

Office accepted a left shoulder strain, left shoulder impingement syndrome and left shoulder tendinitis. Appellant worked intermittently and then stopped working on July 3, 2001 and began receiving compensation for temporary total disability.

The record indicates that appellant accepted a modified distribution clerk position and returned to full-time work on March 19, 2003. She filed claims for compensation Form CA-7 for three-hour periods on intermittent dates beginning May 19, 2003. On June 14, 2003 a compensation payment of \$2,126.34 was direct deposited into appellant's bank account. The payment represented temporary total disability from May 18 to June 14, 2003.

In a letter dated January 26, 2004, the Office advised appellant of a preliminary determination that an overpayment of \$1,338.59 was created. The Office stated that appellant was paid for temporary total disability from May 18 to June 14, 2003, but had returned to work on May 19, 2003. With respect to fault, the Office made a preliminary determination that appellant was at fault because she should have known she was not entitled to receive temporary total disability after she had returned to work. The Office's calculations as to the amount of the overpayment state that appellant received \$2,391.00 in gross compensation. This amount was reduced by \$85.39 for compensation owed on May 18, 2003 and \$702.36 for intermittent compensation from May 19 to July 3, 2003. The Office further subtracted \$210.44 in health benefits premiums and \$54.22 in life insurance premiums deducted in the June 14, 2003 payment, for an overpayment of \$1,338.59.

By decision dated May 4, 2004, the Office finalized its preliminary determination that an overpayment of \$1,338.59 was created and that appellant was at fault in creating the overpayment. Appellant was directed to submit a payment in the amount of \$1,338.59.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death.”¹

¹ 5 U.S.C. § 8116.

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to work as a modified distribution clerk on May 19, 2003. She received a compensation payment for temporary total disability for the period May 18 to June 14, 2003. Since appellant was working, she was not entitled to temporary total disability and an overpayment of compensation was created.

With respect to the amount of the overpayment, the Office's calculations refer to the gross compensation received by appellant, as well as payments for health and life insurance premiums. The overpayment amount should be calculated based on the net payment received of \$2,126.34, not the gross compensation.² It is also noted that the Office reports the amount of compensation owed through July 3, 2003, although the overpayment period is from March 18 to June 14, 2003. The Office should make a more appropriate explanation of how the overpayment was calculated. The overpayment is the difference between the net compensation received on June 14, 2003 of \$2,126.34 and the net compensation that appellant should have been for this period based on the claimed hours for physical therapy. If the Office intends to offset the amount of overpayment by the amount of an underpayment of compensation for the period June 15 to July 3, 2003, then it should make an appropriate calculation with a clear explanation. On remand, the Office should clarify its calculations as to the overpayment amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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."³

Section 10.433(a) of the Office's regulations provides that the Office:

"[M]ay 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 in 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; (2) [f]ailed to provide information which he or she knew or should have known to be material; or (3) [a]ccepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)"⁴

² *Kenneth E. Rush*, 51 ECAB 116 (1999).

³ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

⁴ 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines 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.⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, namely, that she accepted a payment, which she or she knew or should have known to be incorrect. The Office stated that appellant should have known that she was not entitled to full compensation at the same she was working full time. The payment in this case, however, was a direct deposit payment into her bank account. The direct deposit case is distinguishable from those in which a claimant returns to work, subsequently receives a compensation check in the mail covering a period of employment, knows or should know that she is not entitled to such compensation but decides nonetheless to cash or deposit the check.⁶ There was no information provided to appellant as to the specific period covered by the payment. Appellant had been receiving direct deposit compensation payments for a period of time with no specific knowledge as to the period covered for each payment. When a claimant has a further payment deposited into her account after a return to work, the Office cannot make a finding of fault without additional probative evidence that she accepted a payment she knew or should have known was incorrect.⁷ The Office did not present such evidence in this case.

The Board therefore finds that the Office did not establish that appellant was at fault and therefore not entitled to waiver of the overpayment. The case will be remanded for a proper determination as to waiver. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The evidence establishes that an overpayment of compensation was created, but the Office should clarify its calculations as to the amount. The Office did not establish that appellant was at fault in creating the overpayment and the case is remanded for consideration of waiver of the overpayment.

⁵ 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

⁶ See *William F. Salmonson*, 54 ECAB 152 (2002).

⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2004 is affirmed with respect to fact of overpayment; it is reversed with respect to a finding of fault and remanded for further action consistent with this decision.

Issued: March 10, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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