

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAISY MAE HANCOCK and DEPARTMENT OF VETERANS AFFAIRS,  
DENVER VETERANS ADMINISTRATION MEDICAL CENTER, Denver, Colo.

*Docket No. 97-2191; Submitted on the Record;  
Issued July 9, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant was with fault in the creation of an overpayment.

In a decision dated February 28, 1997, the Office of Workers' Compensation Programs found that appellant was with fault in the creation of an overpayment of \$16,549.29. The overpayment occurred from July 24, 1994 through September 16, 1995 when, having reduced appellant's compensation to reflect her capacity to earn wages, the Office mistakenly returned her to the periodic compensation rolls at the total rate. The Office found that appellant was with fault in the matter on the grounds that she accepted checks for total compensation after receiving notice of the reduction of her benefits.

The Board finds that the evidence supports the Office's determination that appellant was with fault in the creation of the overpayment.

Where there are no further payments due<sup>1</sup> and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his or her attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.<sup>2</sup>

An overpayment occurred in this case when the Office paid compensation for total disability while appellant was entitled to compensation for partial disability. Section 8129 of the Act provides that the Office may not recover an overpayment unless an "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat

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<sup>1</sup> Effective November 12, 1995 appellant elected to receive retirement benefits in lieu of compensation under the Federal Employees' Compensation Act.

<sup>2</sup> 20 C.F.R. § 10.321(b).

the purpose of the Act or would be against equity and good conscience.”<sup>3</sup> Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual was without fault.

Section 10.320 of the implementing federal regulations provides as follows:

“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>4</sup>

The Office determined that appellant was with fault under the third criterion because she accepted checks for total compensation after receiving notice of the reduction of her benefits. The record shows that on April 12, 1993 the Office advised appellant that it was adjusting her compensation beginning that date because she was no longer totally disabled for work due to the effects of her employment injury on February 3, 1978.<sup>5</sup> The Office showed appellant how it reduced her net compensation to \$221.02 each four weeks. She had been receiving net compensation of over \$1,250.00 each four weeks, so the reduction was significant. The record shows that the Office subsequently paid compensation at the reduced rate until July 24, 1994, when it once again began paying compensation at the total rate, causing appellant’s checks to increase to over \$1,300.00. The circumstances of the case support the Office’s finding that appellant should have been expected to know that these larger payments were incorrect. She pursued none of the appeal rights accompanying the Office’s decision to reduce her compensation, and although she apparently visited the Office on occasion, there is no evidence that the Office led appellant reasonably to expect that her compensation checks would increase significantly. Because she accepted payments that she knew or should have been expected to know were incorrect, the Office properly found that appellant was with fault in the creation of the overpayment that occurred from July 24, 1994 through September 16, 1995. Although the Office was itself with fault in making the larger payments because it mistakenly believed that it

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> 20 C.F.R. § 10.320(b).

<sup>5</sup> The Board notes that the decision reducing appellant’s compensation was properly addressed. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

had never issued a formal final decision on the reduction of appellant's compensation, this fact does not relieve appellant from liability for repayment where she, too, was with fault in the matter.<sup>6</sup>

Because the evidence supports the Office's finding that appellant was with fault in the creation of the overpayment, the Office is not precluded from recovering the overpayment.<sup>7</sup>

The February 28, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
July 9, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> 20 U.S.C. § 10.320(a).

<sup>7</sup> Because the Office cannot collect the overpayment in this case by adjusting later payments of compensation (appellant elected retirement benefits in lieu of compensation), the Board lacks jurisdiction to review the Office's recovery of the overpayment. 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).