



accident. It later accepted a lumbosacral strain sustained on March 22, 2004.<sup>1</sup> Appellant received compensation for the period June 4, 2005 to June 10, 2006.

In May 2005, appellant's attending physician found her able to perform light-duty work. On August 15, 2005 the employing establishment offered her a light-duty position as a modified clerk within her medical restrictions. Appellant rejected the offer as she desired a different work schedule. Following additional development, the Office issued an October 6, 2005 decision terminating her monetary compensation benefits effective that day under section 8106(c) of the Federal Employees' Compensation Act, on the grounds she refused an offer of suitable work.<sup>2</sup> Appellant requested a telephonic hearing, held on November 2, 2006. By decision dated and finalized December 21, 2006, an Office hearing representative affirmed the October 6, 2005 decision, finding that appellant did not provide a valid reason for refusing suitable work.

By notice dated October 6, 2006, the Office advised appellant of its preliminary determination that an overpayment of \$8,626.72 was created as she erroneously received schedule award compensation from October 6, 2005 to June 10, 2006, after her benefits were terminated effective October 6, 2005.<sup>3</sup> It made the preliminary determination that appellant was at fault in creation of the overpayment as she knew or reasonably should have known that she was not entitled to payments after termination of her compensation. Appellant was afforded the opportunity to submit financial information or request a hearing.

In a November 27, 2007 telephone memorandum, the Office noted that appellant had called that day with questions about the October 6, 2006 notice. It advised appellant to submit her concerns in writing. Appellant did not submit additional evidence.

By decision dated December 19, 2007, the Office finalized its preliminary determination of an \$8,626.72 overpayment of compensation. It found that appellant was at fault in creation of the overpayment as she accepted payments made after the Office had terminated her compensation. The Office directed recovery of the overpayment through a lump-sum payment of the entire amount. The decision was mailed to appellant at her address of record.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>4</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal

---

<sup>1</sup> The Office assigned the December 17, 2001 claim File No. xxxxxx321. The lumbar strain claim was assigned File No. xxxxxx481. The record now before the Board contains the complete record from both claims. Although the two files have not been formally doubled, the Office developed the two claims together regarding the suitable work and overpayment issues.

<sup>2</sup> 5 U.S.C. § 8106(c).

<sup>3</sup> The Office calculated that, for the period October 6, 2005 to June 10, 2006, appellant received \$8,626.72 in compensation.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

injury sustained while in the performance of his duty.<sup>5</sup> Section 8129(a) of the Act provides, in pertinent part, that when “an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>6</sup> The Office’s procedure manual identifies various situations when overpayments of compensation may occur, including when a schedule award expires but compensation continued to be paid.<sup>7</sup>

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

The Office accepted that appellant sustained a fracture and contusions in a December 17, 2001 motor vehicle accident and a lumbar sprain on March 22, 2004. It terminated her entitlement to wage-loss compensation benefits effective October 6, 2005. The evidence reflects and appellant does not dispute that she received compensation from the Office under a schedule award in the amount of \$8,626.72, for the period October 6, 2005 to June 10, 2006. As appellant was not entitled to receive any disability compensation as of October 6, 2005, the Board finds that the Office correctly determined that she received an overpayment of compensation in the amount \$8,626.72 for the period in question.<sup>8</sup>

### **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 good conscience.<sup>9</sup> Section 10.433 of the implementing regulations specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>10</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>11</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient 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

---

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

<sup>8</sup> *Alberto Pineiro*, 51 ECAB 310 (2000).

<sup>9</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>10</sup> 20 C.F.R. § 10.433 (a).

<sup>11</sup> *Id.*

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.<sup>12</sup>

Section 10.433(b) of the Office's regulations provides, in relevant part, that the determination of fault "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."<sup>13</sup>

### ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment under the third standard noted above, because she accepted payments after October 6, 2005 that she knew or should have known were incorrect.

By accepting payments after her entitlement to benefits was terminated, effective October 6, 2005, appellant accepted payments that she knew or should have known were incorrect. Therefore, she was at fault in the creation of the overpayment.<sup>14</sup> The record reflects that a copy of the Office's decision was properly mailed to appellant at her address of record in the ordinary course of business and is thus presumed to have been received.<sup>15</sup> Appellant has not submitted evidence to rebut the presumption of receipt.<sup>16</sup> Accordingly, she was on notice that her wage-loss benefits had been terminated and that she was not entitled to receive any compensation payments subsequent to October 6, 2005. However, appellant accepted compensation payments for the period October 6, 2005 to June 10, 2006, in the amount of \$8,626.72. As she was aware that her entitlement to benefits had been terminated, she accepted payments that she knew or should have known to be incorrect. Accordingly, the Board finds that appellant was at fault in the creation of the overpayment.<sup>17</sup> The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.<sup>18</sup>

As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.<sup>19</sup>

---

<sup>12</sup> 20 C.F.R. § 10.433(a)(3).

<sup>13</sup> 20 C.F.R. § 10.433(b).

<sup>14</sup> See *D.R.*, 59 ECAB \_\_\_ (Docket No. 07-823, issued November 1, 2007); *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>15</sup> See *Joseph R. Giallanza*, 55 ECAB 186 (2003); *Larry L. Hill*, 42 ECAB 596 (1991).

<sup>16</sup> *Joseph R. Giallanza*, *supra* note 15.

<sup>17</sup> *D.R.*, *supra* note 14.

<sup>18</sup> 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

<sup>19</sup> Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); see *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

**CONCLUSION**

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$8,626.72. The Board further finds that appellant was at fault in creation of the overpayment and it was therefore not subject to waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 19, 2007 is affirmed.

Issued: November 4, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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