

the Office accepted the claim for neck sprain. It advised appellant that compensation benefits for total disability were only payable while he could not perform his regular work duties due to his accepted employment injury. Appellant was advised to immediately inform the Office if he returned to work and to return any payment to the Office to prevent an overpayment. He was also advised of the penalties for accepting compensation payments to which he was not entitled. On November 1, 2007 the Office accepted appellant's claim for a herniated disc at C3-4. It authorized a cervical discectomy and disc replacement at C3-4 performed on November 27, 2007 by Dr. Choll W. Kim, an attending Board-certified orthopedic surgeon.

On March 28, 2008 Dr. Kim released appellant to return to part-time work, four hours per day with restrictions. Appellant returned to modified work on March 31, 2008.

On April 16, 2008 the Office made a preliminary determination that appellant received an overpayment in the amount of \$2,565.17, during the period March 31 through April 12, 2008 because he knew or should have known that he was not entitled to wage-loss compensation for total disability following his return to part-time modified work. Worksheets revealed that he received a compensation check dated April 12, 2008 in the amount of \$5,107.92 for the stated period when he was only entitled to receive \$2,542.75. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a precoupment hearing within 30 days 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. Appellant did not respond within the allotted time period.

By decision dated June 4, 2008, the Office finalized the determination that appellant was at fault in the creation of an overpayment of compensation in the amount of \$2,565.17 for the period March 31 through April 12, 2008. It directed him to either repay the overpaid amount in full or contact the Office within 30 days to arrange a repayment plan.

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

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8102(a).

³ *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

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 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 \$2,565.17. The record supports that he returned to part-time modified work, four hours per day, beginning on March 31, 2008 and worked through April 12, 2008 while receiving wage-loss compensation for total disability in the amount of \$5,107.92. Appellant should have received wage-loss compensation in the amount of \$2,542.75. As he returned to work and had earnings for part-time work, he should not have received compensation for total disability. The Board, therefore, finds that appellant's receipt of compensation created an overpayment in the amount of \$2,565.17 for the period March 31 through April 12, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ 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.⁶ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁷ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁸

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."⁹

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations 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

⁴ 20 C.F.R. § 10.500.

⁵ 5 U.S.C. § 8129(b).

⁶ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁷ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁸ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁹ 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment because he knew or should have known he was not entitled to wage-loss compensation for total disability during the period March 31 through April 12, 2008 when he also worked part time. In order for the Office to establish that he was at fault in creating the overpayment of compensation, it must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.¹¹

The Office's April 26, 2007 acceptance letter clearly advised appellant that he was to immediately inform the Office upon his return to work to avoid an overpayment in compensation. Moreover, if he worked during any period covered by a compensation payment, he was to return the payment to the Office. Appellant was also advised of the penalty provision for accepting compensation for which he was not entitled. Under these circumstances, the Board finds that appellant knew or should have known that the payment he received of wage-loss compensation was incorrect.¹² Appellant returned to part-time modified work on March 31, 2008 but did not inform the Office or return the compensation received for the period he worked. Therefore, the Board finds that appellant accepted compensation he knew or should have known was incorrect. Under section 10.433(a) of the Office's regulations, appellant is properly found to be at fault pursuant to section 8129 of the Act and is not entitled to waiver of the overpayment in compensation.

On appeal, appellant contends that he was without fault in creating the overpayment. He contends that Sherry Coffin, an Office referral nurse, advised him that she would inform the Office that he was working part time at the employing establishment. However, the Board notes that the Office advised appellant of his responsibility to notify it upon his return to work. Moreover, the Board has held that the fact that the Office may have been negligent in issuing a check for temporary total disability after being informed of a claimant's return to work, does not excuse the claimant's acceptance of such checks, which he knew or should have known to be incorrect.¹³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,565.17, during the period March 31 through April 12, 2008, because he incorrectly received temporary total disability compensation after he returned to work. The Board further

¹⁰ *Id.* at § 10.433(b); *Diana L. Booth, supra* note 8.

¹¹ *Diana L. Booth, supra* note 8.

¹² *Neill A. Dewald, 57 ECAB 451 (2006).*

¹³ *Russell E. Wageneck, 46 ECAB 653 (1995).*

finds that the Office properly found that appellant was at fault in creating this overpayment and, therefore, ineligible for waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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