

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$638.74 during the period February 5 to 17, 2007 because he received temporary total disability compensation instead of partial disability compensation following his return to part-time work; (2) whether the Office properly found that appellant was at fault in the creation of this overpayment and, therefore, ineligible for waiver of the overpayment; and (3) whether the Office properly ordered repayment of the overpayment in full.

FACTUAL HISTORY

On January 4, 2006 appellant, then a 45-year-old high voltage electrician, filed a traumatic injury claim alleging that on January 3, 2006 he broke his ribs and pelvis on the right side of his body when a bolt on a hydraulic ram broke. He stopped work on the date of injury. By letter dated January 12, 2006, the Office accepted the claim for closed fracture of multiple ribs and closed fracture of the acetabulum. Appellant underwent right hip replacement surgery which was performed by Dr. Michael T. Clarke, an attending orthopedic surgeon.

By letter dated March 31, 2006, the Office advised appellant to provide immediate notification of his return to work to avoid an overpayment of compensation. It further advised him that, if he worked for any portion of this period, he must return the check to the Office; otherwise, an overpayment of compensation could result.

On January 24, 2007 the employing establishment offered appellant a part-time position requiring him to work four hours per day based on the restrictions set forth by Dr. Clarke.¹ Appellant accepted the job offer on January 25, 2007 and returned to work on February 5, 2007.

Following appellant's return to work, the Office issued a compensation check to him in the amount of \$1,277.49 for the period February 5 through 17, 2007. The check was sent directly to his financial institution in the form of direct deposit.

On June 29, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$638.74 because he received compensation in the amount of \$1,277.49 for temporary total disability covering the period February 5 to 17, 2007 when he was only entitled to compensation in the amount of \$638.74 based on his return to part-time work on February 5, 2007. The Office further determined that he was at fault in the creation of the overpayment because he had been advised on March 31, 2006 that he needed to return any payments he received after returning to work. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On July 17, 2007 appellant requested that the Office make a decision based on a review of the written evidence. He stated that the compensation was used to support his family during a difficult time period. Appellant wished to repay the overpayment in several installments if a judgment was issued against him. In an undated and unsigned OWCP-20 form, he stated that he did not have the incorrectly paid compensation check. Appellant reported a monthly income of \$3,000.00. He further reported monthly expenses of \$800.00 for rent or mortgage, \$800.00 for food, \$300.00 for clothing, \$600.00 for utilities, \$1,000.00 for other expenses, \$225.00 for credit card payments and \$50.00 for cable television service, totaling \$3,775.00. Appellant had \$219.00 in a savings account. He contended that he was not at fault in creating the overpayment

¹ The record reveals that appellant was restricted to lifting and carrying 25 to 50 pounds, pushing and pulling 25 to 50 pounds two hours per day and no driving a standard truck.

because payments owed to him lagged by weeks so he did not follow the payment dates as all of his paperwork was prepared by the employing establishment's finance office. Once appellant returned to work part time, he assumed that all the paperwork between the employing establishment and the Office was correct. He stated that on February 1, 2007 he immediately went to the finance office and advised that his physician had released him to return to work part time.

By decision dated October 15, 2007, the Office finalized its determination that appellant received an overpayment in the amount of \$638.74 and that he was at fault in the creation of the overpayment because he accepted a payment that he should have known was incorrect. The Office ordered him to repay the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

If an employee returns to work and has earnings or is in a paid leave status, he is not entitled to receive wage-loss compensation for temporary total disability for the same time period.²

ANALYSIS -- ISSUE 1

Appellant stopped work on January 3, 2006. He returned to part-time work, four hours per day on February 5, 2007. Subsequently, the Office paid appellant wage-loss compensation in the amount of \$1,277.49 for temporary total disability from February 5 to 17, 2007. Because he worked part time during this period, he was not entitled to receive wage-loss compensation for total disability during this period. The record indicates that the Office paid appellant \$1,277.49 in wage-loss compensation for total disability but he was only entitled to compensation for partial disability in the amount of \$638.75. The Board finds that this created an overpayment of \$638.74.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act³ 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.⁴ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁵ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁶

² See 20 C.F.R. § 10.401 (2007).

³ 5 U.S.C. § 8129(b).

⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁶ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

"(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 was incorrect."⁷

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

"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. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."⁸

ANALYSIS -- ISSUE 2

The Office 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 at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.⁹

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The Office found that appellant should have known that he received an incorrect payment for total temporary disability because he had been advised to return any money he received after returning to work. The Board has found a 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 were incorrect.¹⁰ It is not appropriate, however, to make a finding that a claimant has accepted an 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.¹¹

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

⁹ *Diana L. Booth, supra* note 6.

¹⁰ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹¹ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

In this case, appellant received an overpayment of compensation in the amount of \$638.74 by direct deposit. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.¹² Appellant had no reason to suspect at the time the \$638.74 overpayment was deposited into his checking account that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.¹³ Furthermore, because the funds were deposited directly into his bank account, appellant was not in a position to immediately decline acceptance of the amount paid by the Office. Thus, the Board finds that he was not at fault in either creating or accepting the overpayment of \$638.74 for the period February 5 through 17, 2007.¹⁴ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period, and the case must be remanded for the Office to determine whether he is entitled to waiver for this period. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

Based on the Board's determination in the second issue in this case, issue three regarding recovery of the \$638.74 overpayment need not be addressed at this time.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$638.74 from February 5 to 17, 2007, because he incorrectly received temporary total disability compensation instead of partial disability compensation following his return to part-time work. The Board, however, finds that he was not at fault in the creation of this overpayment.

¹² See *Karen K. Dixon*, *supra* note 10.

¹³ See *Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to fact and amount of overpayment. The decision is reversed with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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