

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORENZO RODRIGUEZ and DEPARTMENT OF DEFENSE,
DEFENSE COMMISSARY AGENCY, San Diego, CA

*Docket No. 98-328; Submitted on the Record;
Issued January 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$8,390.29; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

This case has been on appeal previously.¹ In a decision dated June 2, 1995, the Board found that the Office improperly determined appellant's loss of wage-earning capacity beginning April 9, 1993 based on his actual earnings as a real estate agent. The Board found that appellant's earnings as a real estate agent were sporadic in nature and thus did not fairly and reasonably represent his wage-earning capacity. The Board further noted that the Office could deduct appellant's actual earnings from his compensation payments for the periods in which he worked using the *Shadrick* formula.² The findings of fact and conclusions of law in the Board's prior decision are hereby incorporated by reference.

On remand the Office determined the amount of earnings that appellant received from 1979 to 1995 based on information provided by appellant and from Social Security Administration records. The Office next applied the *Shadrick* formula and found that appellant had received an overpayment of \$1,174.00 for the period May 1, 1979 to April 1, 1981; an overpayment of \$762.49 for the period September 1 to December 31, 1984; an overpayment of \$562.07 for the period August 1 to November 30, 1985; an overpayment of \$2,729.48 for the period June 1 to September 11, 1987; an overpayment of \$4,148.15 for the period November 15, 1988 to December 31, 1989; and an overpayment of \$8,178.18 for the period January 1, 1990 to December 31, 1991. The Office further found that it owed appellant \$7,725.04 for the period January 1, 1992 to August 10, 1995 and \$1,439.04 for the period August 11 through

¹ Docket No. 94-11 (issued June 2, 1995).

² See *Albert C. Shadrick*, 5 ECAB 376 (1953).

December 9, 1995. The Office subtracted the \$9,164.08 owed to appellant from the total overpayment of \$17,554.37 and concluded that the remaining overpayment was \$8,390.29.

By notice dated December 19, 1995, the Office advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$17,554.37,³ which occurred because he received compensation for temporary total disability between May 1, 1979 through December 9, 1995 while he had sporadic actual earnings. The Office further determined that appellant was at fault in the creation of the overpayment as he knew or should have known that he could not receive compensation for total disability while working and as the relevant period covered by each check was printed on its face. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or request waiver of the overpayment and asked him to complete an attached overpayment recovery questionnaire in the event that the finding of fault was overturned.

By letter dated January 5, 1996, appellant expressed disagreement with the Office's determination that he was at fault in the creation of the overpayment as he had notified the Office when he returned to work. Appellant further submitted financial information in support of his request for waiver of the overpayment.

In a letter dated February 7, 1996, appellant informed the Office that he had elected to receive benefits from the Office of Personnel Management (OPM) in lieu of benefits from the Office.

By decision dated October 7, 1997, the Office finalized its preliminary determination that appellant received an overpayment of compensation for the period May 1, 1979 through December 9, 1995 and was at fault in the creation of the overpayment. The Office modified its preliminary determination to reflect that the amount of the outstanding overpayment was \$8,390.29 rather than \$17,554.37. The Office determined that based on appellant's training as a paralegal he should have known that he was not entitled to compensation for total disability while receiving earnings from employment. The Office also noted that appellant had failed to fully report his earnings during the relevant periods. The Office indicated that it would obtain repayment from appellant's OPM benefits.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$8,390.29.

In the present case, appellant's statements and Social Security Administration records reveal that he had earnings from 1979 to 1995 from private employment while in receipt of compensation for temporary total disability from the Office. Since appellant had actual earnings during this period, he is not entitled to compensation for total disability and thus received an overpayment. Appellant should only have received disability compensation for the difference between his wage earning prior to his disability and his current actual earnings. In calculating what appellant should have been paid during this period, the Office identified appellant's actual

³ In its preliminary determination of overpayment, the Office did not subtract the amount owed to appellant from the total overpayment and thus overstated the amount of overpayment.

earnings for the relevant periods and using the appropriate wage-earning capacity computations,⁴ determined that appellant's weekly compensation should have been \$427.25 from January 1, 1992 to August 10, 1995; \$348.50 from January 1, 1990 to December 31, 1991; \$351.25 from November 19, 1988 to December 31, 1989; \$189.25 from June 1 to September 11, 1987; \$395.75 from August 1 to November 30, 1985; \$377.75 from September 1 to December 31, 1984; and \$418.25 from May 1, 1979 through April 1, 1981. The Office, after determining the amount of compensation due appellant for the relevant periods, subtracted this amount from the total amount of compensation which appellant received and determined that he had an overpayment in the amount of \$8,390.29. The amount of overpayment is supported by the documentation of record.

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

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."⁵ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁶

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."⁷

In this case, the Office primarily applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the

⁴ See 20 C.F.R. § 10.303.

⁵ 5 U.S.C. § 8129.

⁶ See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

⁷ 20 C.F.R. § 10.320.

time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁸

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which are not due and the ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).”⁹

In this case, appellant received regular checks for compensation for temporary total disability due to an injury in 1976. The Office found that overpayment occurred during various periods from 1979 to 1995 when appellant received compensation for temporary total disability while earning money from private employment. The evidence of record establishes that appellant knew or reasonably should have known that he was not entitled to receive money for total disability while receiving earnings. The Office advised appellant, through form letter CA-1049 dated April 24, 1978, that he should notify the Office immediately upon a return to work and return to the Office any compensation checks received after a return to work in order to avoid an overpayment of compensation. While appellant asserts that he is not at fault in creating the overpayment because he informed the Office of his earnings, the Board has held that the fact that the Office may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed that he had returned to work does not excuse appellant's acceptance of such checks, which he knew or should have been expected to know should have been returned to the Office.¹⁰ In the instant case, appellant completed training as a paralegal as part of a vocational rehabilitation program sponsored by the Office. Based on his education and training, appellant should reasonably have been expected to know that he was not entitled to compensation for temporary total disability during those periods in which he worked part time as a real estate salesman and in other private employment and, thus, under these circumstances the evidence supports the Office's finding that he is not without fault.

The Board further notes that it does not have jurisdiction to review the Office's finding regarding repayment of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹¹ As

⁸ See *Robin O. Porter*, 40 ECAB 421 (1989).

⁹ 20 C.F.R. § 10.320(c).

¹⁰ *Robert W. O'Brien*, 36 ECAB 541 (1985).

¹¹ *Levon H. Knight*, 40 ECAB 658 (1989).

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 Collection Act.¹²

The decision of the Office of Workers' Compensation Programs dated October 7, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 20, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹² 5 U.S.C. § 5511 *et seq.*