



loss compensation following termination of her compensation benefits; and (2) whether appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.

### **FACTUAL HISTORY**

On June 19, 2001 appellant, then a 47-year-old psychiatric nursing assistant, filed a traumatic injury claim alleging that on June 13, 2001 she sustained a right ankle sprain when she fell. The Office accepted her claim for synovitis of the right knee, a right ankle sprain and a lumbosacral sprain. It paid compensation for temporary total disability effective September 10, 2001.

By letter dated December 10, 2003, the Office advised appellant that it proposed to terminate her compensation and medical benefits on the grounds that the medical evidence established that her accepted conditions had resolved and she had no residual disability causally related to her June 13, 2001 employment injury.

On December 24, 2003 based on the Office's notice of proposed termination appellant requested that it send her a consent form so that she could apply for Office of Personnel Management (OPM) retirement benefits.

On January 12, 2004 the Office requested that OPM commence appellant's monthly annuity retirement benefits effective January 25, 2004, the date that her compensation from the Office was scheduled to cease.

By decision dated January 13, 2004, the Office terminated appellant's compensation and medical benefits effective January 25, 2004.

By letter dated November 5, 2004, the Office advised appellant of its preliminary determination that there was a \$3,852.14 overpayment of compensation because she accepted compensation for wage loss for the period January 25 to March 20, 2004, subsequent to the termination of her compensation benefits on January 25, 2004.<sup>3</sup> The Office also made a preliminary determination that she was at fault in the creation of the overpayment because she should have known, based on the January 13, 2004 Office termination decision, that she was not entitled to receive wage-loss compensation on or after January 25, 2004 and had therefore accepted incorrect compensation payments. Appellant was given 30 days in which to request a telephone conference, a precoupment hearing before the Branch of Hearings and Review or a final decision.

On November 20, 2004 appellant requested that the Office issue a final overpayment decision on the issues of fault and waiver.

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<sup>3</sup> The record contains a compensation payment history showing that the Office made two direct deposits to appellant's bank account on February 21 and March 20, 2004 for the periods January 25 to February 21, 2004 and February 22 to March 20, 2004, respectively. In a worksheet dated October 11, 2004, the Office indicated that it did not stop appellant's compensation until March 20, 2004 due to an Office oversight.

By decision dated June 9, 2005, the Office found that there was a \$3,852.14 overpayment of compensation in appellant's case and that she was at fault in the creation of the overpayment, thus, precluding waiver of the overpayment.<sup>4</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

An employee is entitled to compensation under the Federal Employees' Compensation Act<sup>5</sup> for disability sustained in the performance of duty.<sup>6</sup> However, compensation benefits are payable only while the effects of a work-related condition continue.<sup>7</sup> Compensation benefits may be terminated when there is no residual medical condition or disability causally related to the employment injury.<sup>8</sup>

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The record shows that the Office, by decision dated January 13, 2004, terminated appellant's compensation benefits as of January 25, 2004. However, appellant received wage-loss compensation from the Office in the amount of \$3,852.14 for the period January 25 to March 20, 2004 through two direct deposits to her bank account on February 21 and March 20, 2004. Because the Office terminated appellant's compensation benefits as of January 25, 2004, the compensation she received from January 25 to March 20, 2004 constituted an overpayment of benefits. Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$3,852.14 for the period January 25 to March 20, 2004.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered 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

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<sup>4</sup> The Office also determined that recovery of the overpayment would be accomplished through direct payment from appellant in the form of a check in the amount of \$3,852.14. As recovery from continuing wage-loss compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the manner of repayment. *Bob R. Gilley*, 51 ECAB 377 (2000).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8102.

<sup>7</sup> 20 C.F.R. § 10.500(a).

<sup>8</sup> *See* 20 C.F.R. § 10.503.

<sup>9</sup> 5 U.S.C. § 8129.

good conscience.<sup>10</sup> Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>11</sup> The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.<sup>12</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she “[a]ccepted a payment which he or she knew or should have known to be incorrect.”<sup>13</sup> Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Office determined that appellant accepted compensation payments she should have known were incorrect because she accepted the payments following termination of her compensation benefits on January 25, 2004. When the Office finds a claimant at fault in creating the overpayment on the grounds that he or she accepted a payment which the individual knew or should have been expected to know was incorrect, it must establish that, at the time the claimant received the compensation payment, the claimant knew or should have known the payment was incorrect.<sup>15</sup>

The record establishes that the payments from the Office for the period January 25 to March 20, 2004 were deposited directly into appellant’s bank account on February 21 and March 20, 2004. The Office has distinguished such a situation from one in which a claimant receives a check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation but decides nonetheless to cash or deposit the check.<sup>16</sup> The Board has found that mere direct deposit by the Office is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the payment before it was deposited to his account. The record reflects that, on January 12, 2004, the Office requested that OPM commence appellant’s monthly annuity retirement benefits effective January 25, 2004, the date that her compensation from the Office was scheduled to cease. When the two direct deposits were made to appellant’s bank account on February 21 and March 20, 2004, it would not be unreasonable for her to believe that the payments were her OPM monthly retirement benefits which were scheduled to commence following the January 25, 2004 termination of her compensation from the Office. There is no indication that appellant was aware or should have

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<sup>10</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>11</sup> 20 C.F.R. § 10.433(a).

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.433(a)(3).

<sup>14</sup> 20 C.F.R. § 10.433(b).

<sup>15</sup> See *Otha J. Brown*, 56 ECAB \_\_\_\_ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB \_\_\_\_ (Docket No. 03-2265, issued November 9, 2004).

<sup>16</sup> *William F. Salmonson*, 54 ECAB \_\_\_\_ (Docket No. 02-1448, issued October 9, 2002).

been aware of the nature of the two direct deposits from the Office. Therefore, the Board finds that appellant was not at fault in the creation of the overpayment for the period January 25 to March 20, 2004.

**CONCLUSION**

The Board finds that an overpayment of compensation of \$3,852.14 was created during the period January 25 to March 20, 2004 because appellant received compensation for that period but her compensation was terminated as of January 25, 2004. The Board further finds that, under the circumstances of this case, appellant is not at fault in the creation of the overpayment because the evidence does not establish that she knew or should have known the payments were incorrect. The case will be remanded for the Office to consider waiver of the overpayment to be followed by an appropriate decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 9, 2005 is affirmed with respect to fact and the amount of the overpayment. The Office's finding of fault is set aside and the case is remanded for consideration of waiver of the overpayment.

Issued: January 6, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board