

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RONALD LAPERUTA and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, NY

*Docket No. 00-1912; Submitted on the Record;  
Issued April 20, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$874.90; and (2) whether appellant was without fault in the creation of the overpayment, thus precluding waiver of recovery.

On September 1, 1999 the Office of Workers' Compensation Programs accepted appellant's claim for "tear, left medial meniscus," arthroscopy of the left knee and eight weeks of physical therapy post-surgery. Appellant stopped work on May 28, 1999 and returned to light-duty work on June 7, 1999. Appellant underwent surgery on November 11, 1999 and used leave without pay from November 16 until December 10, 1999.

By letter dated December 29, 1999, the Office informed appellant that he would be paid from December 5, 1999 to January 1, 2000, and from January 2 to 29, 2000. Appellant returned to a light-duty assignment on January 17, 2000.

On February 14, 2000 the Office issued a preliminary determination that appellant had received an overpayment in the amount of \$874.90 that arose because appellant had received wage-loss compensation from January 2 to 29, 2000, but had returned to work on January 17, 2000. The Office also found that appellant was not without fault in the creation of the overpayment because he should have been "reasonably aware that he was not entitled to compensation for wage loss subsequent to his return to work on January 17, 2000."

In a letter dated March 8, 2000 appellant stated:

"I am really not sure which day it was, I received another check which I assumed was my final payment. There was no accompanying paperwork with any explanation as I had received before. Since I had told the nurse and my boss and everyone else concerned when I would be returning, [to work] I never gave a thought that the check was incorrect."

By decision dated March 17, 2000, the Office found that appellant had received an overpayment in the amount of \$874.90 that arose because appellant returned to work on January 17, 2000, but accepted payment of compensation through January 29, 2000. The Office also found that appellant was at fault in the creation of the overpayment.

The Board finds that appellant received an overpayment of compensation in the amount of \$874.90.

The primary purpose of workers' compensation is to provide an adequate substitute for an employee's work-related loss of wage-earning capacity. When an employee returns to work and resumes earning wages the same or greater than those earned before, the work-injury compensation is no longer payable.<sup>1</sup>

The record establishes, and appellant does not dispute, that he began work on January 17, 2000. Office computer records establish that appellant received compensation for loss of wage-earning capacity while working full time from January 17 to 29, 2000. Appellant's receipt of compensation for loss of wage-earning capacity should have stopped on January 17, 2000. Appellant has submitted no evidence that he did not receive an overpayment of compensation. Thus, the Office properly determined that he received an overpayment of compensation during that period.

The Board further finds that appellant was not without fault in the creation of the overpayment, which is, therefore, not subject to waiver of recovery.

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b):

"Adjustment or recovery by the United States may not be made when 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>

No waiver of overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

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<sup>1</sup> *Chauncey L. Moore*, 34 ECAB 553 (1983).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent 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 know 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 properly found that appellant was at fault in the overpayment of compensation because he accepted a payment which he knew or should have been expected to know was incorrect. The information sheet accompanying the Office’s December 29, 1999 letter regarding appellant’s payment of compensation clearly advised him of the process regarding overpayments. The letter stated:

“To minimize the possibility of an overpayment of compensation, notify this office immediately when you go back to work. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.”

Given this notification by the Office, appellant knew or should have been expected to know that when he returned to work on January 17, 2000, he was no longer entitled to wage-loss compensation and should have returned the compensation check received for January 17 through 29, 2000.

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<sup>4</sup> 20 C.F.R. § 10.320(b).

The March 17, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.<sup>5</sup>

Dated, Washington, DC  
April 20, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>5</sup> Appellant indicated in the record that he had not been reimbursed for "three days intermittent lost time," but such a request for reimbursement of lost wages cannot be found in the record.