

On February 22, 2006 appellant, then a 32-year-old shipfitter, sustained injury to his back while carrying a heavy hangar foundation. He stopped work on the date of injury. Appellant

returned to limited-duty work on March 2, 2006. The Office accepted the claim for lumbar strain, displacement of the lumbar intervertebral disc without myelopathy and spondylolisthesis. It authorized back surgery which was performed on August 23, 2006.

By letter dated November 29, 2006, the Office informed appellant that he was being placed on the periodic rolls, effective November 26, 2006. Appellant was advised to notify the Office immediately when he returned to work to avoid an overpayment of compensation, and that, if he worked during any period covered by a compensation payment, he must return the payment to the Office. On December 23, 2006 the Office issued a compensation check in the amount of \$1,958.89 for the period November 26 through December 23, 2006 by direct deposit.

On January 11 and 22, 2007 the employing establishment and appellant's field nurse advised the Office that he returned to full-time full-duty work on January 6, 2007.

On September 24, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$1,049.50, during the period January 6 through 20, 2007 because he received wage-loss compensation during a period when he had returned to work. It found him at fault in the creation of the overpayment because he should have been aware that there was no entitlement to wage-loss compensation during a period when he was earning wages. An overpayment worksheet noted that on January 20, 2007 appellant received a periodic payment for the period December 24, 2006 through January 20, 2007 in the amount of \$1,958.98 by direct deposit. As he worked for the period January 6 through 20, 2007, he should have received compensation in the amount of \$909.48 for the period December 24, 2006 through January 5, 2007. This resulted in an overpayment of compensation in the amount of \$1,049.50. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On October 16, 2007 appellant requested a telephone conference. He submitted an OWCP-20 form dated October 15, 2007. Appellant stated that he did not have any of the incorrectly paid checks or payments in his possession. He listed his four-year old daughter and wife as dependents. Appellant reported his monthly income of \$4,174.00 and expenses of \$3,240.00. His assets included \$50.00 cash on hand. Appellant contended that he was not at fault in the creation of the overpayment because there was a change in his payment every two weeks to every month. There were also delays in his receipt of payments. Appellant stated that he reported his return to light-duty work during the first week of January 2007 to the employing establishment's human resources office. He was advised that any payments he received were due him. Appellant was not aware of any overpayment and did not intentionally accept any undue compensation.

In a memorandum of a January 23, 2008 telephone conference with appellant, the Office addressed the overpayment. It asked him whether his wife had any income. Appellant stated that she earned approximately \$3,000.00 per month from various jobs. The Office determined that appellant's monthly income totaled \$7,174.00. Appellant contended that he was not at fault

in the creation of the overpayment because the Office was notified by the field nurse and the employing establishment of his return to work on January 6, 2007. The Office noted that it had been notified on several occasions about appellant's return to work but it was unable to prevent the compensation check from being released due to the district Office's cut-off date of January 11, 2007. Appellant reiterated that he was not at fault in creating the overpayment. He was not aware that he was being overpaid because he was still entitled to compensation for December 24, 2006 which was the beginning of the pay period. The claims examiner stated that the compensation check was deposited into his account on January 20, 2007 and that he should have been aware that he was not entitled to the check after his return to work on January 5, 2007.

By decision dated January 30 2008, the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$1,049.50 for the period January 6 through 20, 2007. He was instructed to submit the \$1,049.50 to the Office within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act¹ provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.² Section 8116 of the 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 or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.³

Section 10.500 of the Office's regulations provides that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,049.50. The record supports that he returned to work on January 6, 2007 and worked through January 20, 2007. Appellant received wage-loss compensation for this period. As he was not entitled to compensation for the period after he returned to work, the amount of compensation that he received from January 6 through 20, 2007 represents an overpayment of compensation.⁵ Appellant received a check in the net amount of \$1,958.98. The Office determined that he should have only been paid \$909.48. Subtracting what appellant should have

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a).

³ 5 U.S.C. § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

⁴ 20 C.F.R. § 10.500.

⁵ *W.F.*, 57 ECAB 705 (2006).

been paid for this period, \$1,958.98, from what he was paid, \$909.48, equals an overpayment of \$1,049.50 for the period January 6 through 20, 2007. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board, therefore, finds that an overpayment occurred in the amount of \$1,049.50 as appellant returned to work but received wage-loss compensation from January 6 to 20, 2007.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides that an overpayment of 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.⁷ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁸ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁹

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”¹⁰

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

“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.”¹¹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time he received the

⁶ 5 U.S.C. § 8129(b).

⁷ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁸ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁹ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

compensation check in question, he knew or should have known that the payment was incorrect.¹²

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The Office found that appellant should have known that he received an incorrect payment for total temporary disability because he had been advised to return any money he received after returning to work. The Board has found a claimant to be at fault in cases where he or 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.¹³ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that an 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.¹⁴

In this case, appellant received an overpayment of compensation in the amount of \$1,049.50 by direct deposit. 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 because the requisite knowledge is lacking at the time of deposit.¹⁵ Appellant had no reason to suspect at the time the \$1,049.50 overpayment was deposited into his checking account that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.¹⁶ As the funds were deposited directly into his bank account, he was not in a position to immediately decline acceptance of the amount paid by the Office. The Board finds that appellant was not at fault in either creating or accepting the overpayment of \$1,049.50 for the period January 6 through 20, 2007.¹⁷

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act¹⁸ if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹⁹ The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$1,049.50 overpayment. After such further development as the Office may find

¹² *Diana L. Booth, supra* note 9.

¹³ *See Karen K. Dixon, 56 ECAB 145 (2004).*

¹⁴ *See K.H., Docket No. 06-191 (issued October 30, 2006).*

¹⁵ *See Karen K. Dixon, supra* note 13.

¹⁶ *See Tammy Craven, 57 ECAB 689 (2006).*

¹⁷ *Id.*

¹⁸ 5 U.S.C. § 8129(b).

¹⁹ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,049.50, during the period January 6 through 20, 2007, because he incorrectly received temporary total disability compensation after he returned to work. The Board, however, finds that the Office improperly found that appellant was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to fact and amount of overpayment and is set aside and the case remanded for further proceedings consistent with this decision of the Board with respect to fault in the creation of the overpayment

Issued: October 8, 2008
Washington, DC

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

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

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