

FACTUAL HISTORY

On June 23, 1995 appellant, a 46-year-old mail processor, filed a traumatic injury claim alleging that he injured his left shoulder on June 15, 1995 while removing mail from a sleeve.¹ He stopped work on June 16, 1995 and returned to limited-duty work on June 23, 1995. The Office accepted the claim for left shoulder strain and subsequently expanded the claim to include a left shoulder rotator cuff tear and a herniated disc at C5-6. Appellant had intermittent periods of disability during the period November 29, 1995 through February 28, 1996, when he stopped work. The Office authorized a C5-6 fusion, which was performed on May 13, 1996 and placed appellant on the periodic rolls for temporary total disability effective August 18, 1996. He returned to the limited-duty job of mail processor on January 25, 1997.

On April 9, 1997 appellant filed a traumatic injury claim alleging that he injured his neck, shoulder and arm when he turned his head suddenly to the right after a person came up behind him and clapped his hands together.² The Office accepted the claim for a cervical strain. Appellant stopped work on November 26, 1997 and returned to limited-duty work on July 31, 1998 working four hours a day. The Office authorized C4-5 fusion, which was performed on February 15, 1999. Appellant stopped work again, returned to limited-duty working four hours a day on December 13, 1999 and subsequently began working eight hours a day on January 12, 2000.³ He had intermittent periods of disability beginning August 8, 2000, until he stopped work on February 7, 2001.⁴ On March 26, 2001 he underwent a C6-7 fusion and discectomy, which had been authorized by the Office. By letter dated April 9, 2001, the Office placed appellant on the periodic rolls for temporary total disability effective February 25, 2001. The Office informed him that his regular gross amount would be \$2,145.96⁵ and would be paid every four weeks. The Office also advised him: “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you go back to work.” (Emphasis in the original.)

On February 23, 2002 the Office issued appellant a check in the net amount of \$2,047.12 for the period January 27 to February 23, 2002.⁶

¹ This was assigned claim number 16-0263167.

² This was assigned claim number 16-0295850. The Office subsequently combined claim numbers 16-0263167 and 16-0295850 with 16-0295850 as the master file number.

³ The Office issued a loss of wage-earning capacity decision on June 28, 1999, in which it reduced appellant's compensation based on his actual earnings in his limited-duty position of modified mail processor.

⁴ On February 14, 2001 the Office issued appellant a schedule award for a 10 percent impairment of his right upper extremity and an 8 percent impairment of his left upper extremity.

⁵ The net amount after deductions for health benefits and life insurance was \$2,001.65, for the “first payment” covering the period February 24 through March 25, 2001 and the net amount for the “regular payment” commencing March 25, 2001 was \$2,059.24.

⁶ The gross amount of the check before deductions for health benefits and life insurance was \$2,145.96.

Appellant returned to limited-duty work, working four hours a day on March 8, 2002. He increased his hours to five hours a day on March 22, 2002.

On March 23, 2002 the Office issued appellant a check in the net amount of \$2,011.80 for the period February 24 to March 23, 2002.⁷

In a letter dated April 22, 2002, the Office informed appellant that it was unable to make an adjustment for his check dated March 23, 2002, in the amount of \$2,011.80. The Office advised that he was only entitled to benefits in the amount of \$731.88 for the period February 24 to March 5, 2002. The Office then requested appellant to return \$1,279.92 to the Office no later than May 6, 2002.

In a May 28, 2002 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$1,279.92, because appellant received compensation for total disability through March 23, 2002, after he had returned to light duty for four hours on March 8, 2002. The Office found that he was at fault in the creation of the overpayment because he accepted compensation he knew or reasonably should have known, to be incorrect. The Office stated that appellant was advised by an April 9, 2001 letter of his responsibilities when he returned to work and that he should have realized that he was only due compensation for four hours a day and that the current amount he was receiving was the amount he received prior to his return to work for four hours a day. In addition, the Office advised him that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter, if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived.

Appellant requested a hearing by letter dated June 5, 2002 and submitted financial information to support a waiver of the overpayment. A hearing was held on March 25, 2003 at which appellant testified and submitted a copy of his bank statement.

By decision dated June 3, 2003, an Office hearing representative finalized the preliminary determination, in which the Office found that appellant was at fault in the creation of an overpayment in the amount of \$1,279.92. The hearing representative found that he received

⁷ The gross amount of the check before deductions for health benefits and life insurance was \$2,145.96.

payments for total disability when he was working part time during the period March 8 through 23, 2002 and should have known that the compensation payment he received was incorrect.⁸

LEGAL PRECEDENT -- ISSUE 1

In reviewing a determination that an overpayment of compensation has occurred, the Board must determine whether there was in fact an overpayment. When an employee returns to part-time work and ceases to be totally disabled, compensation for total wage loss is no longer payable.⁹

ANALYSIS -- ISSUE 1

The record reveals that appellant returned to work for the employing establishment in a part-time limited-duty capacity on March 8, 2002. He initially returned to working four hours a day on March 8, 2002 which was increased to five hours a day on March 22, 2002. Appellant received a check dated March 23, 2002, in the amount of \$2,011.80, for total disability for the period February 24 to March 23, 2002. Thus, the Office has met its burden to establish that an overpayment of compensation existed in this case.

The next question is whether the Office properly calculated the amount of the overpayment. Appellant returned to work for the employing establishment in a part-time limited-duty capacity on March 8, 2002 four hours a day which was increased to five hours a day on March 22, 2002. He received a check dated March 23, 2002, in the amount of \$2,011.80, for total disability for the period February 24 to March 23, 2002. The Office informed him in an April 22, 2002 letter, that he was only entitled to benefits in the amount of \$731.88 for the period February 24 to March 5, 2002 and that he was to return the remaining amount of \$1,279.92. The Board finds, however, that the Office incorrectly determined that appellant was only entitled to compensation for disability for the period February 24 to March 5, 2002 as he returned to work on a part-time basis on March 8, 2002 and was entitled to partial disability for the period March 8 to 23, 2002 as he worked four or five hours a day. As the Office failed to properly consider appellant's entitlement to partial disability in its calculation of compensation owed him, the Office has not shown that an overpayment was created in the amount of \$1,279.92.

⁸ In an investigative memorandum dated January 17, 2003, an investigator from the Postal Inspection Service detailed appellant's employment activity for his business of K.D. Merchandising. The report included witness statements and other documents. On August 8, 2003 the Office issued a preliminary finding that there was an overpayment in the amount of \$54,670.01, which occurred because appellant failed to report earnings from his self-employment on EN1032 forms dated November 26, 1999 and November 23, 2001. The Office informed him that he had forfeited income for the period August 26, 1998 through November 23, 2001. By decision dated August 8, 2003, the Office found that appellant had forfeited his right to compensation for the period August 26, 1998 through November 23, 2001. The Board notes that the record contains no final decision on the overpayment resulting from the forfeiture. On appeal appellant specifically referred to the overpayment which resulted from him being paid compensation for total disability when he was working part time during the period March 8 through 23, 2002.

⁹ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of Federal Employees' Compensation Act¹⁰ provide 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."¹¹ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹²

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation provides in relevant part that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) failed to provide information which he knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he knew or should have known to be incorrect.¹³

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that he was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.¹⁴ The Board finds that the Office was correct in determining that appellant knew or should have been expected to know he accepted incorrect payments inasmuch as he received temporary total disability compensation during the period March 8 through 23, 2002, while he worked part time as a modified mail processor. The record shows that, when the Office placed him on the periodic rolls, it advised him in a letter dated April 9, 2001, that he would be paid regular compensation until he returned to duty. The Office specifically advised appellant as follows: "To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you go back to work." (Emphasis in the original.) By his signature of April 19, 2001, appellant indicated his understanding.

The Board finds that this evidence supports that appellant knew or should have been expected to know that the total disability payment he accepted after returning to work on March 8, 2002 was incorrect. He was not totally disabled as of March 8, 2002, the date he returned to work part time and thus, was not entitled to receive compensation for total disability.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹² *Diana L. Booth*, 52 ECAB 370 (2000); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹³ 20 C.F.R. § 10.433(a) (1999).

¹⁴ *Diana L. Booth*, *supra* note 12.

Therefore, the Office properly found that appellant was at fault in the creation of the overpayment in this case.

CONCLUSION

The Board finds that the Office properly determined that an overpayment was created in this case because appellant received compensation for total disability when he was only entitled to compensation for partial disability. However, the Board finds that the Office incorrectly determined the amount of the overpayment since the Office failed to consider his entitlement to compensation for partial disability for the period March 8 through 23, 2002.

The Board further finds that appellant knew or should have known that the compensation payment he received for total disability for the period March 8 through 23, 2002 was erroneous as he had returned to work part time on March 8, 2002 and was not entitled to compensation for total disability. For this reason, he was at fault in the creation of the overpayment of compensation and, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2003 is affirmed with regards to the creation of an overpayment and the determination that appellant was at fault in the creation of the overpayment.¹⁵ However, the Board sets aside the finding regarding the amount of the overpayment and remands the case to the Office for a correct determination as to the amount of the overpayment.

Issued: August 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
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¹⁵ The record contains evidence from another claimant with claim number 16-0296851.