

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TERRY C. DiCARLO and DEPARTMENT OF LABOR,  
OFFICE OF ADMINISTRATIVE LAW JUDGES, Metairie, La.

*Docket No. 96-1115; Submitted on the Record;  
Issued April 21, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation based upon her actual earnings as a paralegal; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,276.96 from August 29, 1994 through October 15, 1994 due to her reported earnings as a paralegal; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment, making recovery not subject to waiver.

The Board has duly reviewed the case record and finds that the Office properly terminated appellant's compensation based upon her actual earnings as a paralegal.

In the present case, appellant had actual earnings as a paralegal beginning August 29, 1994. It was, therefore, proper for the Office, in its August 31, 1995 decision, to use appellant's actual earnings as the basis for her loss of wage-earning capacity, as there is no evidence that her actual earnings did not fairly and reasonably represent her wage-earning capacity effective August 29, 1994. This determination is consistent with Board precedent which provides that, generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonable represent the injured employee's waging capacity, must be accepted as such measure.<sup>1</sup>

The Board further finds that appellant received an overpayment in the amount of \$1,276.96 due to receipt of earnings during a period she received compensation for total disability.<sup>2</sup>

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<sup>1</sup> *Floyd A. Gervais*, 40 ECAB 1045 (1989); *Clyde Price*, 32 ECAB 1932 (1981).

<sup>2</sup> *William D. Emory*, 47 ECAB \_\_\_ (Docket No. 94-881, issued February 14, 1996).

The record reveals that after appellant began to work on August 29, 1994, she continued to receive compensation benefits based on total disability until October 15, 1994, resulting in an overpayment of \$2,890.29. The Office properly adjusted that overpayment amount from \$1,613.33 to \$1,276.96 because appellant was subsequently entitled to additional compensation from March 20, 1995 through April 15, 1995 which she had not received. In response to the Office's December 1, 1995 preliminary determination of overpayment, appellant wrote that she was not aware of any overpayment because she did not receive a paycheck at her paralegal job until October 30, 1995. Appellant further asserted that she was in pain and suffered financial hardship necessitating waiver. Appellant, however, did not submit evidence or argument to establish either that she was not working while receiving compensation for total disability or that she did not receive the compensation checks. Therefore, the Board finds that the Office properly determined fact and amount of overpayment.

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

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office unless "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>3</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>4</sup>

Section 10.320 of the implementing federal regulations provides the following:

"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."<sup>5</sup>

In its preliminary decision dated December 1, 1995 and its January 30, 1996 decision, the Office found that appellant was at fault in the matter of the overpayment under the third criteria above, that is, on the grounds that appellant accepted payments which she knew or should have been expected to know were incorrect. Appellant alleged that she was not aware of an

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<sup>3</sup> 5 U.S.C. § 8129.

<sup>4</sup> *Harold W. Steele*, 38 ECAB 245 (1986).

<sup>5</sup> 20 C.F.R. § 10.320.

overpayment from August 29 through October 15, 1994 because she did not receive a paycheck from her new employment until October 30, 1995. Appellant, however, did not state that she believed she would not receive wages for her new employment beginning August 29, 1994. Moreover, appellant signed a form dated March 30, 1994 for the purpose of determining her “qualification for continued benefits.” This form specifically inquired about appellant’s employment status. Therefore, the record establishes that appellant knew or should have known that she was not entitled to receive compensation for total disability while she was employed. The Board finds that appellant is with fault in the matter of the creation of the overpayment of compensation, precluding waiver of recovery.

With respect to recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>6</sup> As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment under the Debt Recovery Act.<sup>7</sup>

The decisions of the Office of Workers’ Compensation Programs dated January 30, 1996 and August 31, 1995 are hereby affirmed.

Dated, Washington, D.C.  
April 21, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> *Lewis George*, 45 ECAB 144 (1993).

<sup>7</sup> *Levon H. Knight*, 40 ECAB 658 (1989).