

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD BALTZERSEN and DEPARTMENT OF THE ARMY,
BUTTS ARMY AIRFIELD, Fort Carson, Colo.

*Docket No. 96-2600; Submitted on the Record;
Issued February 10, 1999*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$618.43; (2) whether the Office properly found that appellant was not "without fault" in the creation of the overpayment; and (3) whether the Office abused its discretion in determining the rate of repayment.

On October 14, 1988 appellant filed a claim for a traumatic injury occurring on October 12, 1988. The Office accepted appellant's claim for a fracture of the sacrum and a chip fracture of the left wrist. On October 1, 1990 appellant returned to full-time employment as a sales store clerk, however, the employing establishment involuntarily separated him on January 9, 1993. The Office reinstated compensation benefits for temporary total disability and referred him for vocational rehabilitation.

On January 23, 1995 appellant returned to work with the employing establishment as an energy conservation assistant.¹ On January 25, 1995 the Office issued appellant compensation for temporary total disability for the period January 8 to February 4, 1995. On January 22, 1995 the Office informed appellant that it had made a preliminary determination that an overpayment occurred in the amount of \$698.75 during the period January 23 to February 4, 1995 and that he was at fault in the creation of the overpayment. By letter dated March 10, 1995, appellant requested a preresoupment hearing on the issue of whether he was not without fault in the creation of the overpayment. In a decision dated June 3, 1996, the Office hearing representative

¹ By decision dated March 21, 1995, the Office determined that the position of energy conservation assistant fairly and reasonably represented appellant's wage-earning capacity and reduced his compensation accordingly. Appellant submitted a claim for total wage-loss disability beginning October 19, 1995. By decision dated February 26, 1996, the Office denied appellant's claim on the grounds that the evidence did not establish that he was disabled subsequent to October 19, 1995 from his sedentary position due to his October 12, 1988 employment injury. By decision dated October 9, 1996, and finalized October 11, 1996, an Office hearing representative vacated the February 26, 1996 decision and remanded the case for further development.

found that appellant was not without fault in the creation of an overpayment in the amount of \$618.43 and that the Office should withhold \$50.00 every 4 weeks from his continuing compensation benefits as repayment.²

The Board has reviewed the case record and finds that the Office properly determined that appellant received a \$618.43 overpayment of compensation.

In the present case, appellant returned to work on January 23, 1995 but continued to receive compensation payments for temporary total disability through February 4, 1995. Since he had actual earnings during this period, he is not entitled to compensation for total disability and thus an overpayment occurred. Appellant should only have received disability compensation for the difference between his wage-earning capacity prior to his disability and his current actual earnings. The Office calculated that for the period January 23 to February 4, 1995, appellant received \$759.11 in compensation payments. In determining what appellant should have been paid during this period, the Office calculated appellant's compensation rate based on his actual earnings of \$453.20 per week. Using the appropriate wage-earning computations,³ the Office determined that appellant's compensation rate should have been \$303.00 every 4 weeks, resulting in compensation payments totaling \$140.68 for the period in question. The difference between the \$759.11 that appellant was paid and the \$140.68 that he should have been paid results in an overpayment of \$614.43.

The Board further finds that the Office improperly found that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation 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.⁴ The only exception to this requirement is a situation which meets the test set forth 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."⁵

Accordingly, no waiver of an overpayment is possible if the claimant is not "without fault" in creating the overpayment.

In determining whether an individual is at fault in the creation of an overpayment, Office regulations provide in pertinent part:

² The Office initially computed appellant's overpayment amount as \$698.75 before taking into account his loss of wage-earning capacity.

³ See 20 C.F.R. § 10.303.

⁴ 5 U.S.C. § 8128(a).

⁵ 5 U.S.C. § 8129(b).

“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 known was incorrect.”⁶

In the present case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment, and, therefore, the Office must establish that, at the time appellant received the compensation in question, he knew or should have known that the payment was incorrect.⁷

With respect to whether an individual is without fault, section 10.320(c) of the Office’s regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which are not due and the ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).”⁸

In this case, there is no evidence that appellant knew when he accepted the compensation check covering the period January 8 to February 4, 1995 that the check included compensation, to which he was not entitled. There are no copies of the check or documents accompanying it advising appellant of the inclusive period covered by such check, which would have put appellant on notice that he was receiving compensation for a period in which he worked. The Office determined that appellant was at fault in creating the overpayment because the Office notified him on February 13, 1995 that he was not entitled to the entire amount of the check covering January 8 to February 4, 1995, however, the Office acknowledged that appellant received the check prior to his receipt of its February 13, 1995 letter. Appellant did not return to work until January 23, 1995 and thus could reasonably have believed that the check covered only prior periods, in which he did not work. The Board finds that there is no evidence that appellant

⁶ 20 C.F.R. § 10.320(b).

⁷ See *Linda E. Padilla*, 45 ECAB 768 (1994).

⁸ 20 C.F.R. § 10.320(c)

knew or should have known, at the time he received the check including the period January 23 to February 4, 1995, that this check was for an incorrect amount. Therefore, the Office's June 3, 1996 decision, must be remanded for a determination of appellant's entitlement for waiver.

As this case must be remanded for the Office to consider appellant's eligibility for waiver of the overpayment, it is premature for the Board to address the issue of repayment of the overpayment from appellant's continuing compensation payments.

The decision of the Office of Workers' Compensation Programs dated June 3, 1996 is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
February 10, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member