

she was at fault in creating the overpayment of compensation, thereby, precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 13, 2005 appellant, then a 28-year-old transportation security screener, sustained injury to her left knee when she tripped over a golf bag and fell on her left knee. The Office accepted that she sustained a left knee contusion. Appellant received continuation of pay from February 14 to March 30, 2005 and returned to work in a light-duty position.

Appellant stopped work on June 20, 2005 claiming that she sustained a recurrence of total disability due to her accepted employment injury. The Office accepted her recurrence of disability claim and determined that she also sustained an employment-related left knee strain and bone bruise on February 13, 2005. On October 13, 2005 Dr. Joseph Tutorino, an attending Board-certified orthopedic surgeon, released appellant to full-duty work. On November 1, 2005 appellant returned to full-duty work for the employing establishment on a full-time basis.

In an August 24, 2005 letter, the Office advised appellant that the gross amount of her wage-loss compensation for the period June 20 to August 6, 2005 was \$2,872.49, her health benefits premium was \$113.97 and her basic life insurance premium was \$14.40. The Office did not complete the portion of the letter intended to show the amount of appellant's "regular payment" for the period June 20 to August 6, 2005. For the period August 7 to September 3, 2005, the Office indicated that the gross amount of appellant's wage-loss compensation was \$1,675.62, her health benefits premium was \$75.98, and her basic life insurance premium was \$9.60. The Office did not complete the portion of the letter intended to show the amount of appellant's "regular payment" for the period August 7 to September 3, 2005.¹ The Office advised appellant that her compensation was calculated based on her weekly pay of \$600.36 and that she was being paid at the 75 percent rate of pay because she had a dependent. The Office previously indicated that the \$600.36 figure was comprised of \$558.54 of regular pay, \$13.90 of night differential pay and \$27.90 of Sunday premium pay.²

On September 6, 2005 the Office advised appellant's congressional representative that it had been in contact with appellant every day since the prior week. The Office indicated that appellant's compensation payments had been processed, but that she reported on the morning of September 6, 2005 that she had not received the payment. The Office stated that it advised appellant that it would issue her an "emergency payment."

¹ Subtracting appellant's total health benefits premiums and basic life insurance premiums from the total figure for gross pay between June 20 and September 3, 2005 yields the figure \$4,334.16.

² The sum of these different types of pay actually is \$600.34 rather than \$600.36. The record contains documents relating to the processing of compensation checks on August 22 and 24, 2005 but there is no indication in the record that any checks were issued at that time or that appellant received copies of these documents. The documents indicated that appellant was entitled to \$2,744.12 for the period June 20 to August 6, 2005 and \$1,590.04 for the period June 20 to August 6, 2005.

In a September 6, 2005 letter, the Office advised appellant that her payment for the period June 20 to September 3, 2005 was being processed based on a “temporary pay rate” of \$558.54 per week as information regarding her night differential and Sunday premium pay had not been received from the employing establishment. The Office indicated that it expected to issue a check on September 10, 2005.

On October 4, 2005 the Office determined that appellant was due \$1,590.04 for the period August 7 to September 3, 2005. It did not indicate whether a check was issued or monies were electronically transferred at this time. In December 2005 an “electronic certification system” document dated September 6, 2005 was added to the record which indicated that appellant was to be paid \$4,334.16 for the period June 20 to September 3, 2005. The document contains the handwritten notation “paid September 7, 2005” and also provides the account and routing numbers for appellant’s bank account. The record also contains “payment display” records, produced by the Office in January 2006, which indicates that payments were processed on September 16, 2005 for appellant to receive compensation in the amounts of \$2,803.96 and \$2,744.12.³ The documents provide the account number and routing number for appellant’s bank account. The Office produced other documents in January 2006 indicating that appellant actually should have received \$4,656.36 rather than \$4,334.16 for the period June 20 to September 3, 2005 because night differential and Sunday premium pay were not included in the original calculation.

On January 26, 2006 the Office advised appellant of its preliminary finding that she received a \$6,815.92 overpayment of compensation because she received multiple checks for the same period. The Office indicated that she was issued an emergency check on September 7, 2005 in the amount of \$4,334.16 for the period June 20 to September 3, 2005 and then was issued a \$2,803.96 check on September 16, 2005 for the period June 20 to August 6, 2005, a \$2,744.12 check on September 16, 2005 for the period June 20 to August 6, 2005, and a \$1,590.04 check on October 7, 2005 for the period August 7 to September 3, 2005. The Office found that appellant was only entitled to receive \$4,656.36 for the period August 7 to September 3, 2005 based on her total weekly pay of \$600.36 (comprised of \$558.54 of regular pay, \$13.90 of night differential pay, and \$27.90 of Sunday premium pay).⁴ It found that the \$6,815.92 overpayment was created because appellant actually received \$11,472.28 for the period August 7 to September 3, 2005 rather than \$4,656.36. The Office made a further preliminary determination that appellant was at fault in the creation of the overpayment and requested that she submit financial information even if she did not request waiver of the overpayment.

Appellant submitted a financial information questionnaire which was completed on February 22, 2006. She indicated that her monthly household income was \$3,056.00. Appellant listed various monthly expenses which included \$1,164.00 for mortgage payments, \$450.00 for

³ Other documents of records indicate that these payment were for the period June 20 to August 6, 2005, but it does not appear that appellant received these documents around the time the payments were made.

⁴ The sum of these different types of pay actually is \$600.34 rather than \$600.36.

food, \$50.00 for clothing and \$343.00 for utilities. She indicated that she had to make monthly payments totaling over \$1,000.00 for various debts, including credit card balances.⁵

In March 2006 several documents entitlement “benefit statement” were added to the record. The documents were addressed to appellant’s home address, but it is unclear when these documents were sent to appellant. The documents advised appellant that she received a \$2,803.96 check, dated September 16, 2005 for the period June 20 to August 6, 2005, a \$2,744.12 check, dated September 16, 2005, for the period June 20 to August 6, 2005 and a \$1,590.04 check, dated October 7, 2005, for the period August 7 to September 3, 2005.

Appellant requested a prerecoupment hearing before an Office hearing representative regarding the Office’s preliminary overpayment determination. At the October 18, 2006 hearing, she testified that she did not feel that she was at fault in the creation of the overpayment because the documents that she received regarding her compensation payments were confusing and she did not receive the benefit statements detailing the periods that the payments were meant to cover until months after she received the payments. Appellant indicated that the Office’s August 24, 2005 letter did not adequately apprise her of the amount of compensation she would receive because the Office did not complete the portions of the letter intended to show the amount of her “regular payment” for the period June 20 to August 6, 2005 or for the period August 7 to September 3, 2005. She indicated that she was unable to determine what pay rate was used to calculate her compensation or what total amount she was entitled to receive. Appellant acknowledged receiving the \$4,334.16, \$2,803.96, \$2,744.12 and \$1,590.04 payments, but indicated that they did not come with documentation detailing which periods they covered.⁶ She asserted that she had not received compensation for months and was confused about how much she was owed. Appellant provided additional details regarding her financial situation.

In a January 11, 2007 decision, the Office hearing representative finalized the overpayment.⁷ The Office hearing representative stated that, through letters and telephone calls, appellant knew that she would be receiving a compensation payment in early September 2005 for the period June 20 to September 3, 2005 which roughly equaled \$4,500.00. She indicated that after appellant received a \$4,334.16 payment on September 7, 2005, she should have known that she was not entitled to receive the \$2,803.96 and \$2,744.12 payments on September 16, 2005 and the \$1,590.04 payment on October 7, 2005. The Office hearing representative found that appellant was at fault in the creation of the overpayment and denied waiver of the overpayment. She determined that the overpayment would be recovered by deducting \$300.00 from appellant’s compensation payments every 28 days.⁸

⁵ Appellant did not submit documents to support these expenses. She indicated that she had \$798.66 in assets.

⁶ Appellant did not provide any details about the precise dates when she was aware that she received these payments.

⁷ The record contains a similar January 8, 2007 document which appears to be a draft of the January 11, 2007 decision.

⁸ With respect to recovery of the overpayment of compensation, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. *Cheryl Thomas*, 55 ECAB 610 (2004). As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act. *Id.*

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁰ Section 8129(a) of the Act 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.”¹¹

Section 8116(a) of the Act provides that while an employee is receiving compensation or if she 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, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.¹²

ANALYSIS -- ISSUE 1

The Board notes that the Office properly calculated that appellant received a \$6,815.92 overpayment of compensation for the period June 20 to September 3, 2005. The record contains worksheets showing that she was entitled to receive \$4,656.36 for this period. The Office had originally calculated that appellant was only entitled to receive \$4,334.16 for the period June 20 to September 3, 2005 and issued her a payment in this amount. However, the Office later indicated that the initial calculation did not account for her weekly premium pay (\$13.90 of night differential pay and \$27.90 of Sunday premium pay) in addition to her weekly pay of \$558.54. There is no indication that appellant was entitled to receive any other monies for the period June 20 to September 3, 2005. The record also reveals that she received payments totaling \$11,472.28 for the period June 20 to September 3, 2005¹³ and the subtraction from this figure of the total amount that she was entitled to receive for this period (\$4,656.36) yields the correct overpayment figure of \$6,815.92.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8102(a).

¹¹ 5 U.S.C. § 8129(a).

¹² 5 U.S.C. § 8116(a).

¹³ Appellant received payments of \$4,334.16, \$2,803.96, \$2,744.12 and \$1,590.04.

payments to which an individual is entitled.¹⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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.”¹⁵ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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....”¹⁶

Section 10.433(c) of the Office’s regulations 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.”¹⁷

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant’s account. The Office may not deposit compensation into a claimant’s account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant’s intent that these payments are deposited to his or her account which is something more than receipt, *i.e.*, it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.¹⁸

¹⁴ 5 U.S.C. § 8129(a).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 20 C.F.R. § 10.433(a).

¹⁷ 20 C.F.R. § 10.433(c).

¹⁸ *Tammy Craven*, 57 ECAB ___ (Docket No. 05-249, issued July 24, 2006).

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments she knew or should have known to be incorrect.¹⁹ The Board has found the claimant to be at fault in cases where she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.²⁰ It is not appropriate, however, to make a finding that a claimant has accepted an 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.²¹

ANALYSIS -- ISSUE 2

In finding that appellant was at fault in the creation of the \$6,815.92 overpayment of compensation, the Office found that she accepted payments which she knew or should have known to be incorrect. The Board notes that, through written and telephonic communications, appellant would have been reasonably aware that she would receive a compensation payment in early September which covered the period June 20 to September 3, 2005. The Office advised appellant that this payment was an “emergency payment” as prior attempts to process her payment through the regular channels had failed. However, the Board notes that she could reasonably have been confused about the precise amount of compensation she would receive for this period.

In an August 24, 2005 letter, the Office advised appellant that the gross amount of her wage-loss compensation for the period June 20 to August 6, 2005 was \$2,872.49 and that the gross amount of her wage-loss compensation for the period August 7 to September 3, 2005 was \$1,675.62. The Office advised her that, for the first period, her health benefits premium was \$113.97 and her basic life insurance premium was \$14.40 and that, for the second period, her health benefits premium was \$75.98 and her basic life insurance premium was \$9.60. However, the Office did not indicate that these premiums would be subtracted from appellant’s gross compensation or otherwise explain their effect on her net compensation. The Office did not complete the portion of the letter intended to show the amount of her “regular payment” for the period June 20 to August 6, 2005 or for the period August 7 to September 3, 2005. Moreover, the Office first advised appellant that her compensation would be based on the weekly pay of \$600.36 and then told her it would be based on \$558.54 despite the fact that it ultimately used the \$600.36 amount.

Given the above-noted facts, appellant would not be expected to know the precise amount of the payment she was slated to receive in early September 2005 but she would have been expected to know that it would be roughly \$4,000.00 or \$5,000.00. The record reveals that on September 7, 2005 a payment in the amount of \$4,334.16 was directly deposited into appellant’s

¹⁹ *William E. McCarty*, 54 ECAB 525 (2003).

²⁰ *See Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

²¹ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

bank account. It is unclear from the record when appellant became aware that this payment was made to her account and it does not appear that appellant was contemporaneously advised of what period the payment covered.

On September 16, 2005, *i.e.*, just nine days after the September 7, 2005 payment was direct deposited to appellant's account, the Office direct deposited payments into her bank account in the amount of \$2,803.96 and \$2,744.12. The Office later indicated that appellant was advised that these monies were intended to cover the period June 20 to August 6, 2005, *i.e.*, a portion of period covered by the September 7, 2005 payment, but there is no record that she was contemporaneously advised of what periods the payments covered.²² Unlike the initial payment of \$4,334.16, appellant would not have had any notice that these payments would be made by the Office. As these payments were direct deposited into her bank account, it is unclear when she became aware that these monies were in her account.²³

Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment (or in this case two incorrect payments received on the same day) because the requisite knowledge is lacking at the time of deposit. The Board finds that, given the above-described circumstances, there is no evidence of record to show that appellant knew or should have known that the \$2,803.96 and \$2,744.12 payments were incorrect at the time that she accepted them, *i.e.*, the date that they were deposited into her bank account on September 16, 2005.²⁴

A finding of no fault does not mean, however, that the claimant may keep the amount of the overpayment created by \$2,803.96 and \$2,744.12 payments, only that the Office must consider eligibility for waiver for this period, and the case must be remanded for the Office to determine whether she is entitled to waiver for the portion of the \$6,815.92 overpayment created by these incorrect payments.

Appellant received one more payment which helped to create the overpayment. On October 7, 2005 she was issued an incorrect payment of \$1,590.04 which the Office later indicated was intended to cover the period August 7 to September 3, 2005.²⁵ By this time, sufficient time had passed (a month since the Office sent appellant the \$4,334.16 payment) that

²² The record contains benefit statements which advised appellant that she received a \$2,803.96 check, dated September 16, 2005, for the period June 20 to August 6, 2005 and a \$2,744.12 check, dated September 16, 2005, for the period June 20 to August 6, 2005. However, these documents were not added to the record until March 2006 and it is unclear when they were first sent to appellant. Although the documents use the word "check" it appears that these payments were sent electronically.

²³ At the hearing before an Office hearing representative, appellant did not indicate the precise date she was aware that these monies were deposited into her account. She further testified that she had not received compensation in months and was confused about how much she was owed and about the periods the payments were intended to cover.

²⁴ See *Karen K. Dixon*, *supra* note 20.

²⁵ It is unclear whether this payment was made electronically or through a paper check.

she would reasonably have been aware that she had received payments totaling about \$9,900.00.²⁶ As appellant had previously been advised that she was only entitled to receive about \$4,000.00 or \$5,000.00 for the period June 20 to September 3, 2005 she now would have been expected to know that she was not entitled to any additional payments.²⁷ Therefore, the Board finds that appellant was at fault in the portion of the \$6,815.92 overpayment created by the \$1,590.04 payment because she accepted a payment she knew or should have known to be incorrect.²⁸ Consequently, she would not be entitled to waiver for this portion of the overpayment.²⁹

The case should be remanded to the Office to determine whether appellant is entitled to waiver for the portion of the \$6,815.92 overpayment created by the \$2,803.96 and \$2,744.12 payments. After such development as it deems necessary, the Office should issue an appropriate decision detailing what monies, if any, appellant would be required to repay.³⁰

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$6,815.92 overpayment of compensation. The Board finds that appellant was not at fault in the portion of the overpayment created by the receipt of the \$2,803.96 and \$2,744.12 payments but that she was at fault in the portion of the overpayment created by the receipt of the \$1,590.04 payment. The case is remanded to the Office for further development, including whether appellant would be entitled to waiver with respect to the \$2,803.96 and \$2,744.12 payments.

²⁶ The \$4,334.16, \$2,803.96 and \$2,744.12 checks totaled about \$9,900.00.

²⁷ Appellant did not provide any argument that she felt that this check was for any period other than June 20 to September 3, 2005.

²⁸ 20 C.F.R. § 10.433(a).

²⁹ See *supra* note 15 and accompanying text.

³⁰ In calculating the ultimate amount that appellant must repay, if any, the Office should bear in mind that appellant was entitled to receive \$4,656.36 for the period June 20 to September 3, 2005 rather than the \$4,334.16 figure which was originally calculated.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 11, 2007 decision is affirmed with respect to the fact and amount of the \$6,815.92 overpayment and with respect to the finding that appellant was at fault in the portion of the overpayment created by the receipt of the \$1,590.04 payment. The decision is modified to reflect that she was not at fault in the portion of the overpayment created by the receipt of the \$2,803.96 and \$2,744.12 payments.

Issued: October 9, 2007
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