

laceration of the left ankle. The Office advised appellant to return any checks received after she returned to work to avoid an overpayment of compensation.

Appellant underwent a repair of a left Achilles tendon rupture on October 5, 2001 and a revision of the hardware in her left Achilles tendon on November 15, 2001. Appellant returned to work on April 26, 2002. By letter dated May 21, 2002, the Office, in response to a telephone message from appellant regarding her return to work, related:

“You were placed on the periodic rolls which generated an automatic payment for the period April 21 through May 18, 2002. The record reflects that you returned to work on April 26, 2002, creating an overpayment for the period of April 26 to May 18, 2002. If you choose to return the last payment sent to you, an amended payment for April 21 through April 25, 2002 will be issued. This will prevent an overpayment situation.”

By letter dated November 6, 2002, the employing establishment informed the Office that appellant had received a check for the period May 19 through June 15, 2002. The employing establishment enclosed an Office compensation payment history which showed that appellant received a check dated May 18, 2002 in the amount of \$2,081.26 for the period April 21 through May 18, 2002 and a check dated June 15, 2002 in the amount of \$2,081.26 for the period May 19 to June 15, 2002.¹

The Office completed an overpayment worksheet and determined that appellant received an overpayment of compensation in the amount of \$3,930.50 for the 51-day period April 26 to June 15, 2003. The Office subtracted the health and life insurance deductions taken by both the Office and the employing establishment during this period and found that appellant had received a total overpayment of \$3,790.87.

On May 15, 2003 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$3,790.87 because she returned to work on April 26, 2002 but received compensation for temporary total disability until June 15, 2002. The Office further notified appellant of its preliminary determination that she was at fault in the creation of the overpayment because she had been informed that she should return any compensation checks received after she returned to work.²

In a response dated June 10, 2003, appellant requested a decision based on the written evidence. In a letter dated June 11, 2003, appellant contended that she was not at fault in the creation of the overpayment and that the overpayment should be waived. Appellant related that on May 17, 2002 she received a compensation check for the period April 21 through

¹ By decision dated May 5, 2003, the Office reduced appellant's compensation to zero based on its finding that her actual earnings as a modified clerk effective December 12, 2002 fairly and reasonably represented her wage-earning capacity. In a decision dated May 7, 2003, the Office issued appellant a schedule award for a six percent permanent impairment of the left leg. Appellant has not appealed these decisions and therefore they are not before the Board at this time.

² The Office further noted that in its May 21, 2002 letter informing appellant of the overpayment, it had stated that if she did not return the check dated June 14, 2002 a “larger overpayment would be created.”

May 18, 2002. She noted that she had returned to work on April 26, 2002 and that she had submitted a claim for compensation from April 20 to 25, 2003. Appellant stated that on May 21, 2002 her union representatives spoke to Mr. Bradley, an "OWCP Specialist" to report the overpayment. She stated, "At this time I was out of work once again and Mr. Bradley told me to go ahead and cash the check that nothing would happen to me as I needed money to live on." Appellant related that the Office wrote her a letter on May 21, 2002 requesting that she return the check but then took no further action for one year. In an accompanying statement, appellant noted that subsequent to receiving the June 14, 2002 check she stopped work from July 10 to September 5, 2002.³ She stated that she cashed the June 14, 2002 check to pay bills as she had received no further compensation from the Office.

Appellant further submitted a letter dated May 21, 2002, received by the Office on June 16, 2003, in which she related that she had received a compensation check on May 17, 2002 for the period April 21 to May 18, 2002. Appellant indicated that she returned to work on April 26, 2002. Appellant noted that both the employing establishment and the Office took out health and life insurance for the period covered by the May 2002 check and that she was off work for part of the time covered by the check. Appellant stated, "I do not feel I should send the entire check back [and] wait another month for money I [have] already waited [one] month to receive." Appellant also submitted a statement from her union representatives dated May 21, 2002. The union representatives indicated that appellant could cash the compensation check mistakenly sent by the Office without being arrested.

By decision dated June 25, 2003, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$3,790.87 for the period April 26 through June 15, 2002 because she received compensation for temporary total disability while working. The Office further finalized its determination that she was at fault in the creation of the overpayment and therefore not entitled to waiver.⁴ The Office also found that the overpayment should be recovered in a lump sum as appellant had recently received a schedule award.⁵

LEGAL PRECEDENT -- ISSUE 1

20 C.F.R. § 10.500(a) provides as follows:

"Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury...."

³ It appears that appellant is referring to the June 15, 2002 check.

⁴ In the memorandum to the file accompanying the Office's decision, a claims examiner noted on the first line that appellant had been found to be without fault in the creation of the overpayment and included waiver information. However, it is apparent from the conclusion of the memorandum and the Office's decision that appellant was found to be with fault in the creation of the overpayment.

⁵ On May 7, 2003 the Office issued appellant a schedule award for a six percent permanent impairment of the right leg. Office records show that the Office issued appellant a lump sum payment for the entire amount of the schedule award, \$9,698.95, on May 9, 2003.

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to full-time employment on April 26, 2002 but received compensation for temporary total disability from April 26 to June 15, 2002. Office records obtained by the employing establishment reveal that appellant received a check dated May 18, 2002 for the period April 21 to May 18, 2002 in the amount of \$2,081.26 and a check dated June 15, 2002 for the period May 19 to June 15, 2002 in the amount of \$2,081.26. In calculating the overpayment, the Office determined that appellant had received an overpayment of compensation for 51 days in the amount of \$3,930.50. The Office credited appellant for health and life insurance premiums deducted during this period and concluded that the total amount of the overpayment was \$3,790.87. Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation or contesting the existence and amount of overpayment. Thus, the Office properly determined that appellant received an overpayment of compensation in the amount of \$3,790.87.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁶ provides that "[a]djustment 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 this subchapter or would be against equity and good conscience." Section 10.433 of the Office's implementing regulations⁷ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

"(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."

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433.

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 appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.⁸ In this case, appellant returned to work on April 26, 2002. She received a check dated May 18, 2002 for the period April 21 to May 18, 2002 and a check dated June 15, 2002 for the period May 19 to June 15, 2002. In response to a telephone call from appellant, the Office sent appellant a letter dated May 21, 2002 informing her that she should return the May 18, 2002 check. Appellant, in a May 21, 2002 letter, stated that she did not want to return the entire check. In correspondence dated June 11, 2003, appellant related that she was out of work again and needed the money received from the May 18 and June 14, 2002 checks for necessary living expenses. Appellant contended that her union steward had told her that she could cash the check and additionally noted that she was not currently in a financial position to pay back the money. However, as acknowledged, appellant knew when she accepted her compensation checks that they included wage-loss compensation to which she was not entitled, therefore, she is not without fault in the creation of the overpayment. Thus, waiver of the overpayment is not possible.

On appeal, appellant argues that she was without fault in creating the overpayment because she informed the Office, the employing establishment and the nurse assigned to her by the Office of her return to work. However, the Board has held that the fact that the Office may have been negligent in continuing to issue appellant checks for temporary total disability, after being informed by appellant of a return to work, does not excuse appellant's acceptance of such checks, which she knew or should have been expected to know should be returned to the Office.⁹ Appellant also argued that the Office found her without fault in the memorandum accompanying the Office's June 25, 2003 decision and then found her at fault in the June 25, 2003 decision. However, it is apparent from the context of the memorandum that the claims examiner concluded that appellant was at fault in the creation of the overpayment. Appellant was notified of the Office's preliminary determination that she was at fault in a letter dated May 15, 2003. The Office finalized its fault determination in its June 25, 2003 decision.¹⁰

The Board further notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in a lump sum. Although appellant was issued a lump sum schedule award payment on May 9, 2003, she was not in receipt of continuing compensation when the Office issued its June 25, 2003 decision. The Board's jurisdiction is limited to

⁸ See *Robin O. Porter*, 40 ECAB 421 (1989).

⁹ *Robert W. O'Brien*, 36 ECAB 541 (1985).

¹⁰ Appellant submitted evidence and raised arguments concerning matters subsequent to the Office's June 25, 2003 decision. The Board, however, is precluded from reviewing evidence for the first time on appeal; see 20 C.F.R. § 501.2(c).

reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,790.87.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2003 is affirmed.

Issued: February 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

¹¹ *Lewis George*, 45 ECAB 144 (1993). *See also Rose Carye*, 50 ECAB 482, 487 (1999).