

Appellant, a 22-year-old mail handler, injured her left shoulder on October 27, 1995 while pulling and lifting a sack of mail. She filed a claim for benefits on October 30, 1995 which the Office accepted for left shoulder tendinitis and left rotator cuff tear. The Office paid appellant appropriate compensation for total disability. She returned to a modified mail handler

job with the employing establishment on June 25, 2006. The Office, however, continued to pay her temporary total disability compensation until August 5, 2006.

By letter dated August 17, 2006, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$2,823.21, covering June 25 to August 5, 2006. It found that appellant was at fault in creating the overpayment because she should have known that she was not entitled to receive compensation payments after she returned to work. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office or request a precoupment hearing with the Branch of Hearings and Review.

On August 24, 2007 appellant's attorney requested an oral hearing, which was held on July 12, 2007. Appellant did not attend the hearing; she was represented by her attorney.

In a decision dated September 25, 2007, an Office hearing representative finalized the preliminary determination regarding the overpayment of \$2,823.21. The hearing representative found that appellant should have been aware that she was not entitled to receive compensation checks after she returned to work on June 25, 2006.

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

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.<sup>1</sup> Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>2</sup>

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

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,823.21 for the period June 25 through August 5, 2006. The record shows that appellant received an overpayment during the period in question because she continued to receive checks for temporary total disability compensation after returning to full-time work on June 25, 2006. The Office calculated the \$2,823.21 overpayment by totaling the gross amount of temporary total disability compensation appellant received from June 25 to August 25, 2006, which amounted to \$3,507.00 and subtracting \$683.79 in deductions for life insurance premiums. Based on this determination, it properly found that appellant received an overpayment of compensation in the stated amount during that period.

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<sup>1</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>2</sup> *Id.* at § 500(a) (2003).

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

Section 8129 of the Act<sup>3</sup> 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.<sup>4</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provide 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.”<sup>5</sup>

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

“(b) 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.”

## **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for it to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time she received the direct deposits in question she knew or should have known that the payment was incorrect.<sup>6</sup> The overpayment of compensation occurred in this case when appellant accepted direct deposits after she returned to work on June 25, 2006, until the period ending August 5, 2006. Consequently,

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<sup>3</sup> 5 U.S.C. § 8129(a)-(b).

<sup>4</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> *See Robin O. Porter*, 40 ECAB 421 (1989).

for appellant to be found at fault in creating the overpayments, the evidence must establish that, when she accepted these direct deposits she knew or should have been expected to know that each check included a payment for a period of wage loss to which she was not entitled.<sup>7</sup> With regard to her receipt of the July 7, 2006 direct deposit, the Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>8</sup> Therefore, for receipt of the July 7, 2006 direct deposit, the Board finds that appellant was without fault. While appellant accepted the overpayment by gaining control of the funds deposited into her checking account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account.

With respect to the subsequent direct deposits covering the period through August 5, 2006, the record contains no evidence that appellant had been apprised by the Office, as of the time of the direct deposits, what periods were covered by the deposits or that she was not entitled to accept compensation payments after a return to work.<sup>9</sup> If such evidence existed which established that appellant had notice that she was not to accept a payment after return to work, this would establish fault. However, the record does not contain any evidence that any letter or other information accompanied or preceded the direct deposits which would have reasonably put appellant on sufficient notice. Further, appellant was not informed in either the initial acceptance letter or the EN1032 forms the Office sent her that the Office actually told her to return any check received or that she would not be entitled to any payments after a return to work. As noted above, in determining whether an individual is without fault, the Office must consider an individual's understanding of the obligation to return payments which were not due. If there is no evidence which indicates that an individual knew or should have known at the time the incorrect payment was accepted that the payment was not due, the Office cannot meet its burden of proof in finding that such individual was at fault in accepting an incorrect payment. There is no other evidence of record which put appellant on notice that the July 21, 2006 direct deposit and those issued to her until August 5, 2006, were for a period of time to which she was not entitled to compensation. For this reason, the Office has not met its burden of proof in establishing that she was at fault in creating the portion of the overpayment beginning July 21

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<sup>7</sup> *Id.*; see also *Michael R. Nixon*, 40 ECAB 398 (1988); *Marlene R. Pavlo*, 38 ECAB 716 (1987) (where the Board found that appellant was without fault where the record contained no evidence indicating that she was apprised by the Office, as of the time she received the compensation check, of the specific period the check covered so as to put her on notice that she was being paid incorrectly for a period of time during which she worked).

<sup>8</sup> The Board has found appellant 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 *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). 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.

<sup>9</sup> *Robin O. Porter*, *supra* note 6.

continuing through August 5, 2006, while appellant was working at the employing establishment.

For these reasons, the Board finds that, under the circumstances of this case the Office improperly found that appellant was at fault in the creation of the overpayment in the amount of \$2,283.21. The September 25, 2007 Office decision is reversed and the case is remanded to the Office for determination of whether appellant is entitled to waiver of the overpayment.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,283.21 for the period June 25 through August 5, 2006. The Office's finding of fault for the overpayment from June 25 to August 5, 2006 decision is reversed and the case is remanded to the Office for a determination on the issue of whether appellant is entitled to waiver of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 25, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed regarding the amount of overpayment and reversed regarding the finding of fault.

Issued: May 14, 2009  
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