

Appellant stopped work on June 11, 2003 and was placed on the periodic rolls. On August 26, 2003 the Office notified her of her entitlement to compensation and informed her of her obligation to return to the Office any payment received for any period during which she was employed. Appellant returned to work on a full-time basis on June 13, 2004. However, she received compensation from the Office for the period June 13 through July 7, 2004.

Appellant stopped work on July 10, 2004 and was returned to the periodic rolls, after the Office accepted her July 15, 2004 claim for recurrence of disability.

A computer generated compensation payment history (ESAFEC), dated December 15, 2004, reflected a payment to appellant, made by automatic deposit on July 10, 2004 for the period June 13 through July 10, 2004, in the net amount of \$1,452.00. An overpayment calculation worksheet dated December 15, 2004 reflected that, for the period June 13 through July 10, 2004, she had been paid the net amount of \$1,452.00, when she should not have received any compensation, resulting in an overpayment for that period in the amount of \$1,452.00.

In a preliminary overpayment decision dated December 28, 2004, the Office found that appellant had received an overpayment of compensation for the period June 13 through July 10, 2004, due to the fact that she had remained on the rolls, even though she had returned to work on June 13, 2004. The Office also made a preliminary determination of fault in the creation of the overpayment, finding that she retained payments that she knew or should have known were erroneous. The Office advised appellant of actions available to her if she believed that she should receive a waiver instead of repaying the overpayment, including requesting that the Office issue a final decision based on the written evidence currently of record. It further advised her to submit a detailed explanation of her reasons for seeking a waiver; a completed Form OWCP-20; and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

On January 24, 2005 appellant requested that the Office issue a decision on the issues of fault and possible waiver based on the written evidence. In an overpayment recovery questionnaire dated January 24, 2005, she stated that, after returning to work on June 13, 2004, she suffered a recurrence of disability on July 14, 2004. Appellant continued to work for four weeks before stopping working completely. She stated that she believed that the payment she received in the amount of \$1,452.00, was for the recurrence claim. Appellant listed her monthly income as \$1,350.00 and her expenses as approximately \$1,400.00.

By decision dated May 12, 2006, the Office found that an overpayment existed in the amount of \$1,452.00 and that appellant was at fault in the creation or acceptance of the overpayment. The Office further determined that she should repay the amount at the rate of \$100.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained

¹ 5 U.S.C. §§ 8101-8193.

while in the performance of her duty.² When an overpayment has been made to an individual 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 the individual is entitled.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,452.00, for the period June 13 through July 10, 2004.

Appellant returned to full-time employment on June 13, 2004 and was, thus, no longer entitled to receive compensation benefits after that date. However, she received compensation from the Office for the period June 13 through July 10, 2004 in the net amount of \$1,452.00. Since appellant was not entitled to receive compensation from the Office after her return to full-time employment, the Office properly determined that she received an overpayment of compensation in the amount of \$1,452.00, for the period June 13 through July 10, 2004.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that 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 this subchapter or would be against equity and good conscience. Section 10.433 of the Office's implementing regulation⁵ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

- (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.

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.⁶

² 5 U.S.C. § 8102(a).

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433.

⁶ 20 C.F.R. § 10.433(b).

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 it to establish that she was at fault in creating the overpayment the Office must show that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.⁷

The record establishes that the July 10, 2004 payment from the Office was deposited directly into appellant's bank account. The record further establishes that she was not notified of the incorrect payment until December 28, 2004, when the Office issued its preliminary overpayment decision. 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 she is not entitled to such compensation but decides nonetheless to cash or deposit the check.⁸ The Board has found that the mere direct deposit by the Office is not sufficient to establish fault by a claimant who has had no opportunity to make a decision on the check before it was deposited to her account. Appellant had no reason to suspect at the time such check was deposited on July 10, 2004 that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.⁹ Furthermore, because the funds were deposited directly into her bank account, appellant was not in a position to immediately decline acceptance of the amounts paid by the Office. Thus, given the circumstances of this case, the Board finds that she was not at fault in either creating or accepting the overpayment.¹⁰ Accordingly, the Office's May 12, 2006 finding of fault is reversed. The case is remanded to the Office to determine whether appellant is eligible for waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,452.00, for the period June 13 through July 10, 2004. The Board also finds that she was without fault in either the creation or the acceptance of the overpayment.

⁷ See *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006). See also *Lorenca Rodriguez*, 51 ECAB 295, 298 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

⁸ *William F. Salmonson*, 54 ECAB 152 (2002); *Leotis Hall* (Docket No. 02-2140, issued February 5, 2004).

⁹ The Board has generally found that a claimant is not at fault for accepting the first incorrect payment, because the requisite knowledge is lacking at the time of deposit. See *Tammy Craven*, *supra* note 7.

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further action consistent with this decision.

Issued: October 5, 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