

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GORDON R. TAYLOR and FEDERAL EMERGENCY MANAGEMENT
AGENCY, Denton, TX

*Docket No. 03-1687; Submitted on the Record;
Issued September 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$906.62 overpayment of compensation for the period April 23 to May 6, 2000; and (2) whether appellant was with fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

On August 16, 1999 appellant, then a 43-year-old inspection service specialist, filed a claim for a traumatic injury alleging that he injured his back on August 12, 1999 when a co-worker pulled a chair out from under him and he fell. The Office accepted his claim for a lumbar sprain.

On May 31, 2000 appellant filed a claim for compensation for the period April 23 to May 6, 2000. Of record is a Time Analysis Form (Form CA-7a) dated June 5, 2000 indicated that appellant was claiming lost wages for 4 hours and 45 minutes on May 4 and 5, 2000 when he underwent physical therapy and that he worked for 13 hours and 15 minutes on those 2 days.

Office computer records show that on May 25, 2001 appellant was issued a compensation check in the amount of \$967.06 for the period April 23 to May 6, 2000. A copy of this check does not appear in the record.

On July 25, 2002 an employing establishment compensation specialist stated that appellant filed a claim for the period April 23 to May 6, 2000 for 4 hours and 45 minutes of lost wages but the Office paid compensation for total disability for that period, resulting in an overpayment. The employing establishment enclosed a copy of a benefit statement sent to appellant at his address of record indicating that the Office sent appellant a check dated May 25, 2001 in the amount of \$967.06 for the period April 23 to May 6, 2000. The employing establishment enclosed a June 19, 2001 letter from appellant to the Office, requesting an audit of his case, in which he indicated that he filed a claim for 50 hours of lost wages but his

compensation had been “greatly delayed and ... inaccurate.”¹ Appellant indicated that he had received a check dated May 25, 2001 in the amount of \$967.06 for the period April 23 to May 6, 2000.

In a March 26, 2003 notice, the Office advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$906.62,² which occurred because he received compensation for total disability for the period April 23 to May 6, 2000 but should have received compensation for partial disability for May 4 and 5, 2000. The Office further advised appellant that he was at fault in the creation of the overpayment because he should have known that he was not entitled to wages and compensation for total disability for the same dates. The Office advised appellant that he could request a telephone conference, a final decision based on the written evidence, or a hearing within 30 days of the date of the 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 or if he believed that recovery of the overpayment should be waived, along with supporting financial documents and a completed overpayment recovery questionnaire (Form OWCP-20).³

By decision dated April 28, 2003, the Office finalized its preliminary determination regarding the amount of the overpayment and its finding that appellant was at fault in the creation of the overpayment.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$906.62.

In this case, the record reflects that appellant received compensation for total disability in the amount of \$967.06 for the period April 23 to May 6, 2000 but was entitled to only \$60.44 for 4 hours and 45 minutes of lost wages on May 4 and 5, 2000. Therefore, the Office properly found that an overpayment existed in the amount of \$906.62.

The Board further finds that the Office properly determined that appellant was with fault in the creation of the overpayment of compensation for the period April 23 to May 6, 2000.

Under section 8129 of the Federal Employees’ Compensation Act an overpayment will be recovered unless 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.⁴

¹ The record shows that between June 5, 2000 and January 22, 2001 appellant submitted claims for 50 hours of compensation for intermittent dates between April 23 and November 18, 2000, including 4 hours and 45 minutes for the period April 23 to May 6, 2000.

² Appellant received \$967.06 for total disability for the period April 23 to May 6, 2000 but was entitled to only \$60.44 for 4 hours and 45 minutes of lost wages for May 4 and 5, 2000, creating an overpayment of \$906.62.

³ The record shows that appellant did not file a response to the Office’s March 26, 2003 notification.

⁴ 5 U.S.C. § 8129.

Section 10.433(a) of the implementing regulations, the Code of Federal Regulations, specifically provides that the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁵

In determining whether an individual is at fault in accepting or creating an overpayment, section 10.433(a) provides:

“A recipient who has done any of the following will be found to be 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.”⁶

In this case, the Office applied the third standard -- appellant accepted a payment that he knew or should have known was incorrect. -- in finding appellant with fault in the creation of the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.⁷

With respect to whether an individual is with fault, section 10.433(b) provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”⁸

The Board finds that the facts of this case establish that appellant knew or should have been expected to know that he accepted an incorrect payment for the period April 23 to May 6, 2000. Appellant indicated in his June 19, 2001 letter that he had received a check dated May 25, 2001 for the period April 23 to May 6, 2000. Appellant filed a claim for only 4 hours

⁵ 20 C.F.R. § 10.433(a) (2003).

⁶ *Id.*

⁷ See *Diana L. Booth*, 52 ECAB 370 (2001); *Robin O. Porter*, 40 ECAB 421 (1989).

⁸ 20 C.F.R. § 10.433(b) (2003).

and 45 minutes of lost wages⁹ for the period April 23 to May 6, 2000 but received compensation for total disability for that period. He knew or should have known that he was not entitled to receive both wages and compensation for lost wages for the same period. Additionally, he knew or should have known that \$967.06 was not a correct payment for only 4 hours and 45 minutes of lost wages. Under the circumstances, the Office properly determined that appellant was at fault in the creation of the overpayment.

The April 28, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁹ As noted above, appellant claimed 4 hours and 45 minutes for attendance at physical therapy sessions on May 4 and 5, 2000.