

syndrome and authorized an open lateral release. Appellant worked intermittently after the injury. She accepted a part-time job on September 21, 1995 and stopped work on July 1, 2004.¹

In an April 13, 2005 letter, the Office notified appellant that she returned to work as a mail handler on September 21, 1995 but abandoned the position on July 1, 2004 without a valid reason. It noted that she remained out of work and received compensation based upon a loss of wage-earning capacity for four hours per day. The Office advised that the position remained available and that the job constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing. She was informed that the provision of 5 U.S.C. § 8106(c)(2) provides for termination of compensation if an employee is shown to have abandoned a suitable job.

On May 23, 2005 the Office advised appellant that it considered the reasons given by her for abandoning the position and found them to be invalid. It afforded her 15 additional days to report for duty and advised her of the provisions of section 8106(c)(2).

In a June 28, 2005 decision, the Office terminated appellant's monetary compensation, effective July 10, 2005, on the grounds that she abandoned suitable work.²

In a November 10, 2005 file memorandum, the Office noted that appellant's compensation was terminated on July 10, 2005 but she continued to receive wage-loss benefits through November 10, 2005. Appellant was paid for 112 days and an overpayment of \$3,456.00 was created. In a November 10, 2005 manual adjustment form, the Office calculated that a \$3,456.00 overpayment occurred from July 10 to October 29, 2005. In a November 16, 2005 telephone call memorandum, it discussed the overpayment with appellant. Appellant advised that she received compensation checks after the Office terminated her compensation on July 10, 2005 and had cashed the checks.

On November 16, 2005 the Office informed appellant that it made a preliminary determination that she had received a \$3,456.00 overpayment of compensation from July 10 to October 29, 2005 because she received wage-loss benefits after the Office terminated her monetary compensation. It found that she was paid \$3,456.00 in compensation from July 10 to October 29, 2005. The Office explained how the overpayment was calculated and found that appellant was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect.

On December 12, 2005 appellant submitted an overpayment questionnaire and requested a decision based on a review of the written record. She submitted a 2004 federal tax return and asserted that she was not at fault in accepting the overpayment and that it would be a financial hardship for her to repay the debt. Appellant noted that she stopped working based on a doctor's recommendation. She received compensation starting July 10, 2005 and believed that the Office

¹ After appellant returned to part-time work, the Office reduced her compensation to reflect her loss of wage-earning capacity based on her ability to work four hours per day.

² Appellant did not appeal this decision to the Board. She requested reconsideration several times with the most recent Office decision being an August 24, 2006 decision denying modification of the prior decision.

was giving her additional time for reconsideration of her claim. Appellant also submitted a December 2, 2005 pay stub.

In a December 21, 2005 decision, the Office found that appellant received a \$3,456.00 overpayment of compensation from July 10 to October 29, 2005 for which she was at fault in creating. The overpayment occurred because she received wage-loss benefits after the Office terminated her compensation for abandoning suitable work pursuant to 5 U.S.C. § 8106(c). The Office found that she was at fault in creating the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect.

On January 6, 2006 appellant requested waiver contending that it would be a hardship to repay the debt because she had no income. She submitted federal tax returns for the period 1999 to 2004 and requested her compensation benefits be recalculated to include her dependent grandchild.

On March 17, 2006 appellant appealed to the Board. In a February 9, 2007 order, the Board remanded the case for reconstruction of the record. The Board instructed the Office to issue an appropriate decision to protect appellant's appeal rights.³

On July 28, 2008 the Office informed appellant that it had preliminarily determined that she received a \$3,456.00 overpayment from July 10 to October 29, 2005 because she received wage-loss compensation after the Office terminated her compensation. It found that she was paid \$3,456.00 in compensation from July 10 to October 29, 2005. Appellant received \$864.00 in compensation for each of the following four pay periods: July 10 to August 6, August 7 to September 3, September 4 to October 1 and October 2 to 29, 2005. The Office found that appellant was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect.

In a September 2, 2008 decision, the Office found that appellant received a \$3,456.00 overpayment of compensation from July 10 to October 29, 2005 for which she was at fault in creating. It indicated that she did not respond to the notice of preliminary overpayment.

In a letter dated September 12, 2008, appellant disagreed with the overpayment and fault finding and asserted that she was unable to work and remained entitled to compensation for her work injury. She submitted an overpayment recovery questionnaire dated August 26, 2008 and requested a preresoupment hearing. In a separate statement, appellant noted she brought the overpayment to the Office's attention and thought she was entitled to receive the compensation payments until the error was corrected. She believed that the Office was providing basic assistance because of the permanent nature of her injury and she was unable to repay the debt.⁴

On November 14, 2008 appellant appealed to the Board and reasserted her arguments regarding her ability to work and to repay the overpayment. In an October 21, 2009 order, the

³ Docket No. 06-973 (issued February 9, 2007).

⁴ In an October 15, 2008 decision, the Office denied appellant's request for a hearing noting that a final overpayment decision is not subject to the hearing provision of 5 U.S.C. § 8124(b).

Board remanded the case to the Office for further development. The Board noted that, after the November 16, 2005 preliminary overpayment finding, the Office received responsive evidence, including an overpayment questionnaire and a 2004 tax return, on December 19, 2005. The Board noted that the Office's December 21, 2005 final overpayment decision found that appellant did not submit responsive evidence. The Board noted that the December 21, 2005 overpayment decision did not review the evidence submitted by appellant and received by the Office on December 19, 2005. The Board remanded the matter to the Office to consider all the evidence submitted at the time of the December 21, 2005 and September 2, 2008 decisions.⁵

On November 24, 2009 the Office advised appellant of the Board's action and the pending overpayment matter. It requested that she complete and submit a new/current overpayment questionnaire so that the Office could further consider the issues of fault and waiver. The Office also requested appellant submit any supporting documents including tax returns, bank account statements and other records that support the income and expenses listed. It provided appellant 30 days to submit the evidence.

In a February 24, 2010 decision, the Office found that appellant received a \$3,456.00 overpayment of compensation from July 10 to October 29, 2005 because she received wage-loss compensation after the Office terminated her compensation benefits for abandoning suitable work pursuant to 5 U.S.C. § 8106(c). It found that she was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect. The Office noted reviewing the December 12, 2005 and August 28, 2006 overpayment questionnaires as well as the federal tax returns for the period 1999 to 2004. It stated that it would request full payment of \$3,456.00 within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 duty.⁶ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁷

Section 8106(c)(2) of the Act⁸ states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.⁹ The implementing regulations provide that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work

⁵ Docket No. 09-796 (issued October 21, 2009).

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8106(c)(2).

⁹ *Id.*

after suitable work is offered to or arranged for him or her, is not entitled to compensation, including compensation for a schedule award under 5 U.S.C. § 8107.¹⁰

ANALYSIS -- ISSUE 1

In a June 28, 2005 decision, the Office terminated appellant's monetary compensation effective July 10, 2005 based on her abandonment of suitable work. Appellant continued to receive wage-loss compensation for partial disability, four hours per day, through October 29, 2005. Based on the termination of compensation under section 8106(c)(2), she was not entitled to wage-loss compensation beginning July 10, 2005. Thus, an overpayment occurred.

The Office determined that from July 10 to October 29, 2005 appellant received \$3,456.00 wage-loss compensation. As appellant was not entitled to wage-loss compensation beginning July 10, 2005, this amount represents an overpayment of compensation. She received four compensation checks during this period, each in the amount of \$864.00. Appellant noted that she received the compensation checks and cashed them. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$3,456.00.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides that adjustment or recovery by the United States may not be made when 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.¹¹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹²

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³

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

¹⁰ See 20 C.F.R. § 10.517.

¹¹ 5 U.S.C. § 8129(b).

¹² *Gregg B. Manston*, 45 ECAB 344 (1994).

¹³ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116 (1999).

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.¹⁴

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant accepted the compensation checks in question, she knew or should have known the payments were incorrect.¹⁵

As noted, the Office erroneously issued wage-loss benefits in the amount of \$864.00 during four payments issued July 10 to October 29, 2005 after her monetary compensation was terminated pursuant to 5 U.S.C. § 8106(c) for abandoning suitable work. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payments she knew or should have known were incorrect.¹⁶ On April 13 and May 23, 2005 the Office advised appellant that a person who abandoned suitable work was not entitled to compensation. In a June 28, 2005 decision, it terminated further monetary compensation effective July 10, 2005. The decision clearly stated that wage-loss benefits were terminated as of that date. The evidence reflects that appellant should have been aware that, as of July 10, 2005, she was not entitled to receive additional wage-loss compensation.

Appellant noted in the overpayment questionnaires dated December 12, 2005 and August 26, 2008 that she received compensation after July 10, 2005 but believed that the Office was providing basic assistance to her because of her injury. This was not a reasonable belief in light of the language of the June 28, 2005 decision. The Office contacted appellant on November 16, 2005, and she acknowledged receiving the compensation checks and cashing them after the Office had terminated her compensation. The evidence establishes that appellant knew or should have known that the payments were incorrect as she was not entitled to receive wage-loss compensation after her benefits were terminated.

For these reasons, the Office properly found that appellant accepted wage-loss compensation from July 10 to October 29, 2005 which she knew or should have known to be incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$3,456.00 overpayment of compensation may not be waived.¹⁷

On appeal, appellant reasserted her belief that the Office was providing basic assistance because of the permanent nature of her disability. She also noted that she experienced severe

¹⁴ 20 C.F.R. § 10.433(b).

¹⁵ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁶ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹⁷ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

financial hardship and could not repay the debt.¹⁸ As noted, even though the overpayment may have resulted from negligence on the part of the Office, this does not excuse her from accepting payments she knew or should have known to be incorrect.¹⁹ The evidence establishes that appellant was at fault in creating the overpayment of compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from July 10 to October 29, 2005 for which she was at fault in creating.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁸ Appellant also submitted new evidence on appeal. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review evidence submitted by appellant on appeal. See 20 C.F.R. § 501.2(c)(1).

¹⁹ See *Russell E. Wageneck*, *supra* note 16.