

**United States Department of Labor
Employees' Compensation Appeals Board**

ELI DELESTON, Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
AIRPORT, Oakland, CA, Employer**

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**Docket No. 04-1908
Issued: February 24, 2005**

Appearances:
Eli Deleston, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 26, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated June 15, 2004, finding that an overpayment occurred in the amount of \$1,419.46 and that appellant was at fault in the creation of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,419.46; and (2) whether appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On April 4, 2003 appellant, then a 41-year-old security screener, filed a notice of traumatic injury alleging that he injured his left knee while lifting baggage in the performance of duty. The Office accepted his claim for left knee strain. The Office entered appellant on the periodic rolls on July 9, 2003. In the form letter, the Office advised him that the period of payment was shown on each check and that, if a payment included monies for a period after a

return to duty, there would be an overpayment. Appellant completed a form requesting that his compensation payments be directly deposited into his checking account on May 20, 2003.

Appellant underwent a left knee arthroscopy on July 30, 2003. His attending physician released him to light duty and the Office referred him for vocational rehabilitation services. In a report dated March 29, 2004, the vocational rehabilitation counselor informed the Office that appellant began working on March 24, 2004 in a temporary position earning \$25.00 per hour.

In a preliminary determination dated May 5, 2004, the Office found that appellant had received an overpayment in the amount of \$1,419.46. The Office stated that the overpayment occurred as appellant returned to work on March 24, 2004 and received compensation for total disability for the period March 21 through April 17, 2004. The Office found that he was at fault in the creation of the overpayment as he knew or should have known that payment received after March 24, 2004 was not due. The Office allowed appellant 30 days to submit evidence or pursue an oral hearing.

In a separate memorandum to file, the Office stated that the period of payments were shown on all checks and that appellant should have known the payment received was incorrect. The Office also noted that the July 9, 2003 letter described his payments and advised him that an overpayment might occur on a return to work.

The record contains a daily roll payment form listing the period to be paid from March 24 to April 17, 2004 and stating that appellant received an overpayment of \$1,508.04 for this period which was reduced by a health benefit credit of \$78.98 and a basic life insurance credit of \$9.60 for a net overpayment of \$1,419.46.

Appellant did not respond to the preliminary notice. By decision dated June 15, 2004, the Office finalized the finding of an overpayment in the amount of \$1,419.46 and concluded that he was at fault in the creation of the overpayment. The Office instructed him to forward a check in the amount of \$1,419.46.¹

On appeal to the Board in a letter dated July 19, 2004, appellant stated that the Office directly deposited a check into his account in the amount of \$1,419.46 nearly a month after his vocational rehabilitation counselor informed the Office that he had returned to work on March 25, 2004. He stated his correct return to work date was March 23, 2004. Appellant disagreed with the Office's finding of fault and requested waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act² defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee

¹ Following the Office's June 15, 2004 decision, the Office issued a wage-earning capacity determination on June 22, 2004. Appellant requested a review of the written record regarding this decision on June 26, 2004. As this decision is currently before the Branch of Hearings and Review, the Board will not review the June 22, 2004 in conjunction with this appeal as it is in an interlocutory posture. 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193, § 8116(a).

is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ The regulation provide that “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.”⁴

ANALYSIS -- ISSUE 1

The Office found that an overpayment was created in this case when appellant returned to work on March 24, 2004 and continued to receive compensation for total disability. The Office issued a check covering the period March 21 through April 17, 2004 which resulted in an overpayment of \$1,419.46. Appellant has not disputed that he received payment for this period from the Office and asserted on appeal that the Office directly deposited a check for \$1,419.46⁵ into his checking account nearly a month after March 25, 2004. The Board finds that an overpayment occurred in this case when the Office issued a check covering a period after appellant returned to work on March 23, 2004.

In regard to the amount of the overpayment, the Office found that appellant returned to work on March 24, 2004 and was, therefore, entitled to compensation for the period March 21, 2004 until his return to work. On appeal appellant noted the fact that he had returned to work on March 23, 2004. On remand the Office should recalculate the amount of the overpayment based on appellant’s appropriate return-to-work date.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides: Adjustment or recovery by the United States may not be made when 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.”

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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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 he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or

³ 5 U.S.C. § 8116(a).

⁴ 20 C.F.R. § 10.500.

⁵ The Board notes that this is the amount that the Office alleged appellant was overpaid, not the amount that the Office alleged it paid appellant.

⁶ 5 U.S.C. § 8129(b).

should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁷

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 determined that appellant had accepted a payment which he should have known was incorrect in the preliminary finding of overpayment dated May 5, 2004 based on the third criterion above, namely, that he accepted a payment which he knew or should have known to be incorrect. The Office noted that appellant had returned to work and that in the July 9, 2003 form letter, the Office had advised appellant that the period of payment was shown on each check and that, if a payment included monies for a period after a return to duty, there would be an overpayment. Where the Office finds a claimant at fault in creating the overpayment because he or she accepted a payment which the individual knew of should have been expected to know was incorrect, it must establish at the time the claimant received the compensation check in question, the claimant knew or should have known that the payment was incorrect.⁹

The record establishes that the payment from the Office was deposited directly into appellant's bank account. The Board has noted that a direct deposit does not indicate "the period for which payment is made."¹⁰ The Board has distinguished such a situation from one in which a claimant receives a check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation but decides nonetheless to cash or deposit the check.¹¹ The Board has found that the mere direct deposit by the Office is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the check before it was deposited to his account.¹² In the present case, there is no evidence of record supporting that appellant had an opportunity to review written bank statements and determine that the deposit was made prior to the Office's preliminary determination of fault.¹³ The Board finds that appellant was not at fault with respect to the overpayment beginning March 23, 2004. The case will be remanded for the Office to consider waiver of this portion of the overpayment.

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

⁹ *Lorenca Rodriguez*, 51 ECAB 295, 298 (2000).

¹⁰ *Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

¹¹ *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002); *Leotis Hall*, (Docket No. 02-2140, issued February 5, 2004).

¹² *See, e.g., William F. Salmonson*, *supra* note 11.

¹³ *But see, William E. McCarty*, 54 ECAB ____ (Docket No. 03-308, issued April 14, 2003); *George A. Hirsch*, 47 ECAB 520, 525-26 (1996).

CONCLUSION

The Board finds that the record establishes that the Office issued appellant a payment for temporary total disability after he returned to work on March 23, 2004. Therefore, an overpayment of compensation was created as appellant had returned to work and continued to receive compensation for total disability. He is found not to be at fault with respect to the direct deposit because there is no evidence that he should have known that the payment was incorrect.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2004 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact of overpayment and remanded to accurately determine the amount of the overpayment and for consideration of waiver.

Issued: February 24, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member