

sprain and authorized lumbar discectomy surgery, which was performed on January 19, 2005. Subsequently, it accepted cervical strain, cervical radiculopathy, displacement of a lumbar intervertebral disc without myelopathy and degeneration of the lumbosacral intervertebral disc.

By letter dated June 2, 2005, the Office placed appellant on the periodic rolls for temporary total disability. It informed appellant that he would be receiving a net amount of \$2,517.08 every 28 days with the first regular payment covering the period May 15 to June 11, 2005. Appellant was advised to inform the Office when he returned to work and that if he worked for any portion of the period for which he was paid compensation that he was to return the payment to the Office. The record reveals that he received payment by direct deposit.

In a report of termination of disability and/or payment (Form CA-3), the employing establishment informed the Office that appellant returned to work on June 24, 2005. On July 5, 2005 the Office terminated appellant's periodic rolls payment.

On September 20, 2006 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,368.35 for the period June 24 to July 9, 2005 because he received compensation for total disability after he returned to work. It noted that appellant was paid \$2,517.08 for the period June 12 to July 9, 2005, when he was only entitled to compensation in the amount of \$1,148.73 for the period June 12 to 23, 2005. An overpayment in the amount of \$1,368.35 was created for the period June 24 to July 9, 2005. The Office informed him of its preliminary determination that he was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to receive compensation for total disability after he returned to work at no wage loss. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On October 24, 2006 appellant requested a prerecoupment hearing before an Office hearing representative. By decision dated November 30, 2006, the Office denied appellant's request for a prerecoupment hearing on the grounds that he failed to timely file his request within 30 days.

By decision dated October 17, 2007, the Office finalized the overpayment in the amount of \$1,368.35 for the period June 24 to July 9, 2005 based on appellant's receipt of compensation for disability after his return to work. It found that appellant was at fault as he accepted payments which he knew or should have known to be incorrect. The Office reviewed appellant's financial information and concluded that he should submit \$150.00 per month to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation under the Act the employee may not receive salary, pay or remuneration of any type from the United States. Office procedures provide that an

overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation except in limited specified instances.¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation. The record supports that he returned to work on June 24, 2005 and received wage-loss compensation through July 9, 2005. As appellant was not entitled to compensation for the period after his return to work, the amount of compensation that he received for the period June 24 through July 9, 2005 was an overpayment in compensation.²

The Board however finds that the case is not in posture for decision regarding the amount of the overpayment. The record before the Board does not contain an explanation of the method used in calculating the overpayment. The Office noted that appellant was entitled to \$1,487.73 during the period June 12 to 23, 2005, but that appellant received \$2,517.08 during this period. It concluded that, the overpayment of \$1,368.35, the difference between \$2,517.08 and \$1,487.73, resulted during the period June 24 to July 9, 2005. However, there are no overpayment worksheets or computer printouts showing entitlement or how the overpayment determination was reached by the Office. As there is insufficient evidence of record regarding how the amount of the overpayment was determined, the Board will remand the case to the Office. It should provide documentation and an explanation regarding the amount of compensation appellant received from June 24 through July 9, 2005.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act³ 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.⁴ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁵ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁶

¹ 5 U.S.C. § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

² *W.F.*, 57 ECAB 705 (2006).

³ 5 U.S.C. § 8129(b).

⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁶ *Diana L. Booth*, 52 ECAB 370 (2001); *William G. Norton, Jr.*, 45 ECAB 630 (1994).

On the issue of fault, section 10.433 of the Office's regulations, provide 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.”⁷

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.”⁸

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for it to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time he received the compensation check in question, he knew or should have known that the payment was incorrect.⁹

Based on the circumstances of this case, the Board finds that appellant is not at 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.¹⁰ 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.¹¹

In this case, appellant received the overpayment of compensation by direct deposit. Since Office regulations define fault by what the claimant knew or should have known at the

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

⁹ *Diana L. Booth*, *supra* note 6.

¹⁰ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹¹ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

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.¹² Appellant had no reason to suspect at the time that an overpayment was electronically 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.¹³ 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 for the period June 24 through July 9, 2005.¹⁴

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 Act¹⁵ 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.¹⁶ The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of overpayment. After such further development as it may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

CONCLUSION

The Board finds that the Office properly determined that an overpayment of compensation was created during the period June 24 to July 9, 2005. The case is not in posture for decision regarding the amount of the overpayment. The Board also finds that the Office improperly found that appellant was at fault in creating the overpayment. The case is remanded for a determination of the correct amount and waiver, to be followed by any necessary development and an appropriate decision.

¹² See *Karen K. Dixon*, *supra* note 10.

¹³ See *Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 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.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: January 26, 2009
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