

herniation at L5-S1 and paid compensation beginning April 5, 2004. Appellant underwent a decompression at L5-S1 on May 20, 2004.

On July 20, 2004, July 8, 2005 and July 10, 2006 appellant signed CA1032 forms which advised him to report all employment for which he received any kind of salary or wages and to immediately report any change in his employment status. He returned to limited-duty employment on September 16, 2006 with no loss of earnings. Using direct deposit, the Office paid appellant \$6,139.21 in compensation for total disability from September 16 through December 23, 2006.

On July 16, 2007 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$6,139.21 for the period September 16 through December 23, 2006 because he received compensation for total disability after he returned to work. It further informed him of its preliminary determination that he was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to receive compensation for total disability after he returned to work at no wage loss. The Office calculated that it paid appellant compensation in the amount of \$868.39 for the period September 16 through 30, 2006, \$1,756.94 for the period October 1 through 28, 2006 and \$1,756.94 for the period October 29 through December 23, 2006, for a total overpayment of \$6,139.21.¹ It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On August 12, 2007 appellant requested a telephone conference. He requested waiver of the overpayment based on financial hardship sustained due to his employment injury. Appellant submitted supporting financial information. In the completed overpayment questionnaire, he alleged that he was not at fault in the creation of the overpayment as he had debts arising from when he was out of work. Appellant maintained that he did not know how to notify the Office regarding the change in his financial circumstances.

At the telephone conference held on December 7, 2007, the Office described its calculation of the overpayment and reviewed appellant's completed overpayment recovery questionnaire and supporting financial information. It requested additional financial information which he submitted on January 2, 2008.

By decision dated January 30, 2008, the Office finalized its finding that appellant received a \$6,139.21 overpayment of compensation for the period September 16 through December 23, 2006 based on his receipt of compensation for disability after his return to work. It further finalized its finding that he was at fault as he accepted payments which he knew or should have known were incorrect. The Office reviewed appellant's financial information and concluded that he should submit \$150.00 per month to repay the overpayment.

¹ The Office missed a payment in describing its calculation of the overpayment of compensation. It paid appellant \$1,756.94 for the period October 1 to 28, 2006, \$1,756.94 for the period October 28 to November 25, 2006 and \$1,756.94 for the period November 26 through December 23, 2006.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act² provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ The Office's regulations state in pertinent part: "compensation for wage-loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$6,139.21. The record supports that he continued to receive compensation from the date that he returned to work on September 16 through December 23, 2006. During this time appellant received \$6,139.21 in compensation. When an employee returns to work and ceases to have any loss of wages, he is no longer entitled to compensation for wage loss.⁶ As appellant was not entitled to compensation after his return to work, the Office properly found an overpayment of compensation in the amount of \$6,139.21.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its 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.⁷ Section 10.433 of the implementing regulations 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.⁸ 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.⁹ Under the regulations, a recipient will be found to

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102.

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁷ 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.*

be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.¹⁰ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹¹

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 were incorrect.¹² 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.¹³

ANALYSIS -- ISSUE 2

The Office determined that appellant was at fault in creating the overpayment of \$6,139.21 based on its finding that he knew or should have known that the payments received by direct deposit from September 16 through December 23, 2006 were not proper because he had returned to work. 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 known that he was not entitled.¹⁴ Appellant signed EN1032 forms dated July 20, 2004, July 8, 2005 and July 10, 2006 clearly indicating that he must immediately notify the Office if he resumed work. It was not reasonable for him to believe that he could continue to receive compensation for total disability after resuming employment. Appellant returned to work on September 16, 2006 but did not return any compensation received after that date, even though he knew or should have know that an overpayment would be created if he accepted compensation benefits after his return to work.

Appellant received a direct deposit on September 30, 2006 in the amount of \$1,756.94 containing the portion of the overpayment covering the period September 16 through 30, 2006. The Board has held that an employee who receives payment from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁵ 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

¹⁰ 20 C.F.R. § 10.433(a)(3).

¹¹ 20 C.F.R. § 10.433(b).

¹² See *Karen K. Dixon*, 56 ECAB 145 (2004).

¹³ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁴ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹⁵ See *Karen K. Dixon*, *supra* note 12.

payments were incorrect.¹⁶ 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.¹⁷

Regarding the overpayment of compensation for the period September 16 through 30, 2006, the Board finds that appellant was without fault in creating the overpayment. While appellant accepted the overpayment by gaining control of the funds deposited into his bank account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day.¹⁸ Unlike the situation where a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, appellant was not on notice of the amount of the payment until after it was deposited electronically into his account. There is no evidence of record in this case to show the period covered by the direct deposit for the compensation payment from the Office which included the period September 16 through 30, 2006.¹⁹ 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. The case will thus be remanded to the Office to determine whether he is entitled to waiver for this period.

After appellant's receipt of the first direct deposit, for which fault may not be imputed to him, he knew or should have known that the subsequent direct deposits were in error under the reasonableness standard addressed above. When he received the checks issued for the periods October 1 through December 23, 2006, he had worked for around six weeks. Appellant has not argued or offered any probative evidence that he believed that these payments for temporary total disability were correct. As discussed, he signed forms advising him to notify the Office immediately upon his return to work. In determining fault the Office applies a reasonable person test.²⁰ It was not reasonable for appellant to believe that he could continue to receive compensation after he returned to work and enough time had passed for him to review confirmation of the incorrect payments in his bank account. The Board finds that he knew or should have known that the deposits received covering the periods October 1 through December 23, 2006 were incorrect.

CONCLUSION

The Board finds that appellant received a \$6,139.21 overpayment of compensation from September 16 through December 23, 2006 because he continued to receive compensation for total disability after he returned to work. The Board further finds that he was without fault in the

¹⁶ *Id.*

¹⁷ See *K.H.*, *supra* note 13.

¹⁸ See *Tammy Craven*, 57 ECAB 689 (2006).

¹⁹ See *Karen K. Dixon*, *supra* note 12.

²⁰ See *L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008).

creation of the overpayment for the period September 16 through 30, 2006 but is with fault in creating the overpayment for the periods October 1 through December 23, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 30, 2008 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 24, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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