



cervical degenerative disc disease at C5-7, right upper extremity radiculopathy and tension headaches. The record indicates that appellant worked intermittently in a light-duty capacity for four to six hours a day and stopped work on January 26, 2006. The Office paid appropriate compensation for all relevant periods. Appellant was placed on the periodic rolls on June 30, 2005 receiving a net amount of \$2,723.52 every 28 days. The compensation payments were direct deposited.

In April 14 and May 6, 2005 letters, appellant indicated that he received direct deposit payments and questioned how his compensation was computed.<sup>1</sup> The direct deposit payments received were noted as being for the amounts of \$3,683.84, \$6,617.44, \$2,036.85 and \$2,590.20. In a May 13, 2005 call to the Office, appellant was informed that he was on the period rolls and would receive a direct deposit on May 14, 2005. When he did not receive the May 14, 2005 payment, appellant called the Office on May 19, 2005 and was informed that he would receive his first check from the periodic rolls on June 11, 2005. He was advised that a supplemental check would be issued on May 27, 2005.

In a June 6, 2005 call to the Office, appellant stated that he got paid twice and was worried he would not get a payment for the next month. At that time the Office advised appellant that an overpayment existed, the details of which would be forthcoming.<sup>2</sup> A June 24, 2005 memorandum indicated that a payment of \$2,590.20 for the period April 17 through May 14, 2005 had been deposited into appellant's account on May 24, 2005 but was not reflected in appellant's payment history. On May 19, 2005 the Office redeposited a check of \$2,590.20 for the period April 17 through May 14, 2005. A June 27, 2005 memorandum indicated that an emergency payment of \$6,617.44 for the period November 5, 2004 through February 24, 2005 had been deposited into appellant's account on March 28, 2005 but was not reflected in his payment history. On June 27, 2005 the Office deposited a duplicate payment of \$6,617.44 for the period November 5, 2004 through February 24, 2005 into appellant's account.

In a July 14, 2005 call received by the Office, appellant advised that he received his payment advisory letter regarding the periodic rolls and that he would send money back for duplicative payments received.

By letter dated July 22, 2005, the Office advised appellant that it issued two incorrect duplicative payments in the amount of \$6,617.44 for the period November 5, 2004 to February 24, 2005 and \$2,590.20 for the period April 17 to May 14, 2005. Appellant was advised to return the payment amounts by personal check or money order.

By letter dated August 11, 2005, the Office advised appellant of a preliminary determination of a total overpayment of \$9,207.64<sup>3</sup> for two duplicative payments for the periods

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<sup>1</sup> He additionally requested a refund on his health insurance benefits which were deducted from his 2005 paychecks.

<sup>2</sup> The Office additionally indicated that a check for the amount owed for appellant's health benefits would be refunded directly to him, as verified in a July 12, 2005 letter. On July 13, 2005 a check in the amount of \$625.42 was sent to appellant for an overdeduction of health benefits.

<sup>3</sup> Although the Office stated that the total overpayment amount was \$9,207.60, that amount is a mathematical error as the correct amount is \$9,207.64 (\$2,590.20 plus \$6,617.44).

April 17 through May 14, 2005 (\$2,590.20) and November 5, 2004 through February 24, 2005 (\$6,617.44). A preliminary determination was made that appellant was at fault in creating the overpayment as he was informed on June 30, 2005<sup>4</sup> that the overpayments had occurred and had indicated that he noticed such duplicative payments in his account. The Office advised appellant of the actions he could take regarding the overpayment and requested that he complete the enclosed OWCP-20 form as the financial information was relevant to waiver and repayment issues.

In an August 29, 2005 letter, appellant advised that he was in debt and, if an overpayment had occurred, he was without fault and it would be a financial hardship for him to repay it. He stated that he “neither induced such an overpayment nor did [he] knowingly accept same.” On September 10, 2005 appellant requested a prerecoupment hearing, which was held on February 23, 2006. He indicated that he took out a loan for living expenses prior to receiving compensation. Once his checks started coming in, the monies were automatically deducted for expenses and used to pay off his debts. Appellant stated that he did not know what the checks were for and was unaware he was paid duplicative payments. He stated that he did not recall a telephone conversation with a claims examiner on June 30, 2005 concerning receipt of duplicative payments. Appellant indicated that he was hospitalized for an epidural on June 22, 2005 and was not in “any condition to, you know, answer the [tele]phone.” Appellant’s spouse testified that, during the period in question, appellant would answer the telephone but not remember he had been on the telephone or what was said.

In an overpayment recovery questionnaire dated March 2, 2006, appellant listed his monthly income as \$2,200.00, total monthly expenses of \$2,785.00<sup>5</sup> and funds of \$395.00. He reiterated that the overpayment was through no fault of his own. The Office received a financial statement from the Internal Revenue Service dated July 2005 indicating that appellant owed \$8,044.42 documentation that appellant’s daughter was enrolled in college and appellant had borrowed a \$5,500.00 educational loan a deferred presentment agreement for \$300.00 and a deposit agreement for \$300.00 from check cashing locations a copy of a June 22, 2005 consent to surgery and copies of appellant’s letters of April 14 and May 6, 2005, which noted his receipt of the Office’s direct deposits on March 25 and 28 and April 8 and 15, 2005 and which requested benefit statements and a health benefits refund for the year 2005.

By decision dated May 11, 2006, an Office hearing representative finalized the \$9,207.64 overpayment for which appellant was at fault and not eligible for waiver. The Office found that appellant could repay the overpayment by deducting \$300.00 each month from continuing compensation until the overpayment was recovered.

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<sup>4</sup> The record is devoid of any evidence of a June 30, 2005 telephone conversation with appellant.

<sup>5</sup> This includes: \$1,000.00 rent; \$450.00 food; \$20.00 clothing; \$335.00 utilities; and monthly payments of \$200.00 for a \$7,054.00 Internal Revenue Service (IRS) debt; \$430.00 for an \$11,285.00 car debt; \$100.00 for Household Card Services debt of \$1,336.00; \$150.00 for a \$4,642.00 Sears debt; and \$100.00 for a \$3,500.00 MasterCard debt.

### **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 that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>6</sup> When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.<sup>7</sup>

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

The record establishes that the Office deposited compensation payments into appellant's account on March 28, 2005, \$6,617.44 for the period November 5, 2004 through February 24, 2005 and on May 24, 2005, \$2,590.20 for the period April 17 through May 14, 2005. These payments represented the total compensation due appellant for the periods in question. The Office deposited duplicate compensation checks in the amount of \$2,590.20 on May 19, 2006 and \$6,617.44 on June 27, 2006 for the same periods. Since appellant was not entitled to duplicate compensation for the periods November 5, 2004 through February 24, 2005 and April 17 through May 14, 2005, an overpayment of compensation of \$9,207.64 was created.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act provides as follows: 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.<sup>8</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>9</sup>

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>10</sup>

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<sup>6</sup> 5 U.S.C. § 8116(a).

<sup>7</sup> See *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>10</sup> *Kenneth E. Rush*, 51 ECAB 116 (1999).

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“(b) 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>11</sup>

### ANALYSIS -- ISSUE 2

The Office determined that appellant was not without fault because he accepted payments he knew or should have known were incorrect. The factual history of the case indicates that, prior to being placed on the periodic rolls, appellant received compensation payments through direct deposit on March 28, May 19 and 24 and June 27, 2005 for \$6,617.44, \$2,590.20, \$2,590.20 and \$6,617.44, respectively. The May 24 and June 27, 2005 direct deposits were duplicative of deposits previously made to appellant on March 28 and May 19, 2005.

The Board has found the claimant to be at fault in cases where he or she is receiving compensation payments through direct deposit, which involve a series of payments over several months, with clear knowledge that the payments are incorrect.<sup>12</sup> However, the Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.

The record establishes that the May 19 and 24, 2005 payments from the Office in the amount of \$2,590.20 were deposited directly into appellant's bank account. On June 6, 2005 appellant called the Office, noting that he received duplicative payments through direct deposit from the Office. As previously noted the May 24, 2005 deposit was a duplicative payment. The record further establishes that appellant was first notified on June 6, 2005 of an overpayment. 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.<sup>13</sup> 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 his account. Appellant had no reason to suspect at the time such duplicate payment was deposited on May 24, 2005 that the Office had issued an incorrect or duplicative payment, given that this was the first incorrect

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<sup>11</sup> 20 C.F.R. § 10.433(b).

<sup>12</sup> See *Otha J. Brown*, 56 ECAB \_\_\_\_ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB \_\_\_\_ (Docket No. 03-2265, issued November 9, 2004); *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>13</sup> See *Tammy Craven*, 57 ECAB \_\_\_\_ (Docket No. 05-249, issued July 24, 2006); *William F. Salmonson*, 54 ECAB 152 (2002).

payment made by the Office.<sup>14</sup> Furthermore, because the funds were deposited directly into his bank account, appellant was not in a position to immediately decline acceptance of the May 24, 2005 amounts paid by the Office. Thus, the Board finds that he was not at fault in either creating or accepting the overpayment of the duplicate deposit of May 24, 2005.<sup>15</sup>

The record also establishes that the March 8 and June 27, 2005 payments from the Office in the amount of \$6,617.44 were also deposited directly into appellant's bank account. As previously noted, the June 27, 2005 deposit was a duplicate payment. On June 6, 2005 appellant was advised that an overpayment existed. When he received the duplicative payment of \$6,617.44 on June 27, 2005, he knew or should have known that such payment was duplicative as he was not on the periodic rolls at that time and had recently been informed by the Office that an overpayment existed. Appellant expressed concern over receiving duplicate payments. This is persuasive evidence that appellant accepted two payments of \$6,617.44 he knew or should have known were duplicative. While he alleges that he does not remember a telephone conversation with a claims examiner concerning receipt of duplicative payments because of a June 22, 2005 hospitalization, the June 6, 2005 conversation occurred prior to appellant's June 22, 2005 hospitalization. In any event, the record is void of any medical evidence establishing that appellant did not have the capacity to realize that he was being overpaid.

Even if the duplicative payments resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment, which he knew or should have expected know he was not entitled.<sup>16</sup> Appellant was not yet on the periodic compensation rolls. After his receipt of the first direct deposit in the sum of \$6,617.44 on March 28, 2005, the second receipt of direct deposit in the same amount of money on June 27, 2005 should have been enough to put him on notice that he was not entitled to the duplicative sums, especially in light of the Office's June 6, 2005 conversation informing him of an overpayment.

For these reasons, the Board finds that appellant reasonably knew or should have known that the second direct deposits issued by the Office on June 27, 2005 in the amount of \$6,617.44 was in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$6,617.44 may not be waived. However, as noted, appellant was not at fault in either creating or accepting the overpayment which occurred as a result of the duplicative deposit of May 24, 2005. Accordingly, the Office's May 11, 2006 finding of fault will be set aside. The case is remanded to the Office to determine whether appellant is eligible for waiver of recovery of the overpayment in the amount of \$2,590.20.

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<sup>14</sup> 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, id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

## CONCLUSION

The Board finds that a total overpayment of \$9,207.64 was created for the periods November 5, 2004 through February 24, 2005 (\$6,617.44) and April 17 through May 14, 2005 (\$2,590.20). The Board finds that appellant was at fault in creating the overpayment for the period November 5, 2004 through February 24, 2005 (\$6,617.44).<sup>17</sup> However, the Board finds that appellant was without fault in creating the overpayment for the period April 17 through May 14, 2005 (\$2,590.20) and the case is remanded for the Office to consider his eligibility for waiver regarding this overpayment.

## ORDER

**IT IS HEREBY ORDERED THAT** the May 11, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: February 22, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>17</sup> As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *See Judith A. Cariddo*, 55 ECAB 348 (2004); *Levon H. Knight*, 40 ECAB 658, 665 (1989).