Appellant underwent right carpal tunnel release on May 19, 2000 and left carpal tunnel release on September 8, 2000 and began receiving compensation benefits on May 21, 2000. On June 2, 2000 he signed a statement (Form EN1049) indicating that he understood the conditions under which he may receive compensation benefits and the items that he must report to the Office. Appellant was advised to notify the Office immediately if he returned to work; he was also advised that if he worked for any portion of a period covered by a compensation payment, he must return the payment to the Office.

Dr. Tsu-Min Tsai, a Board-certified orthopedic surgeon, indicated that appellant could return to light-duty work on October 26, 2000. On November 13, 2000 the employing establishment offered appellant a temporary position as a motor vehicle dispatcher and appellant accepted the position. Appellant returned to work on November 13, 2000. Appellant was terminated from his employment on January 3, 2001 for misconduct.

On January 11, 2001 appellant filed a claim for compensation (Form CA-7) for the period November 13, 2000 to January 2, 2001.

By decision dated January 25, 2001, the Office denied appellant's claim for compensation for wage-loss benefits effective January 3, 2001 due to the fact that he was terminated "for cause."¹

On October 7, 2002 the Office issued a preliminary determination that appellant had received an overpayment in the amount of \$43,217.90. The Office found that the overpayment occurred because appellant returned to full-time employment on November 13, 2000 but he received compensation for total disability through August 10, 2002. The Office also made a preliminary finding that appellant was at fault in the matter because he knew or reasonably should have known that he was not entitled to compensation for wage loss after returning to work and after being formally denied compensation. The Office also noted that appellant was formally notified in the January 25, 2001 decision that he was not entitled to compensation after January 3, 2001.

By letter dated February 22, 2003, appellant requested that the Office make a decision based on the written evidence on the issues of fault and possible waiver of the overpayment. He explained that he "could not conceive" that the Office would continue to send benefits if he was not entitled and stated that he assumed that the letter that the Office sent terminating his benefits was in error. He also stated that he did not think he should have to repay the money because he had done nothing illegal. Appellant also submitted copies of his financial documents.

By decision dated February 4, 2003, the Office finalized its determination that appellant had received an overpayment in the amount of \$43,217.90 and that he was at fault in helping create the overpayment.

The Board finds that appellant received an overpayment of compensation in the amount of \$43,217.90 for the period November 13, 2000 through August 10, 2002.

The primary purpose of workers' compensation is to provide an adequate substitute for an employee's work-related loss of wage-earning capacity. When an employee returns to work and resumes earning wages the same or greater than those earned before the work-injury compensation is no longer payable.²

The record establishes and appellant does not dispute that he began full-time work on November 13, 2000. The record shows that appellant received compensation after returning to full-time work on November 13, 2000. He received compensation until August 10, 2002. The total amount of compensation paid was \$43,217.90. Appellant's receipt of compensation should have stopped on November 13, 2000. Appellant has submitted no evidence indicating that he did not receive an overpayment of compensation. The Office properly determined that he received an overpayment of compensation for this period in the amount of \$43,217.90.

¹ The employing establishment reported that appellant's limited-duty job would have continued had he not been terminated and the termination was not due to his physical restrictions.

² *Chauncey L. Moore*, 34 ECAB 553 (1983).

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment is not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act³ 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.⁴ 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 this subchapter or would be against equity and good conscience."⁵ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 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 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."⁶

The Office properly found that appellant was at fault in creating the overpayment of compensation because he accepted payments, which were deposited into his bank account, which he knew or should have known were incorrect. The information sheet accompanying the Office's May 23, 2000 EN1049 letter regarding appellant's payment of compensation clearly advised him of the process regarding overpayments. The letter stated:

"To minimize the possibility of an overpayment of compensation, notify this office immediately when you go back to work. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working."

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433(a).

Appellant signed the document on June 2, 2000 indicating that he understood the conditions under which he may receive compensation. Thus, appellant knew or reasonably should have known that he was not entitled to compensation for wage loss after he returned to work on November 13, 2000 and should have returned any compensation after that date. However, he did not notify the Office when he returned to full-time work and continued to accept the compensation payments for an additional 19 months. Furthermore, by decision dated January 25, 2001, the Office advised appellant that he was not entitled to compensation after January 3, 2001, the date that he was terminated from his employment for cause.

Given these notifications by the Office, appellant knew or should have known that when he returned to work on November 13, 2000, he was no longer entitled to wage-loss compensation and should have returned the money to the Office. He is therefore with fault under section 10.433(a) and is not entitled to waiver of the overpayment.⁷

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 4, 2003 and October 7, 2002 are hereby affirmed.

Dated, Washington, DC
September 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁷ Although the Office may have been negligent in paying compensation, this does not excuse appellant from accepting payments that he knew or should have known to be incorrect. *See Diana L. Booth*, 52 ECAB 370 (2001); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).