

The issues are: (1) whether an overpayment was created in the amount of \$10,875.31 for the period September 11, 2006 through March 17, 2007; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of the recovery of the overpayment.

### **FACTUAL HISTORY**

On October 21, 2004 appellant, then a 40-year-old cemetery caretaker, sustained injury to his shoulder and back while in the performance of duty. The Office accepted the claim for exacerbation of lumbar stenosis and authorized lumbar decompressive L3 to S1 laminectomy surgery, which was performed on April 25, 2006. Appellant returned to light-duty work for six hours per day on August 1, 2005. By letter dated August 1, 2006, the Office accepted appellant's recurrence of disability claim effective April 25, 2006 due to surgery.

By letter dated September 22, 2006, the employing establishment informed the Office that appellant had returned to full-time light-duty work on September 11, 2006.

In a February 1, 2007 file memorandum, the Office determined that an overpayment occurred because appellant returned to full-time modified employment on September 11, 2006. The Office determined that the period of the overpayment was from September 11, 2006 through January 20, 2007 as appellant continued to receive compensation for total disability during this period. The Office found that appellant received an overpayment of \$1,166.07 for the period September 11 through 30, 2006. This was calculated by multiplying the payment of \$1,632.50 by 20/28. Appellant received four compensation payments of \$1,632.60 or \$6,530.00, which resulted in a total overpayment of \$7,696.07 for the period September 11, 2006 through January 20, 2007. The Office found him at fault as appellant knew or should have known that the wage-loss compensation payments after returning to work were incorrect.

On February 1, 2007 the Office made a preliminary determination that appellant was overpaid in the amount of \$7,696.07 for the period September 11, 2006 to January 20, 2007. The Office stated that he was at fault in the creation of the overpayment as he accepted a payment which he knew or reasonably should have known was incorrect. The Office noted that appellant returned to work full time on September 11, 2006. The Office found that he was overpaid for the period September 11, 2006 through January 20, 2007 in the amount of \$7,696.07. The Office found that appellant was at fault as he had accepted a payment he knew or should have known he was not entitled to.

Appellant requested a prerecoupment hearing before an Office hearing representative, which was held on June 13, 2007. He completed an overpayment recovery questionnaire and reported a monthly income of \$1,600.00. Monthly expenses included \$500.00 to 700.00 for rent/mortgage; \$200.00 to \$400.00 for food; \$90.00 for clothing; \$100.00 to \$150.00 for utilities; \$200.00 for automobile insurance and \$400.00 for health insurance.

In a March 26, 2007 file memorandum, the Office determined that an overpayment occurred because appellant returned to full-time modified employment on September 11, 2006. The Office determined that the overpayment period was from January 21 through March 17, 2007 as appellant continued to receive full compensation for this period. The Office found that appellant received an overpayment of \$3,179.24 for the period January 21 through March 17, 2007. This was calculated by multiplying the payment of \$1,589.62 by two. The Office noted a preliminary finding of fault as appellant should have been aware that he was not entitled to wage-loss compensation after returning to work.

On March 26, 2007 the Office made a second preliminary determination that appellant was overpaid in the amount of \$3,179.24 for the period January 21 through March 17, 2007. The Office stated that he was at fault in the creation of the overpayment as he accepted a payment which he knew or reasonably should have known was incorrect. The Office noted that appellant returned to work full time on September 11, 2006. The Office found that he was overpaid for the period September 11, 2006 through January 20, 2007 in the amount of \$7,696.07. The Office found that appellant was at fault as he had accepted a payment he knew or should have known he was not entitled to.

Subsequent to the preliminary overpayment determinations, copies of payment information for the period July 24, 2005 through March 17, 2007. The record reflects that appellant was paid \$1,632.50 on September 30, October 28, November 25 and December 23, 2006 and January 20, 2007. These payments covered the period September 1 through January 20, 2007. On February 17 and March 17, 2007 appellant was paid \$1,589.62 for the period January 21 through March 17, 2007.

By decision dated August 23, 2007, the Office hearing representative finalized the two preliminary overpayment determinations to reflect a total overpayment amount of \$10,875.31 for the period September 11, 2006 through March 17, 2007 for which he was at fault.<sup>1</sup> The hearing representative noted that, as appellant failed to provide any documentation of his monthly expenses, it was not possible to determine an equitable repayment schedule or whether the claimant has the assets to repay the overpayment in full. He directed recovery in full.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. Section 8106(a) provides in pertinent part as follows:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.”<sup>3</sup>

The Act further provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.<sup>4</sup> Section 8129(a) of the Act

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<sup>1</sup> Appellant filed a claim for a schedule award on October 24, 2006. As there is no final Office decision on his schedule award claim, the Board does not have jurisdiction over this issue. 20 C.F.R. § 501.2(c). *See Karen L. Yaeger*, 54 ECAB 323 (2003) (Board's jurisdiction is limited to reviewing final decisions of the Office).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>3</sup> 5 U.S.C. § 8106(a).

<sup>4</sup> 5 U.S.C. § 8116(a). *See Danny E. Haley*, 56 ECAB 393 (2005).

provides that, when an overpayment has been made to an employee because of an error of fact or law, adjustment shall be made by decreasing later payments to which he is entitled.<sup>5</sup>

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

The record establishes that an overpayment was created because appellant returned to full-time modified duty on September 11, 2006 but remained on the periodic rolls and received wage loss for total disability. The Office determined that, for the time frame of September 11, 2006 through March 17, 2007, appellant received \$10,875.31 in compensation for total disability. As he returned to work and had no entitlement to compensation for this period, the receipt of compensation created an overpayment of compensation. The Board will affirm the Office's August 23, 2007 decision on the issue of fact of overpayment.

The Office's overpayment worksheet shows that appellant received compensation for total disability for the period September 11, 2006 through March 17, 2007. In calculating the amount, the Office determined that appellant received \$7,696.07 for the period September 11, 2006 through January 20, 2007 and \$3,179.24 for the period January 21 to March 17, 2007. This resulted in a total overpayment of \$10,875.31 for the period September 11, 2006 through March 17, 2007. The Board finds that the Office properly calculated that appellant received a \$10,875.31 overpayment of compensation from September 11, 2006 through March 17, 2007.

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

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of, benefits. 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 he or she knew or should have known to be incorrect; (2) Failed to provide information which he or she 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 (this provision applies only to the overpaid individual).<sup>6</sup>

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

In finding appellant at fault in the creation of the overpayment, the Office relied on the third standard. The Office found that appellant knew or should have known that he accepted incorrect payments as he had returned to work on September 11, 2006. Although the Office may have been negligent in making the incorrect payments, this does not excuse a claimant from accepting a payment that he should have known to be incorrect.<sup>7</sup> Appellant does not dispute that

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<sup>5</sup> 5 U.S.C. § 8129(a); *see C.M. & J.M., (J.M.)*, 58 ECAB \_\_\_\_ (Docket No. 06-1597 issued May 8, 2007).

<sup>6</sup> 20 C.F.R. § 10.433(a). *See F.C.*, 59 ECAB \_\_\_\_ (Docket No. 07-1541, issued November 16, 2007); *J.S.*, 58 ECAB \_\_\_\_ (Docket No. 06-2113, issued May 10, 2007).

<sup>7</sup> *William E. McCarty*, 54 ECAB 525 (2003).

he returned to work and was overpaid as he received compensation and his salary. He knew or should have known that he was not entitled to both his regular salary and compensation for total disability. The Board finds that appellant was at fault in the creation of the overpayment. Accordingly, as he was not without fault in accepting the incorrect payment, the Office properly directed recovery of the overpayment.

### **CONCLUSION**

The Board affirms the finding that appellant received an overpayment in the amount of \$10,875.31, for which he was at fault, and that he was not entitled to waiver.<sup>8</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 23, 2007 is affirmed.

Issued: May 22, 2008  
Washington, DC

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

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

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

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<sup>8</sup> As the Office did not direct recovery of the overpayment from continuing compensation, the Board has no jurisdiction to review the issue of recovery. *See Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).