



## ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$1,115.12, for the period September 22 to October 4, 2003; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus, precluding waiver of recovery.

## FACTUAL HISTORY

On December 27, 2000 appellant, then a 48-year-old flat sorter keyer/distribution clerk, sustained an injury to her back and lower extremities while casing mail. The Office accepted her claim for aggravation of degenerative disc disease and paid appropriate benefits.<sup>2</sup> Appellant was eventually retained on the periodic rolls. She returned to full-time work on September 22, 2003.

By letter dated December 19, 2002, the Office advised appellant that effective December 1, 2002 she would receive regular compensation payments for temporary total disability. She was advised to notify the Office immediately if she returned to work. The Office noted that each compensation payment showed the period covered by the payment and if appellant worked for any portion of this period, she should return the payment to the Office.

On September 2, 2003 appellant signed and completed Form EN1032-0494, indicating that she did not work in the past 15 months.

In a letter dated September 23, 2003, appellant's attorney advised that she returned to work on September 22, 2003.

By letter dated January 8, 2004, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$1,115.12, because she had returned to work on September 22, 2003 but continued to receive compensation for total disability until October 4, 2003. The Office found that appellant was without fault in creating the overpayment. The Office asked her to submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment and advised her of her right to request a prerecoupment hearing or a telephone conference.

In a letter dated January 9, 2004, appellant's attorney requested a hearing on the January 8, 2004 preliminary notice of overpayment. A completed Form OWCP-20 dated February 3, 2004 was also submitted. By decision dated May 24, 2004, an Office hearing representative set aside the January 8, 2004 preliminary overpayment decision, finding that a new preliminary overpayment decision should be issued, finding that appellant was at fault in acceptance of the overpayment.

By letter dated June 3, 2004, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$1,115.12, because she had returned to work

---

<sup>2</sup> The record reflects that, although appellant originally filed a recurrence claim of her April 2, 1999 work injury, claim number 030234535, the Office treated the recurrence claim as a claim for a new traumatic injury occurring on December 27, 2000 under claim number 032008317.

on September 22, 2003, but continued to receive compensation for total disability until October 4, 2003. The Office advised that appellant was found to be with fault in the creation of the overpayment because she accepted payment that she knew or should have known to be incorrect.

By decision dated August 3, 2004, the Office found that appellant's actual wages as a mail processing clerk to which she returned to on September 22, 2003 fairly and reasonably represented her wage-earning capacity.<sup>3</sup>

By decision dated August 24, 2004, the Office finalized the overpayment determination in the amount of \$1,115.12 and the finding of fault.<sup>4</sup> The Office further determined that the overpayment sum of \$1,115.12 could be repaid in full within 30 days.

On appeal appellant's attorney argues that the Office's August 24, 2004 decision is void as appellant timely responded to the Office's preliminary notice of overpayment by requesting a hearing in a letter dated July 6, 2004. The Board's jurisdiction, however, is limited to a review of that evidence which was before the Office at the time of its final decision. The record reflects that appellant's July 6, 2004 letter requesting a hearing on the Office's preliminary notice of overpayment was received by the Office on October 14, 2004. As this evidence was not before the Office at the time of the issuance of the August 24, 2004 decision, the Board may not consider this evidence.<sup>5</sup>

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

Section 8129(a) of the Federal Employees' Compensation Act<sup>6</sup> provides in pertinent part:

“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.”

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.<sup>7</sup>

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

The record reveals that appellant returned to work on September 22, 2003 but continued to receive disability compensation from the Office until October 4, 2003. The Office determined

---

<sup>3</sup> As previously noted, appellant has not appealed this decision to the Board.

<sup>4</sup> The Board notes that the Office found that appellant returned to work on June 3, 2004; however, this return to work date is a typographical error as she returned to work on September 22, 2003.

<sup>5</sup> 20 C.F.R. § 501.2(c).

<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8116(a).

that the amount of money appellant earned for the period September 22 to October 4, 2003 totaled \$1,183.46 and, after deducting proportional amounts for her standard deductions, an overpayment existed in the amount of \$1,115.12. Because she received regular full-time wages from the employing establishment during the period September 22 to October 4, 2003, she was not entitled to disability compensation from the Office for the same period. The record establishes that appellant received an overpayment of compensation in the amount of \$1,115.12.

### **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. 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. 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 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).<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that she was at fault in creating the overpayment, the Office must show that, at the time she received the compensation checks in question, she knew or should have known that the payment was incorrect.<sup>9</sup> With respect to whether an individual is with fault, section 10.433(b) provides:

“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.”<sup>10</sup>

In this case, appellant returned to work on September 22, 2003 and notified the Office of her return to work on September 23, 2003. The Office, however, continued to pay her temporary total disability compensation during the period September 22 through October 4, 2003. Under the circumstances of this case, the Office failed to provide sufficient explanation for the fault determination. The June 3, 2004 preliminary determination stated that appellant should have realized she was not entitled to compensation for the period September 22 through October 4,

---

<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> See *Diana L. Booth*, 52 ECAB 370 (2001); *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>10</sup> 20 C.F.R. § 10.433(b).

2003, as she was advised by the December 19, 2002 EN1049 form that, once she returned to work, she was not entitled to any further compensation and that she should return any compensation checks received after returning to work even if she worked for part of the period for which compensation was paid. The Office, however, failed to acknowledge the circumstances of this case and how appellant should have been aware upon acceptance of the payment that she was not entitled to such payment in view of the brief period of time between her return to work and the issuance of the payment in question.<sup>11</sup> The Office's December 19, 2002 EN1049 letter indicated that she was placed on the periodic compensation rolls effective December 1, 2002 and that her first compensation payment would be from December 1 to December 28, 2002 and continue every 28 days. After appellant signed and completed the form EN1032-0494 on September 2, 2003 indicating that she did not work in the past 15 months, she returned to work on September 22, 2003 and notified the Office of her return to work in a September 23, 2003 letter from her attorney. There is insufficient evidence that the Office provided appellant with relevant evidence regarding her entitlement to compensation after it notified her of her placement on the periodic compensation rolls in December 19, 2002 or that she knew or should have known that she had accepted compensation to which she was not entitled.

The Office bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment of compensation.<sup>12</sup> The Office's assertion that appellant should have known that she was not entitled to compensation from September 22 to October 4, 2002 since she was receiving her salary for full-time employment during the same period is not persuasive because she had not claimed any compensation after she returned to work. Moreover, the record contains no evidence that the Office had sufficiently explained, at the time appellant accepted the payments, what evidence would have put her on notice to establish that she knew or should have known that she was accepting an incorrect payment of compensation or provided other relevant evidence regarding her entitlement to compensation. Thus, the Board finds that the Office did not meet its burden of proof to establish that appellant was at fault in creating the overpayment.

The Board notes that the record contains a completed overpayment recovery questionnaire. Because the Board finds that appellant was without fault in accepting the overpayment of benefits, the case will be remanded to the Office for a determination of whether appellant is entitled to a waiver of recovery of the overpayment.

### CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,115.12, during the period September 22 to October 4, 2003 and she was without fault in accepting the overpayment. The case will be remanded to the Office for consideration of appellant's request

---

<sup>11</sup> See *Porter, supra* note 9 (where the Board held that an Office form letter announcing the terms and condition of compensation payments was of no evidentiary value in establishing what appellant knew or should have known with regard to the receipt of a subsequent payment issued several months after issuance of the Office form, since the form letter contained no information regarding the period covered by any such subsequent payment).

<sup>12</sup> *Danny L. Paul*, 46 ECAB 282 (1994).

for waiver. Following such further development of the evidence as deemed necessary, the Office shall issue a *de novo* decision on the issues of waiver and recovery of overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 24, 2004 is affirmed in part and reversed in part, and the case is remanded for further action consistent with this decision.

Issued: May 10, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member