

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE H. LANDRY and DEPARTMENT OF DEFENSE,  
DEFENSE DISTRIBUTION REGION, Stockton, Calif.

*Docket No. 97-1839; Submitted on the Record;  
Issued April 16, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment of compensation benefits in the amount of \$1,251.81; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the overpayment.

In this case, appellant filed a claim alleging that he was exposed to fumes in the performance of duty. The Office accepted appellant's claim for chemical exposure on February 10, 1992. Appellant received compensation benefits through August 21, 1993. Appellant returned to work on August 2, 1993. Appellant retired on disability retirement on March 17, 1995. The Office notified appellant of a preliminary determination of overpayment in the amount of \$1,251.81 as he returned to work on August 2, 1993 and received compensation benefits through August 21, 1993. Appellant requested a preresumption hearing on April 2, 1996. By decision dated March 28, 1997, the hearing representative found that there was an overpayment in the amount of \$1,251.81 and that appellant was at fault in the creation of the overpayment and that, therefore, the overpayment was not subject to waiver.

The Board finds that appellant received an overpayment in the amount of \$1,251.81.

In this case, appellant did not dispute that he received a check for \$1,816.36 for the period from July 25 through August 21, 1993. Appellant also did not dispute that he returned to work on August 2, 1993 and that he was not entitled to receive the entire amount of the check. Therefore, the Board finds that the Office properly calculated that appellant received an overpayment of compensation in the amount of \$1,251.81.

The Board further finds that appellant was not without fault in the creation of the overpayment and that the overpayment is not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that, where an overpayment of compensation has been made "because of an error or fact of 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 against equity and good conscience."<sup>2</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations<sup>3</sup> 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 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."

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.<sup>4</sup>

In this case, appellant conceded at oral argument that he knew that he was not entitled to the full amount of the check for the period from July 25 to August 21, 1993. Appellant indicated that he spoke to someone at the Office who instructed him to cash the check and that he would later be informed regarding what amount he should return. Appellant stated that he never received a statement of the amount owed the Office and that after the end of the year he assumed that the overpayment had been forgiven. Therefore, the Office properly found at the time appellant received the check he knew that the payment was incorrect. As appellant was not without fault in the creation of the overpayment he is not entitled to waiver of the overpayment.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8129(a).

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.320(b).

<sup>4</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.<sup>5</sup>

The decision of the Office of Workers' Compensation Programs dated March 28, 1997 is hereby affirmed.

Dated, Washington, D.C.  
April 16, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> See *Lewis George*, 45 ECAB 144, 154 (1993).