

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT B. STRAWDER and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Gainesville, Fla.

*Docket No. 97-1751; Submitted on the Record;  
Issued March 2, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant is at fault in the creation of an overpayment of \$4,736.57.

The Board has duly reviewed the record and finds that the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of an overpayment of \$4,736.57.

Where there are no further payments due 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 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>1</sup>

An overpayment of \$4,736.57 was made in the present case when appellant returned to work on August 12, 1996 with no wage loss but continued to receive compensation for total disability through November 9, 1996.<sup>2</sup> Section 8129 of the Federal Employees' Compensation Act provides, however, that the Office may not adjust later compensation or recover an overpayment unless an "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, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

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<sup>1</sup> 20 C.F.R. § 10.321(b)

<sup>2</sup> The Office has shown appellant how the amount of the overpayment was calculated: He was overpaid for 90 days at the rate of \$1,473.60 each four weeks, or 90 x (\$1,473.60/28), or \$4,736.57.

<sup>3</sup> 5 U.S.C. § 8129(b).

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>4</sup>

On December 11, 1996 the Office made a preliminary determination that appellant was at fault in the matter of the overpayment under the third criterion above because he should have been aware that he was not entitled to the checks he received after returning to work on August 12, 1996 with no loss of wages. The record shows that when the Office placed appellant on the periodic roll, it advised him that he would be paid regular compensation until October 1, 1996, the date his physician expected him to be fit for light duty, or until he returned to duty. The Office specifically advised appellant as follows: “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you go back to work.” (Original emphasis.)

The Board finds that this evidence supports that appellant knew or should have been expected to know that the payments he accepted after returning to work on August 12, 1996 were incorrect and that he was therefore at fault in the creation of the overpayment that thereby occurred. The Office allowed appellant 30 days to request a telephone conference or a review of the written evidence or a prerecoupment hearing to address whether the overpayment actually occurred, the amount of the overpayment, whether he was at fault in the creation of the overpayment, or whether the overpayment should be collected. When appellant did not respond, the Office finalized its determination on February 21, 1997.

Because the evidence supports the Office’s finding that appellant was at fault in the creation of the overpayment that occurred in this case, section 8129 of the Act does not preclude recovery by the Office.<sup>5</sup>

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<sup>4</sup> 20 C.F.R. § 10.320(b).

<sup>5</sup> The Board’s jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual is entitled; *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because collection of the overpayment in this case cannot be made by adjusting later payments (appellant is no longer entitled to receive monetary compensation for disability under the Act) but must be recovered by other means, the Board lacks jurisdiction to review the Office’s recovery of the overpayment.

The February 21, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
March 2, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member