

FACTUAL HISTORY

On November 20, 1991 appellant, then a 31-year-old letter sorting machine operator, filed a claim alleging that her bilateral carpal tunnel syndrome was a result of her federal employment. The Office accepted her claim for bilateral carpal tunnel syndrome, approved surgery and paid compensation on the periodic rolls after appellant sustained a recurrence of total disability on September 10, 2001.

On April 12, 2002 appellant's physician released her to return to limited duty for four hours a day. On May 28, 2002 he increased her hours to eight. The employing establishment confirmed appellant's return to work for four hours a day on May 15, 2002 and for eight hours a day on May 28, 2002. The Office paid compensation for temporary total disability on the periodic rolls through June 15, 2002.²

On November 18, 2003 the Office made a preliminary determination that appellant received an overpayment of \$2,207.13 from May 15 through June 15, 2002. The Office also made a preliminary determination that she was not at fault in the matter. The Office advised her that if she believed that she should receive a waiver instead of having to repay the overpayment, she should submit a detailed explanation of her reasons, complete an enclosed overpayment recovery questionnaire and attach financial documents to support the income and expenses shown on the questionnaire. The Office notified appellant that, if she failed to furnish the information requested within 30 days, it would deny waiver.

In a decision dated January 13, 2004, the Office finalized its preliminary determinations and denied waiver of recovery. The Office noted that it had received no response to its preliminary decision, no disagreement from appellant and no financial information of any kind.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act places limitations on the right to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.³ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁴ "Temporary total disability" is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.⁵

² The Office paid no further compensation because she was again working full time at the same grade and step and had no wage loss as a result of her employment injury.

³ 5 U.S.C. § 8116(a).

⁴ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

⁵ 20 C.F.R. § 10.400(b) (1999).

ANALYSIS -- ISSUE 1

After a recurrence of total disability on September 10, 2001 appellant received compensation for temporary total disability because she was unable to return to her position and was unable to earn equivalent wages or perform other gainful employment. The Office paid this compensation on the periodic or automated rolls. When she returned to work for four hours a day on May 15, 2002 at the same grade and step, she was no longer entitled to compensation for temporary total disability. When she returned to work for eight hours a day on May 28, 2002 she was no longer entitled to compensation for any kind of disability because she had no wage loss as a result of her employment injury. An overpayment thus arose when the Office mistakenly continued to pay compensation for temporary total disability on the periodic rolls through June 15, 2002. The Board affirms the Office's January 13, 2004 decision, on the issue of fact of overpayment.

In its November 18, 2003 preliminary determination, the Office properly showed its calculations. From \$2,873.23 in total gross compensation from May 15 through June 15, 2002, the Office subtracted \$565.67 for compensation to which appellant was entitled for the loss of four hours a day through May 27, 2003. The Office also credited \$100.43 in premiums for health and life insurance, which were deducted from compensation and which, therefore, did not contribute to the overpayment. This left an overpayment of \$2,207.13. The Board affirms the Office's January 13, 2004 decision on the issue of amount of overpayment.

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.⁶ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁷

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the

⁶ *Id.* § 10.433(a).

⁷ *Id.* § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* § 10.437(b).

repayment schedule, if necessary.⁸ Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁹

ANALYSIS -- ISSUE 2

The record shows that the Office properly mailed its November 18, 2003 preliminary determinations and request for financial information to appellant's last known address. Appellant notified the Office of this address on July 10, 2003. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹⁰ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹¹ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. This is known as the "mailbox rule."¹²

Under the mailbox rule, appellant is presumed to have received the Office's November 18, 2003 preliminary determinations and request for financial information. Because the record shows no response from appellant within 30 days -- indeed, no response through January 13, 2004 -- the Office properly denied waiver of recovery. The Board will affirm the Office's January 13, 2004 decision, on the issue of waiver of recovery.¹³

CONCLUSION

The Board finds that appellant received an overpayment of \$2,207.13 in compensation from May 15 through June 15, 2002, when she returned to work but continued to receive compensation for temporary total disability. As she was not at fault in the matter, the Office properly requested the financial information needed to determine whether waiver was warranted. With no response from appellant, the Office properly denied waiver of recovery.

⁸ *Id.* § 10.438(a).

⁹ *Id.* § 10.438(b).

¹⁰ *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

¹¹ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹² *Larry L. Hill*, 42 ECAB 596 (1991) (the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike). See generally Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

¹³ The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled. 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because collection of the overpayment in this case cannot be made by adjusting later payments, as appellant returned to work and is no longer entitled to compensation for wage loss, but must be made by other means, the Board lacks jurisdiction to review the issue of recovery.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member