

bicipital tenosynovitis and commenced paying him compensation for total disability. In the January 7, 2003 letter advising appellant that he would be paid temporary total disability compensation, the Office stated: "To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN 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 [O]ffice, even if you have already advised the [Office] that you are working.*" (Emphasis added).

By letter dated May 4, 2005, appellant informed the Office that he had commenced part-time employment on May 3, 2005. He further stated:

"Please let me know what I am supposed to do. I do not know if I need to fill out anything special or not. In addition, can you please send me information on how my health insurance, compensation check and everything else that is related to my injury, will be affected. Since I am only working part-time and only working when the company has drafting work, I am uncertain on how your OWCP system regards my situation."

By letter dated July 10, 2005, appellant requested additional information from the Office. He stated:

"Last month I wrote a letter to inform OWCP that I started back to work on a part-time basis. Since I did not receive [a] response back to respond to my questions and I notice that this month's compensation check did not change, plus I received a notice that my claims examiner was changed again, I felt that possibly that my letter was not received by the correct person or department."

Appellant further advised the Office that he had commenced employment in a drafting position, at which he averaged approximately 16 to 20 hours per week at the salary of \$16.00 per hour. He stated that he was unsure as to how long this position would last.

On August 22, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$3,180.74 because appellant had been receiving compensation to which he was not entitled. The Office found that appellant received an overpayment for the period March 20 through April 16, 2005 because basic life insurance premiums were not deducted from his compensation and an overpayment for the period May 3 through July 20, 2005 because he continued to receive compensation for temporary total disability after he returned to part-time work on May 3, 2005. The Office found that appellant was at fault in the matter because when he obtained full-time employment effective May 3, 2005 he should have been aware that the payments he had been receiving were incorrect.¹ The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. The Office further advised appellant that, when he was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good

¹ The Office did not make a finding as to whether appellant was at fault for the overpayment for March 20 to April 16, 2005.

conscience. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the October 20, 2003 letter. Appellant did not respond to this letter within 30 days.

In a decision dated October 12, 2005, the Office finalized the preliminary determination regarding the overpayment of \$3,180.74.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Group Life Insurance (FEGLI) program, most civilian employees of the federal government are eligible to participate in basic life insurance with one or more options.² The coverage for basic life is effective unless waived³ and premiums for basic and optional life coverage are withheld from the employee's pay.⁴ Under the FEGLI program, insurance remains in effect until canceled and premiums due are to be deducted from the injured employee's compensation payments. The injured employee remains responsible for all insurance premiums.

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.⁵ Compensation for wage-loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.⁶ Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.⁷

Office procedures state: "The reason that the overpayment occurred must be clearly stated in the preliminary decision and the [Office] should provide a clearly written explanation indicating how the overpayment was calculated."⁸

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation due to its failure to deduct basic life insurance premiums for the

² See *James Lloyd Otte*, 48 ECAB 334, 337 (1997); Part 870 -- Basic Life Insurance, subpart B -- Coverage; see 5 C.F.R. § 870.201.

³ 5 C.F.R. § 870.204(a).

⁴ 5 C.F.R. § 870.401(a).

⁵ 20 C.F.R. § 10.401(a) (2003).

⁶ 20 C.F.R. § 500(a) (2003).

⁷ 20 C.F.R. § 10.403(b) (2003).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4.a (May 2004).

period March 20 to April 16, 2005. The August 8, 2005 Office worksheets documented that the Office withheld no premiums for basic life insurance during this period. In addition, the Office also documented that appellant continued to receive checks for temporary total disability compensation after returning to work on May 3 to July 20, 2005. As it appears that appellant received more compensation to which he was entitled, the Board will affirm the Office's October 12, 2005 decisions on this issue of fact of overpayment due to under withholding of basic life insurance premiums from March 20 to April 16, 2005 and to appellant's receipt of checks for temporary total disability to which he was no longer entitled from May 3 to July 20, 2005.

The Board finds, however, that the Office did not follow its procedures when it released the August 12, 2005 letter notifying appellant of its preliminary findings. Specifically, the Office did not "provide a clearly written explanation indicating how the overpayment was calculated." The August 12, 2005 letter informed appellant that he was overpaid \$3,180.74 because the Office failed to deduct premiums for his basic life insurance from March 20 to April 16, 2005 and because appellant received checks for temporary total disability compensation to which he was not entitled from May 3 to July 20, 2005. The Office, however, offered him no clear formula or explanation as to how it arrived at the sum of \$3,180.74.

The record contains three internal worksheets indicating the amount of basic life insurance that had been weekly deducted from his compensation and the amount of weekly temporary total disability compensation appellant had been receiving. However, these worksheets did not indicate the formula by which the Office arrived at the total of \$3,180.74; *i.e.*, how the Office derived the exact amount of overpayment from under withheld basic life insurance and from temporary total disability compensation for the respective periods of overpayment and how the Office combined these figures in calculating the total amount of appellant's overpayment.⁹ Therefore, because the Office failed to follow procedures in calculating the overpayment and did not provide a clear explanation to appellant, the Board will set aside the Office's October 12, 2005 decision on the issue of amount and remand the case for further development.¹⁰

⁹ Federal (FECA) Procedure Manual, Part 6 -- Initial *Overpayment Actions*, Chapter 6.200 (September 1994) states:

"When an overpayment is discovered, the [c]laims [e]xaminer (CE) will enter information concerning the correct period of entitlement and the actual period paid on Form CA-24, CA-25, whichever form is appropriate and arrange for certification of this entry. The mathematics involved in the calculation of the overpayment must be documented in writing in the case file. In performing these calculations, use should be made of the worksheet calculation capabilities of the Automated Compensation Payment System (ACPS), for compensation paid since 1981; and/or of the ACPS Shadrick (CA-816) calculation capability for compensation payments for any prior period of time."

¹⁰ The Board notes that, based on the findings above, the period of appellant's overpayment has been amended to June 9 to July 20, 2005, a period equivalent to one month of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act¹¹ provides that 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 good conscience.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.¹²

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment --

- (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 provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.¹³

ANALYSIS -- ISSUE 2

The Office did not make a finding as to whether appellant was at fault for the overpayment for March 16 to April 20, 2005. Based on the circumstances of this case, the Board finds that appellant is not at fault in creating this overpayment. This overpayment occurred because the Office did not withhold life insurance premiums from appellant’s compensation. There is no evidence of record, however, that appellant had any awareness that the premiums had not been deducted from his compensation. The evidence, therefore, does not establish that appellant accepted a payment that he knew or should have known was incorrect, failed to provide material information or provided an incorrect statement of material fact which led to the overpayment. The evidence of record, therefore, does not establish that appellant was at fault in the creation of the March 16 to April 20, 2005 overpayment.

Regarding the second overpayment period of May 3 through July 20, 2005, this overpayment occurred because appellant received wage-loss compensation after returning to work. The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit, which involve a series of payments over several

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² *Bonnye Mathews*, 45 ECAB 657 (1994).

¹³ 20 C.F.R. §10.433(a).

months, with clear knowledge that the payments are incorrect.¹⁴ However, the Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment. In the instant case, the first direct deposit payment in June 6, 2005 after appellant's return to work occurred without appellant's knowledge that the direct deposit had been made. On July 10, 2005 appellant wrote to the Office advising that this month's compensation payment had not changed, even though he had written to the Office that he had returned to work. Based on these facts, the evidence establishes that appellant knew by the second direct deposit payment of the erroneous wage-loss benefits in July 2005 that he was not entitled to receipt of these benefits.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have expected know he was not entitled.¹⁵ Appellant was informed by the Office in its January 7, 2003 letter that he was required to notify the Office as soon as he returned to work and to return any payment of compensation to the Office even if he had already advised the Office he was already working in order to avoid an overpayment of compensation. After his receipt of the first direct deposit, for which fault may not be imputed to him, it could be presumed that he knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which he was entitled.¹⁶

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the direct deposits issued by the Office which covered the period commencing June 8, 2005 were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation may not be waived for this time period. Thus, the Office decision dated October 12, 2005 is affirmed in this respect. The evidence of record does not establish that appellant was at fault for any of the overpayments made prior to July 2005, the Office's finding of fault is, therefore, modified in this regard.

¹⁴ See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002).

¹⁵ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹⁶ As noted above, the Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *supra* note 14. The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment. In the instant case, by the time appellant accepted the June 6, 2005 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for appellant to become aware of the fact that the checks contained an overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation due to an under withholding of basic life insurance premiums from March 20 to April 16, 2005 and an overpayment because he continued to receive checks for temporary total disability compensation after returning to full-time work on May 3 to July 20, 2005. The Board finds that the amount of overpayment is not in posture for decision. Also the Board finds that appellant is at fault for the overpayment for the period commencing June 9, 2005, but is not at fault for the prior periods of overpayment commencing March 20, 2005. The case is remanded to the Office for issuance of a determination of how the amount of overpayment was calculated and for determination of waiver.

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2005 decision of the Office of Workers' Compensation Programs is affirmed in part, modified in part and remanded in part for further adjudication in compliance with this decision of the Board.

Issued: October 30, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board