

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FERNANDO SILVA and DEPARTMENT OF THE TREASURY,
UNITED STATES CUSTOMS SERVICE, El Paso, Tex.

*Docket No. 96-500; Submitted on the Record;
Issued January 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of recovery of the overpayment that occurred in this case from November 13, 1994 through January 7, 1995.

Appellant received monetary compensation on the automatic rolls for an injury sustained on May 8, 1994. He returned to work on November 8, 1994 but continued to receive compensation checks. The first check he received after returning to work was for the period November 13 to December 10, 1994. The second was for the period December 11, 1994 to January 7, 1995. When the Office notified appellant of this error and requested that he return the checks, he explained that he could only return the second check because he had cashed the first. He stated that he realized that he had already returned to work and added, "I figured it couldn't be for compensation but just in case I told [my wife] not to cash it yet." Appellant had just inquired about his request for leave buy back and was told that a response was pending. He stated that the Office owed him for sick leave or leave without pay and for disability immediately following the cessation of continuation of pay. He also stated that he needed to pay backed up bills. "I told the wife after a few weeks to cash," appellant stated, "me thinking this was probably the money owed me from buy-back leave, etc."

In a preliminary determination of May 16, 1995, the Office found that appellant was at fault in the matter of the overpayment that occurred from November 8, 1994 through January 7, 1995 because he was aware that he was not entitled to compensation after returning to work. The Office finalized its decision on August 29, 1995, finding that the circumstances of appellant's case did not warrant waiver of recovery because he was not without fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to

which the individual is entitled.¹ Section 8129(b) provides the only exception to this mandatory recovery:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”²

Thus, to establish waiver and avoid recovery of an overpayment, two conditions must be satisfied: (1) the individual must be without fault; and (2) adjustment or recovery must defeat the purpose of the Act or be against equity and good conscience.

Regarding the first condition, section 10.320(b) of the implementing federal regulations³ provides as follows:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education and physical and mental condition. 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.”

The Office based its finding of fault on the third standard, namely, that appellant accepted payment that he knew or should have known was incorrect. Appellant’s admission is sufficient to establish that he knew or should have been expected to know that he was not entitled to the compensation payments he received after returning to work, but the evidence establishes that he accepted only one of the checks, not both. The memorandum attached to the Office’s preliminary determination states that appellant returned the check covering the period December 11, 1994 through January 7, 1995. Without acceptance of this check there was no overpayment with respect to the period December 11, 1994 through January 7, 1995. The Board will therefore reverse the Office’s August 29, 1995 decision on the issues of fault and recovery for the period December 11, 1994 through January 7, 1995.

¹ 5 U.S.C. § 8129(a).

² *Id.* § 8129(b).

³ 20 C.F.R. § 10.320(b).

Appellant's response to the Office's notification of the error establishes that he could not return the first check, covering the period November 13 through December 10, 1994, because he had cashed it. Acceptance is therefore established with respect to the first check and the Office properly found that appellant was at fault with respect to the overpayment created thereby. Having properly been found to be at fault with respect to the overpayment that occurred from November 13 through December 10, 1994, recovery of this overpayment must be made. The Board will affirm the Office's August 29, 1995 decision on the issues of fault and waiver for the period November 13 through December 10, 1994.

The August 29, 1995 decision of the Office of Workers' Compensation Programs is reversed in part and affirmed in part.

Dated, Washington, D.C.
January 7, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member