

On January 31, 2007 appellant, then a 45-year-old ramp clerk, filed an occupational disease claim (Form CA-2) alleging that on December 21, 2006 he became aware that the tendinitis in both hands and forearms was due to his employment duties. He listed lifting sacks

and pouches onto a scale, and scanning, keying, tagging and stacking sacks and pouches into an airplane. Appellant stopped work on December 27, 2006. On February 23, 2007 he filed a claim for a recurrence of disability (Form CA-2a) for the period February 6 through 13, 2007. By decision dated March 19, 2007, the Office accepted appellant's occupational disease claim for right radial styloid tenosynovitis. It also accepted the February 6, 2007 recurrence of disability.

On April 12, 2007 appellant filed a recurrence of disability claim (Form CA-2a) commencing March 24, 2007, alleging that he experienced progressively worsening pain in his wrists and forearms. He stopped working on March 25, 2007. On May 31, 2007 the Office accepted right carpal tunnel syndrome. In a June 7, 2007 decision, it accepted the recurrence of disability claim.

By letter dated July 17, 2007, the Office notified appellant that he would receive compensation on the periodic rolls. It advised that checks would be generated on a 28-day cycle and provided him with a schedule for the receipt of checks. The Office advised appellant to notify it immediately when he returned to work in order to avoid an overpayment of compensation. It stated that payments made on the automated periodic rolls system would include the period for which the payment was made and that, if he worked for any portion of the period noted, he was required to return the check, otherwise an overpayment would be created.

On June 21, 2007 appellant underwent right carpal tunnel surgery. On August 21, 2007 Dr. Daniel J. Murphy, a Board-certified orthopedic surgeon, released appellant to return to full-time light duty. Appellant accepted an offer of light duty working eight hours a day. In an August 23, 2007 medical note, Dr. Murphy stated that appellant could return to light duty, four hours a day starting August 20, 2007. On August 24, 2007 appellant accepted a light-duty position working four hours a day. The record shows that he worked eight hours on August 21, 2007 and then worked four hours a day thereafter.

In a September 28, 2007 letter, the Office advised appellant of its preliminary determination that he received an overpayment in the amount of \$1,158.06 because he returned to full-time limited duty on August 21, 2007 but received wage loss for total disability from August 5 through September 1, 2007. Appellant received compensation automatically on a 28-day cycle and that the payments were disbursed by a paper check. The Office found that he was entitled to compensation from August 5 through 20, 2007 in the amount of \$1,544.07. It subtracted this amount from the net payment of \$2,702.13, the difference reflecting an overpayment in the amount of \$1,158.06 from August 21 through September 1, 2007 after appellant returned to full-time duty. The Office determined that he was aware or reasonably should have been aware that he was not entitled to any compensation benefits for disability upon his return to work on August 21, 2007 but did not return any portion of the compensation payment. Thus, appellant knowingly accepted compensation to which he was not entitled and was at fault in the overpayment.

Appellant did not respond to the preliminary overpayment determination. He did not request waiver and did not complete the overpayment questionnaire.

By decision dated November 7, 2007, the Office finalized its finding that appellant received an overpayment of compensation for the period August 21 through September 1, 2007

because he returned to full-time duty on August 21, 2007. It also finalized its finding that he was at fault in the creation of the overpayment and that the overpayment would not be waived.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death.”¹

ANALYSIS -- ISSUE 1

The Office placed appellant on the periodic rolls on July 17, 2007. Appellant returned to light duty on August 21, 2007 but continued to receive wage-loss compensation for total disability compensation through September 1, 2007. He was not entitled to receive compensation for total disability after he returned to work. Accordingly, an overpayment of compensation was created.²

The Office determined that appellant received an overpayment in the amount of \$1,158.06 on the grounds that he was not entitled to any wage-loss compensation after he returned to work on August 21, 2007. The Board finds, however, that the Office incorrectly computed the amount of the overpayment. While appellant was not entitled to total disability compensation during the period at issue, he was entitled to partial wage loss based on the four hours a day he did not work.

The record shows that appellant worked eight hours on August 21, 2007 but decreased to four hours a day from August 22 through September 1, 2007. The Board has held that a short-lived and unsuccessful attempt to return to duty does not shift the burden of proof to him to establish a recurrence of disability.³ Here, there is no probative medical evidence establishing

¹ 5 U.S.C. § 8116.

² See *Danny E. Haley*, 56 ECAB 393 (2005).

³ *Fred Reese*, 56 ECAB 568, 571-72 (2005); *Janice F. Migut*, 50 ECAB 166, 169 (1998) (employee attempted to return to work for two days and then claimed compensation for total disability).

that appellant's employment-related condition had ceased on or after August 21, 2007 or that his inability to perform the light-duty job was unrelated to his employment injury. Dr. Murphy initially indicated that appellant could return to light-duty work for eight hours a day; however, after appellant attempted to work full time on August 21, 2007, Dr. Murphy found that he was only capable of working four hours a day. Appellant was entitled to partial disability for the period August 22 through September 1, 2007 during which he worked part time, four hours a day.⁴ Thus, the Office incorrectly calculated the amount of overpayment on the mistaken assumption that he had no employment-related wage loss after August 20, 2007. The case will be remanded for a recalculation of the amount of overpayment to reflect appellant's entitlement to partial compensation from August 22 through September 1, 2007.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in 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."⁵

Section 10.433(a) of the Office's regulations provides that the Office:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show in 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 in 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.)"⁶

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines the circumstances surrounding the overpayment. The degree of care

⁴ See *V.B.*, Docket No. 08-463 (2008) (where the Board found that appellant was entitled to partial disability compensation after returning to full time work one day and thereafter working four hours a day.

⁵ 5 U.S.C. § 8129. See *Linda E. Padilla*, 45 ECAB 768 (1994).

⁶ 20 C.F.R. § 10.433. See *Sinclair L. Taylor*, 52 ECAB 227 (2001). See also 20 C.F.R. § 10.430.

expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁷

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment as he accepted a payment which he knew, or should have known, to be incorrect. The Board finds that appellant was at fault in creating the overpayment from August 21 through September 1, 2007.

On July 17, 2007 the Office notified appellant that he would receive compensation on an automatic 28-day cycle and that if he worked for any portion of the period noted on his check he was required to return the check otherwise an overpayment would be created. The record establishes that appellant received total disability compensation for the period August 5 through September 1, 2007 by way of a paper check. In accordance with its regulations, the Office includes on each periodic check a clear indication of the period for which payment is being made. Further, a form is sent to the recipient with each supplemental check which states the date and amount of the payment and period for which the payment is being made.⁸ Thus, appellant was on notice that the check was for the period August 5 through September 1, 2007 and that it included payment for 28 days of total disability compensation.⁹ He was also on notice that he was not entitled to both total wage-loss compensation and pay from the employing establishment for the same period of time. As appellant returned to work full time on August 21, 2007 and part time thereafter, he was aware or reasonably should have been aware that he was not entitled to total wage-loss compensation for the period August 5 through September 1, 2007. The Board finds that he was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect.¹⁰ That the Office may have been negligent in issuing the compensation check to appellant does not mitigate this finding. Overpayments resulting from the negligence of the Office do not excuse the employee from accepting payment which the employee knew or should have been expected to know that he was not entitled to receive.¹¹ The Office's finding that appellant was at fault in the creation of the overpayment is proper under the facts and the circumstances of this case, as he knew or should have known that he was not entitled to accept a check for total wage-loss compensation for the entire period August 5 through September 1, 2007 after he returned to work on August 21, 2007.¹² As appellant is at fault in the creation of the overpayment, he is not eligible for waiver of the recovery of the overpayment.¹³

⁷ 20 C.F.R. § 10.433(b). *See also Duane C. Rawlings*, 55 ECAB 366 (2004).

⁸ 20 C.F.R. § 10.430(a).

⁹ *Id.* at § 10.430(b).

¹⁰ *See Neill D. Dewald*, 57 ECAB 451 (2006).

¹¹ *See J.K.*, 60 ECAB ____ (Docket No. 08-1761, issued January 8, 2008).

¹² *See Tammy Craven*, 57 ECAB 689 (2006).

¹³ *See Neill D. Dewald*, *supra* note 10.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period August 5 through September 1, 2007, for which he was at fault. However, the Board finds that the Office did not properly calculate the amount of the overpayment as appellant was entitled to partial disability after August 22, 2007. Thus, the case is remanded for a recalculation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2007 decision of the Office of Workers' Compensation Programs is affirmed as to the issue of fact of overpayment and fault but is remanded for the Office to determine the correct amount of the overpayment.

Issued: October 27, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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