

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. ZWECK and DEPARTMENT OF VETERANS AFFAIRS,
WILLIAM S. MIDDLETON VETERANS HOSPITAL, Madison, Wis.

*Docket No. 97-494; Submitted on the Record;
Issued November 20, 1998*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an \$839.97 overpayment in compensation for the period August 20 to November 11, 1995; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

On November 3, 1994 appellant, then a 30-year-old licensed practical nurse, filed a traumatic injury claim, alleging that she injured her back while assisting a patient. Appellant stopped work on November 5, 1994. The Office accepted appellant's claim for acute paralumbar strain and temporary aggravation of spondylolisthesis. On September 11, 1995 appellant returned to work on limited duty for two hours a day. On November 27, 1995 the Office advised appellant that it had made a preliminary determination that she had received and was at fault in the creation of an \$839.97 overpayment in compensation. The Office advised appellant to submit additional evidence or argument if she disagreed with the preliminary determination. By letter dated December 15, 1995, appellant requested a reevaluation of the Office's preliminary determination that she was at fault and waiver of the overpayment. By decision dated September 24, 1996, the Office finalized its preliminary determination that appellant was at fault in the creation of an \$839.97 overpayment in compensation and denied waiver of the overpayment.¹

The Board finds that the Office properly found that there was an overpayment in compensation in the amount of \$839.97 due to appellant's acceptance of compensation checks for temporary total disability after she had returned to work.

¹ A review of the record also reveals that appellant filed a claim for recurrence of disability on May 12, 1996 which was accepted by the Office on January 14, 1997. The Office deducted appellant's overpayment of compensation from her initial check for temporary total disability in relation to her recurrence claim.

Section 8129(a) of the Federal Employees' Compensation Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when recovery would defeat the purpose of the Act or would be against equity and good conscience."² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment. Any overpayment resulting from the Office's negligence does not permit an employee to accept compensation to which she knew or should have known she was not entitled.³

In the present case, the Office found and appellant concurred that she returned to work on September 11, 1995 on a limited-duty assignment, working two hours a day. Nonetheless, appellant also accepted checks for temporary disability to which she knew or should have known she was not entitled as she was working during the time period covered by the checks. Therefore, the Office properly found that there had been an overpayment in compensation during the period August 20 to November 11, 1995.

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

In determining whether an individual is with fault section 10.320(b) of the Office's regulations 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."⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Appellant was advised in by the Office in a letter dated July 6, 1995 as follows:

"Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of the period, you must return the check to this Office. Otherwise, an overpayment of compensation may result."

² 5 U.S.C. § 8129(b).

³ *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁴ 20 C.F.R. § 10.320(b).

Appellant acknowledged receipt of this letter and agreed to comply with the condition stipulated therein on August 14, 1995. Therefore, despite the fact that appellant advised the Office that she was working during the time period in question and the Office continued to send her compensation checks for temporary total disability, appellant knew or should know that she was accepting compensation which was incorrect and to which she was not entitled. Thus, the Office properly determined that appellant was at fault in the creation of an \$839.97 overpayment in compensation pursuant to section 10.320(b)(3) and therefore is not entitled to waiver of the overpayment.

The decision of the Office of Workers' Compensation Programs dated September 24, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 20, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member