

On September 21, 2004 appellant was notified that, in order to avoid an overpayment of compensation, she was to immediately notify the Office of her return to work. She was advised that she was required to return any check to the Office which included a period during which she worked.

Appellant returned to limited-duty employment on September 18, 2006, with no loss of earnings. Using direct deposit, the Office paid appellant the amount of \$2,552.38 in compensation for total disability from September 3 to 30, 2006. The record contains calculations showing that appellant should have been paid the amount of \$1,367.35 for the period September 3 to 17, 2006, the date prior to her return to work. The Office calculated that the difference between the amount paid for the entire period and the amount to which appellant was entitled, resulted in an overpayment of \$1,185.03.

On April 10, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$1,185.03 for the period September 18 to 30, 2006 because she received compensation for total disability after she returned to work, and that she was at fault in the creation of the overpayment, as she knew or should have known that she was not entitled to receive compensation for the described period. It informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence, or a precoupment hearing on the issues of fault and a possible waiver.

On September 12, 2007 appellant requested a hearing on the issues of overpayment and waiver. In a January 14, 2008 telephone conference, she acknowledged that she received compensation through September 30, 2006, which was deposited directly into her bank account. Although appellant did not contest the amount of the overpayment, she contended that she was not at fault in the creation of the overpayment, as she had notified the Office of her return to work in a timely fashion. She further stated that repaying the overpayment would create severe financial hardship. Appellant submitted supporting financial information reflecting monthly income of \$3,500.00, and monthly expenses of \$3,540.00.

By decision dated March 28, 2008, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$1,185.03 for the period September 18 to 30, 2006, based on her receipt of compensation for disability after her return to work. It further found that she was at fault in the creation of the overpayment, as she accepted a payment which she knew or should have known was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.²

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8102.

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, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ The Office's regulations state in pertinent part: compensation for wage-loss due to disability is available only for any periods during which an employee's work-related medical condition prevents 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 \$1,185.03. The record supports and appellant has not disputed that she continued to receive compensation from the date that she returned to work on September 18 to 30, 2006 in the amount of \$1,185.03. When an employee returns to work and ceases to have any loss of wages, she is no longer entitled to compensation for wage loss.⁵ As appellant was not entitled to compensation after her return to work, the Office properly found an overpayment of compensation in the amount of \$1,185.03.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its implementing regulations, an overpayment must be recovered 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.⁶ Section 10.433 of the implementing regulations provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁸ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.⁹ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁰

The Board has found the 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

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.500(a).

⁵ *See Kenneth E. Rush*, 51 ECAB 116 (1999).

⁶ 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁷ *Id.* at § 10.433(a).

⁸ *Id.*

⁹ *Id.* at § 10.433(a)(3).

¹⁰ *Id.* at § 10.433(b).

months with clear knowledge that the payments were incorrect.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault in the creation of a \$1,185.03 overpayment from September 18 to 30, 2006.

An overpayment of compensation occurred in this case when appellant returned to full-time work on September 18, 2006 and received compensation for temporary total disability for the period September 3 to 30, 2006. The compensation check dated September 30, 2006 thus covered two periods: a period of total disability through September 17, 2006, for which appellant remained entitled to compensation and a period of full-time employment from September 18 to 30, 2006 for which she was not entitled to compensation. It is during this latter period that the overpayment occurred.

The Office found that appellant was at fault in the creation of the overpayment based on the fact that she accepted a payment which she knew or should have known to be incorrect. This case, however, is distinguishable from those in which a claimant returns to work, subsequently receives a compensation check in the mail covering a period of employment, and knows or should know that she is not entitled to such compensation, but decides nonetheless to cash or deposit the check. In such cases, the cashing or depositing of the check constitutes acceptance.¹³ In this case, appellant authorized the Office to deposit her compensation directly to her bank account. After she notified the Office of her return to work on September 18, 2006, she received no check in the mail. Under the facts of this case, appellant had no opportunity to make a decision as to the correctness of the September 30, 2006 check before it was deposited to her account. While she accepted the overpayment by gaining control of the funds deposited into her bank account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day.¹⁴

The Board finds that under the circumstances of this case the Office has not presented sufficient evidence to establish that appellant accepted a payment which she knew or should have known to be incorrect. The Board will, therefore, reverse the Office's finding of fault and remand the case to the Office for further development and a final decision on the issue of waiver.

¹¹ See *Karen K. Dixon*, 56 ECAB 145 (2004).

¹² See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹³ *William F. Salmonson*, 54 ECAB 152 (2002). *Gerald A. Karth*, 36 ECAB 503 (1985) (holding that the claimant had an obligation to return any checks to the Office after his return to work).

¹⁴ See *Tammy Craven*, 57 ECAB 689 (2006).

CONCLUSION

The Board finds that appellant received a \$1,185.03 overpayment of compensation from September 18 to 30, 2006 because she continued to receive compensation for total disability after she returned to work. The Board further finds that she was without fault in the creation of the overpayment, and the case will be remanded to the Office to determine whether she is entitled to waiver.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 28, 2008 is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 27, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁵ The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *See* 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008), n.24, *citing Ronald E. Ogden*, 56 ECAB 278 (2005).