

On October 15, 2008 the Office notified appellant of the conditions under which she would receive compensation every four weeks. In order to avoid an overpayment of compensation, she was to contact the Office as to any change in her work status, including if she returned to her former job or obtained other work. Appellant was advised to notify the Office immediately when she returned to work. It was further advised that, if she worked for any portion of the period for which compensation was received, she must return the check to the Office or an overpayment of compensation would result. The period of appellant's first payment was from September 28 to October 25, 2008. Appellant received the payments through direct deposit.

On October 30, 2008 appellant telephoned the Office and inquired if she would be compensated for the months of June and July 2008. On November 10, 2008 she returned to full-time light-duty work at the employing establishment.

On December 15, 2008 appellant returned a call from the Office and confirmed her return to work on November 10, 2008. The Office advised her that she was in receipt of an overpayment of compensation for the period November 11 to 22, 2008. It requested that she return the payment for the period November 23 to December 20, 2008 as she was not entitled to the entire payment. Appellant stated that she did not receive any compensation for June and July 2008, but the Office informed her that she was not entitled to the payment from November 23 to December 20, 2008. She was advised to submit CA-7 and CA-7a forms supported by medical documentation for time loss due to her injury including June and July 2008.

On December 30, 2008 the Office made a preliminary determination that appellant was overpaid compensation in the amount of \$2,627.27 for the period November 10 to December 20, 2008 as she received wage-loss compensation benefits for total disability after she returned to work on November 10, 2008.¹ It explained that appellant was on the periodic rolls receiving compensation every 28 days in the amount of \$1,794.23. The Office noted that \$1,794.23 divided by 28 days equaled \$64.08 which, when multiplied by 41 days (from November 10 to December 20, 2008) equaled \$2,627.27. It found appellant to be at fault in the creation of the overpayment because she was knew or reasonably should have known that she was not entitled to compensation after she returned to work. The Office noted that appellant had the right to submit evidence or arguments which would affect the preliminary findings.

On January 12, 2009 appellant requested a telephone conference. She contended that the overpayment occurred through no fault of her own as she did not receive any money from the Office for her injury until August 18, 2008, when it was supposed to have commenced 45 days after her injury. Appellant stated that she did not receive a full check when she returned to work as she had to continue with physical therapy two to three days a week. She submitted a Form OWCP-20 overpayment recovery questionnaire and supporting financial information with her request. Appellant listed her total monthly income as \$1,398.00 and total monthly expenses as \$3,462.00. Additional unspecified funds were noted as being \$560.00. Appellant reiterated that

¹ Although the preliminary determination indicated that the overpayment began on November 11, 2008 the record indicates that the overpayment actually began on November 10, 2008 as that is when appellant returned to work.

the Office did not compensate her from May through August 2008.² She indicated that she did not fully understand her reporting responsibilities.

On April 20, 2009 a telephonic hearing was held. Appellant testified that the employing establishment stopped paying her on May 20, 2008 and that she had repeatedly submitted wage-loss claims thereafter. She was not sure who received the information. Appellant stated that she was unable to pay her monthly bills as a result of the nonpayment of compensation and that she was very stressed about her financial situation.

On May 15, 2009 appellant submitted a Form OWCP-20 overpayment recovery questionnaire together with other financial information. She listed her total monthly income as \$1,398.00, total monthly expenses as \$3,250.82, and additional funds as \$460.00. Appellant again indicated that she thought the money received was for the period May to August 2008.

By decision dated July 8, 2009, an Office hearing representative found that appellant received a \$2,627.27 overpayment of compensation from November 10 to December 20, 2008 for which she was with fault. The fact appellant was issued payment by direct deposit did not diminish her responsibility to return the monies as she had been verbally advised of the overpaid compensation well in advance of her receipt of the funds. Moreover, appellant had acknowledged her understanding and responsibilities regarding the receipt of compensation. The hearing representative found appellant accepted payments which she knew or should have known to be incorrect. While the evidence supported that appellant's expenses exceeded her monthly income, a reasonable repayment schedule was not possible and the overpayment was found due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ A claimant, however, is not entitled to receive compensation for temporary total disability and actual earnings for the same period.⁵ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

² On March 31, 2009 appellant filed claims and submitted medical documentation for wage-loss benefits from May 26 to June 3, 2008. On April 28, 2009 the Office paid her temporary total disability from May 26 to August 2, 2008.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008); *Danny E. Haley*, 56 ECAB 393 (2005).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004). *See id.*

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation from November 10 through December 20, 2008. The record reflects that appellant returned to work on November 10, 2008 but she received wage loss for temporary total disability through December 20, 2008. As noted, appellant is not entitled to receive compensation for temporary total disability after she returned to work and earned a salary. Accordingly, an overpayment of compensation was created for this period.

The Office found that appellant received an overpayment of compensation from November 10 to December 20, 2008 in the amount of \$2,627.27. It calculated the amount of overpayment by finding appellant received \$64.08 a day (\$1,794.23, the amount of compensation received every 28 days, divided by 28 days) and multiplied by 41 days, the number of days in the period November 10 to December 20, 2008. There is no contrary evidence regarding the fact of and the amount of the overpayment. The Board will affirm the Office's finding on the fact and the amount of the overpayment. Accordingly, appellant received an overpayment as she returned to work and continued to receive compensation.

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.⁷

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

“[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. 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 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;
- (2) Failed to provide information which he or she knew or should have known to be material; or

⁷ 5 U.S.C. § 8129; *see P.M.*, 60 ECAB ____ (Docket No. 07-2169, issued March 3, 2009); *Linda E. Padilla*, 45 ECAB 768 (1994).

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).⁸

“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.”⁹

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 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 *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.¹¹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. It determined that appellant was at fault in creating the overpayment of \$2,627.27 based on the fact that she knew or should have known that the payments received by direct deposit from November 10 through December 20, 2008 were incorrect as she had returned to work. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have known that she was not entitled.¹² Appellant was apprised by letter dated October 15, 2008 that she must notify the Office immediately when she returned to work. The Office also advised that, if appellant worked for any portion of the period for which compensation was paid, she must return the payment to the Office or an overpayment of compensation would result.

The record indicates that appellant received two direct deposits -- one deposit on November 22, 2008 for the period October 26 to November 22, 2008 and another deposit on December 20, 2008 for the period November 23 to December 20, 2008.

Regarding the overpayment of compensation for the period October 26 to November 22, 2008, the Board finds that appellant was without fault in creating the overpayment. While appellant accepted the overpayment by gaining control of the funds deposited into her bank

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

⁹ *Id.* at § 10.433(b).

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

¹¹ *See Tammy Craven*, 57 ECAB 689 (2006). *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹² *See Russell E. Wageneck*, 46 ECAB 653 (1995).

account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day.¹³ Unlike the situation where a claimant receives a physical check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account.¹⁴ There is no specific evidence of record in this case to show that appellant had notice or that she was aware that she had accepted an incorrect payment by direct deposit for the compensation payment that included the period November 10 to 22, 2008. While the hearing representative found appellant to be with fault because she was verbally advised to return the overpayment, the Board notes that the December 15, 2008 teleconference did not occur until well after the payment that was deposited on November 22, 2008. A finding of no fault does not mean, however, that appellant may keep the money, only that the Office must consider her eligibility for waiver. The case will be remanded to the Office to determine whether she is entitled to waiver for that part of the overpayment that occurred from November 10 to 22, 2008.

After appellant's receipt of the first direct deposit, she knew or should have known that the subsequent direct deposits were in error under the reasonableness standard addressed above. On December 20, 2008 when she received the second payment for the period November 23 to December 20, 2008, she had worked for almost six weeks. Appellant has not presented persuasive argument or evidence that she believed that these payments for temporary total disability were correct. Rather, she stated her belief that the additional monies were for wage loss from May through August 2008. The record reflects the Office advised appellant on December 15, 2008 that she was not entitled to the check covering the period November 23 to December 20, 2008 and should return the payment. It also informed her of the evidence to submit to file wage-loss claims for May through August 2008. The record reflects appellant filed her wage-loss claims on March 31, 2009. The evidence does not establish that she had previously filed any wage-loss claims for May through August 2008. Therefore, appellant's contention that the November 22 to December 20, 2008 payment somehow related to money owed is not reasonable. She was clearly advised in the Office's October 15, 2008 letter that she could not receive compensation for a period in which she also worked. In determining fault the Office applies a reasonable person test.¹⁵ It was not reasonable for appellant to believe that she could continue to receive compensation after she returned to work and enough time had passed for her to review confirmation of the incorrect payments in her bank account. This is so especially in light of the December 15, 2008 telephone conversation in which the Office specifically advised her to return the payment. Moreover, the record and appellant's own hearing testimony, indicates that she was aware that there was a question as to whether she was entitled to the compensation payment. The Board finds that she knew or should have known that the deposit received covering the period November 23 through December 20, 2008 was incorrect. Therefore, appellant was at fault in creating this portion of the overpayment.

¹³ See *Tammy Craven*, *supra* note 11.

¹⁴ *Id.*

¹⁵ See *L.C.*, 59 ECAB ___ (Docket No. 08-209, issued June 16, 2008).

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period November 10 to December 20, 2008, in the amount of \$2,627.27. The Board further finds that appellant was without fault in the creation of the overpayment for the period October 26 to November 22, 2008 but is with fault in creating the overpayment for the period November 23 to December 20, 2008. The case is remanded for further proceedings consistent with this decision.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part.

Issued: August 19, 2010
Washington, DC

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

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

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