

On June 5, 2003 appellant, then a 48-year-old supervisory border patrol agent, injured his right shoulder in the performance of duty: “I attempted to lift a half full jug of water onto my Service vehicle when I heard my shoulder make a popping sound.” On July 28, 2003 the Office accepted his claim for injury to the shoulder region.

Appellant underwent right shoulder surgery on November 3, 2003 and November 10, 2004. He underwent further surgery on January 3, 2007. Thereafter, appellant received compensation for total disability on the periodic rolls. On January 30, 2007 the Office informed appellant that compensation benefits for total disability were payable only while he could not perform the duties of his regular job because of his injury at work. It explained how compensation was paid and instructed appellant as follows:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.” (Emphasis in the original.)

On June 6, 2007 the employer notified the Office that appellant had returned to work on June 2, 2007. On June 26, 2007 the Office received a medical report indicating that appellant was released to a trial of full duty effective June 2, 2007. It continued to pay appellant compensation for total disability on the periodic rolls through November 24, 2007.

On November 28, 2007 the Office issued a preliminary determination that appellant was at fault in a \$28,783.04 overpayment from June 2 to November 24, 2007. It found that he knew or should have reasonably been aware that the payments were incorrect. The Office found that he knowingly accepted compensation to which he was not entitled.

Following a conference call with appellant on December 6, 2007, the Office finalized its preliminary findings. In a decision dated December 27, 2007, the Office found that appellant was at fault in a \$28,783.04 overpayment from June 2 to November 24, 2007. It found that he kept compensation payments although he knew, or reasonably should have known, that he was not entitled to compensation for wage loss for any period he did not sustain wage loss.

On appeal, appellant contests the amount of the overpayment. He concedes that he should have caught the overpayment, but argues that the Office also should have caught the overpayment because it received a return-to-duty form. “If that is the case,” he stated, “then we are both responsible for the overpayment.”

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides compensation for disability of an employee resulting from personal injury sustained while in the performance of duty.¹ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.² Total disability is the inability to return to the position held at the time of injury or earn equivalent wages, or to perform other gainful employment, due to the work-related injury.³ No further compensation for wage loss is

¹ 5 U.S.C. § 8102(a).

² 20 C.F.R. § 10.5(f) (1999).

³ *Id.* at § 10.400(b).

payable once the employee has recovered from the work-related injury to the extent that he can perform the duties of the position held at the time of injury, or earn equivalent wages.⁴

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he received 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 with respect to 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; 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 (this provision applies only to the overpaid individual). The fact that the Office may have erred or been negligent in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁵

Whether 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 is being overpaid.⁶ The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷

ANALYSIS

Appellant does not contest the fact of overpayment. The record establishes that the Office paid compensation for total wage loss after he returned to work with no wage loss. The fact of overpayment is established. He does contest the amount of the overpayment. The Office should have clearly explained how it arrived at its figure of \$28,783.04. Appellant's benefit statement shows that after he returned to work on June 2, 2007 he was receiving net compensation of \$4,579.12 every 28 days. The period of the overpayment, from June 2 to November 24, 2007, is 176 days, counting June 2, 2007. So the overpayment amount is \$4,579.12 x 176/28. The Board will affirm the fact and amount of the overpayment.

The Board will also affirm the Office's finding of fault. On January 30, 2007 when the Office placed appellant on the periodic rolls, it made clear that compensation benefits for total disability were payable only while he could not perform the duties of his regular job because of his injury at work. The Office instructed him to return any payment if he worked for any portion of the period covered by the check. Appellant knew, or should have known, that the compensation he continued to receive after he returned to regular duty on June 2, 2007 was incorrect. He is at fault in creating the overpayment under the third standard cited above.

⁴ *Id.* at § 10.515(a).

⁵ *Id.* at § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.433(a).

On appeal, appellant does not argue he was without fault. He understands he should have caught the overpayment. Appellant contends, however, that the Office also should have caught the overpayment. As early as June 6, 2007, the Office knew or should have known that he returned to work. That was the day the employer faxed to the Office a report of termination of disability form. On June 26, 2007 the Office received a medical report indicating that appellant was released to regular work on June 2, 2007. However, it continued to pay compensation for wage loss on the periodic rolls.

Although appellant is correct to point out that the Office shares responsibility for creating the overpayment, this does not mean he gets to keep the money. As noted, the fact that the Office may have erred in making the overpayment does not relieve the individual who received the overpayment from liability for repayment if the individual is at fault in accepting the overpayment. As he was also at fault, he is not eligible for waiver. By law, the Office must recover the overpaid compensation.⁸

CONCLUSION

The Board finds that appellant was at fault in a \$28,783.04 overpayment from June 2 through November 24, 2007. He is therefore not eligible for waiver.

⁸ Appellant and the Office agreed to settle a substantial portion of the debt by applying a schedule award due for the right upper extremity. This left a balance of \$4,026.59. The Board has no jurisdiction to review how the Office collects this balance. The Board's jurisdiction is limited to cases of adjustment, in which the Office decreases later payments of compensation to which the individual is entitled. 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Appellant is not receiving continuing compensation for wage loss.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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