

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYDIA J. DELGADO and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICES, Los Angeles, CA

*Docket No. 98-523; Submitted on the Record;
Issued September 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found a \$1,029.60 overpayment in compensation for the period January 27 to February 14, 1997; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

On October 29, 1996 appellant, then a 49-year-old office automation clerk, filed a notice of traumatic injury and claim, alleging that she injured her back while in the performance of duty. Appellant stopped work on October 24, 1996 and returned to work on October 28, 1996. However, he later stopped work again and filed claims for continuing compensation for the period December 13, 1996 through January 27, 1997 and beginning again on February 24, 1997. Appellant returned to work full time on January 27, 1997. He received compensation for the period December 18, 1996 through February 14, 1997. On March 27, 1997 the Office notified appellant that it had made a preliminary determination that she had received and was at fault in the creation of a \$1,029.60 overpayment in compensation. The Office advised appellant to submit additional evidence or argument if she disagreed with the preliminary determination and requested that she complete an overpayment questionnaire. Appellant did not respond to this notice.¹ By decision dated August 18, 1997, the Office finalized its preliminary determination that appellant was at fault in the creation of a \$1,029.60 overpayment in compensation and, therefore, found that the overpayment was not subject to waiver.

The Board finds that the Office properly found that there was an overpayment in compensation in the amount of \$1,029.60 due to appellant's acceptance of compensation checks for temporary total disability after she had returned to work.

¹ A review of the record indicates that the claims examiner called appellant. During this conversation appellant noted her disagreement with the concept that she was at fault in the creation of the overpayment but also indicated that she did not disagree that there was an overpayment and that she should pay it back.

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, appellant returned to work full time beginning January 27, 1997. However, appellant received a check for temporary total disability for the period January 27 through February 14, 1997. These facts are undisputed. Appellant cashed the check for temporary total disability to which she knew or should have known she was not entitled as she was working during the time period covered by the check. Therefore the Office properly found that there was an overpayment in compensation during the aforementioned period of time.

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. The checks that appellant received from the Office clearly delineated the period of total disability for which the compensation was supplied. Appellant's acceptance of the check for the period January 27 to February 14, 1997 which she then cashed, amounted to a 50 percent overpayment of compensation which she knew or should have known was incorrect since she had already returned to work and in light of the amount of the overpayment. Therefore, despite the fact that appellant advised the Office that she had returned to work, appellant knew or should have known that she was accepting compensation which was

² 5 U.S.C. § 8129(b).

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

⁴ 20 C.F.R. § 10.320(b).

incorrect and to which she was not entitled. Thus, the Office properly determined that appellant was at fault in the creation of a \$1,029.60 overpayment in compensation pursuant to section 10.320(b)(3) and therefore appellant is not entitled to waiver of the overpayment.

The decision of the Office of Workers' Compensation Programs dated August 18, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 21, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member