

to accommodate her work restrictions. Appellant went off work on July 14, 2004, and the Office commenced payment for temporary total disability compensation. In the August 5, 2004 letter advising appellant that she would be paid temporary total disability compensation, the Office stated, "To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. The period of payment is shown on each check. If a payment includes monies for a period after a return to duty, there will be an overpayment and you will be responsible for repayment." (Emphasis in the original.)

On December 13, 2004 appellant commenced employment with Highland Park Baptist Church, for 40 hours per week, as a receptionist.

On May 27, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$6,126.36 for the period December 13, 2004 through April 16, 2005 because she had been receiving compensation to which she was not entitled. The Office found that appellant was at fault in the matter because when she obtained full-time employment effective December 13, 2004 she should have been aware that the payments she had been receiving were incorrect. The Office stated that appellant received compensation in the amount of \$13,035.04 from December 13, 2004 through April 16, 2005, and received actual earnings during this period in the amount of \$6,908.68; this created an overpayment of \$6,126.36. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office informed appellant that, if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the May 27, 2005 letter. Appellant did not respond to this letter within 30 days.

In a decision dated July 27, 2005, the Office finalized the preliminary determination regarding the overpayment of \$6,126.36. The Office noted that appellant had been advised by letter dated May 27, 2005 that a preliminary finding had been made that an overpayment had occurred and that appellant was at fault in the matter, but that appellant had not responded to the preliminary determination within 30 days. Therefore, the Office finalized the preliminary findings of fact, amount, fault and found that appellant was not entitled to waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.¹ Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.²

¹ 20 C.F.R. § 10.401(a) (2003).

² 20 C.F.R. § 500(a) (2003).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,126.36 for the period December 13, 2004 through April 16, 2005. The record shows that appellant received an overpayment during the period in question because she continued to receive checks for temporary total disability compensation after returning to full-time work on December 13, 2004. The Office calculated the \$6,126.36 overpayment by totaling the amount of temporary total disability compensation appellant received during the period December 13, 2004 through April 16, 2005, \$13,035.04, and subtracting the amount of her actual earnings with Highland Park Baptist Church, \$6,908.68. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act³ provides that an overpayment must be recovered 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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁴

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide information which the individual 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.⁵

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

³ 5 U.S.C. § 8129(a)-(b).

⁴ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁵ 20 C.F.R. § 10.433(a).

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 expected know she was not entitled.⁶ Appellant was informed by the Office in its August 5, 2004 letter that she was required to notify the Office as soon as she returned to work and to return any payment of compensation to the Office in order to avoid an overpayment of compensation. Because appellant returned to part-time employment on December 13, 2004 and was, therefore, no longer totally disabled, she knew or should have known that she was no longer entitled to the amount of monthly compensation she had been receiving. Because appellant had been receiving direct deposit payments on a monthly basis, she knew that continuing direct deposit payments would be received unless she notified the Office that she was no longer entitled to receive such payment. Instead, appellant accepted and did not question the direct deposit of this check and of subsequent checks totaling \$6,136.36.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office from December 13, 2004 through April 16, 2005, which contained an overpayment in the amount of \$6,126.36, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$6,126.36, may not be waived.

LEGAL PRECEDENT -- ISSUE 3

With regard to the method determined by the Office to recover the amount of the overpayment, section 10.441(b) of Office regulations provides:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.... If the individual fails to make such refund, [the Office] may recover the same through any available means, including offset of salary, annuity benefits, or other [f]ederal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral to the debt to a collection agency or to the Department of Justice.”⁷

ANALYSIS -- ISSUE 3

The Board lacks the jurisdiction to determine the method of payment for the purpose of the recovery of a finalized overpayment. Section 10.441(b), cited above, gives the Office discretion to determine the method of recovery of the overpayment where an overpayment has been made to an individual who is not entitled to further payments. Further, the Board’s own case law stipulates that it does not have jurisdiction over the amount appellant is required to pay for the purpose of recovery of the overpayment when there is no further entitlement to

⁶ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁷ 20 C.F.R. § 10.441(b) (1999).

compensation, and appellant is not in receipt of continuing compensation benefits.⁸ In the present case, the Board lacks jurisdiction over the method of repayment because appellant returned to work on December 13, 2004 and is therefore is not entitled to disability compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,126.36 for the period December 13, 2004 through April 16, 2005. The Board finds that the Office properly found appellant was at fault in creating the overpayment. The Board lacks jurisdiction over the amount appellant is required to pay and the method employed for the purpose of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 5, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

⁸ *Robert N. Vachon*, 36 ECAB 502 (1985); *Marshall L. West*, 36 ECAB 490 (1985).