

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BONNIE M. LARKIN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, Minn.

*Docket No. 97-803; Submitted on the Record;
Issued December 9, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant received an overpayment in the amount of \$16,119.36 and, if so, whether she was without fault in the matter of this overpayment.

The Board finds that appellant received an overpayment in the amount of \$16,119.36.

Appellant sustained a lumbar strain in the course of her federal employment on September 19, 1992 and began receiving compensation for total disability on the periodic rolls on October 15, 1993. On October 26, 1993 the Office of Workers' Compensation Programs also accepted the claim for a herniated disc at L5-S1 and authorized surgery for the condition. Appellant returned to her regular work on April 5, 1994, but she continued to receive compensation for total disability through November 11, 1994. As appellant was not entitled to compensation for disability after her return to work at the same wages,¹ the compensation paid for the period April 5 to November 12, 1994, in the amount of \$16,119.36 constituted an overpayment of compensation.

The Board further finds that appellant was not without fault in the matter of the overpayment of compensation.

Section 8129(a) of the 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

¹ In general, the term "disability" under the Federal Employees' Compensation Act means "incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury." *Billy G. Sinor*, 35 ECAB 419 (1983).

against equity and good conscience.”² No waiver of an overpayment 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 10.320 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

In the instant case, the Office informed appellant in a form letter CA-1049 dated October 15, 1993 that compensation was payable only while she was unable to perform the duties of her regular work because of her employment injury and that she must return any compensation checks received after her return to work. The Office sent appellant an additional letter dated October 26, 1993, specifically informing appellant to advise it when she returned to work and to return any check received after returning to work in order to avoid an overpayment.

In her December 6, 1995 response to the Office’s preliminary determination that she received an overpayment of compensation, appellant indicated that the creation of the overpayment was unintentional because she believed that Office would properly monitor her benefits. Appellant also stated that repayment of the overpayment would result in financial hardship. Nevertheless, the Office’s letters dated October 15 and October 26, 1993 clearly informed appellant that she must return any compensation received after she returned to her work. Appellant, therefore, knew or should have known that she was not entitled to the payments received from April 5 through November 12, 1994. As appellant was not without fault in the overpayment of compensation in the amount of \$16,119.36, this overpayment cannot be waived.

² 5 U.S.C. § 8129.

³ 20 C.F.R. § 10.320(b).

The decision of the Office of Workers' Compensation Programs dated September 26, 1996 is affirmed.

Dated, Washington, D.C.
December 9, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member