

moving postal flats at work. She stopped work on May 22, 2001. By letter dated June 21, 2001, the Office accepted that appellant sustained an employment-related lumbosacral strain. The Office informed her that, if she received a compensation check for any period while working, she should return the check to the Office to prevent an overpayment in compensation. Appellant received continuation of pay from May 24 through July 7, 2001, and total disability compensation benefits commencing July 8, 2001, receiving checks in the amount of \$1,709.20 for the period July 8 through 27, 2001, \$2,426.24 for the period July 28 through August 29, 2001, and \$1,215.70 for the period August 25 through September 7, 2001.

On September 27, 2001 appellant returned to part-time work for approximately four hours a day that was increased to six hours a day on December 18, 2001.¹ Appellant thereafter submitted CA-7 form, claims for compensation, for two to four hours daily, covering the period September 22 to November 2, 2001. The record indicates that appellant was due temporary total disability for 104 hours from September 8 through 26, 2001, and 103 hours from September 27 through November 2, 2001. Computer print-outs of record indicate that by check dated October 26, 2001, appellant received compensation totaling \$2,431.40 for the period September 8 to October 5, 2001, by check dated November 9, 2001, compensation totaling \$1,215.70 for the period October 6 to 19, 2001, and by check dated November 23, 2001, compensation totaling \$1,215.70 for the period October 20 to November 2, 2001. By a check dated November 30, 2001, she received compensation for the period November 3 to 16, 2001, totaling \$549.39 and by check dated January 25, 2002, compensation totaling \$1,526.08 for the period November 17 to December 28, 2001.

By letter dated December 5, 2001, an employing establishment injury compensation specialist, Trish Kero, controverted appellant's claim for compensation for the period November 17 through 30, 2001 and informed the Office that an overpayment had been created because appellant had received compensation for total disability for the period September 27 through November 2, 2001 although she had returned to part-time work. In correspondence dated December 11, 2001, appellant acknowledged receiving Ms. Kero's letter, noting "I been overpaid along with everything else [sic]." In a letter dated April 23, 2002, Ms. Kero attached a worksheet that described the compensation appellant had received for the period July 8, 2001 to April 5, 2002.

By decision dated October 21, 2003, the Office terminated appellant's compensation benefits, based on the opinion of Dr. David C. Mitchell, Board-certified in orthopedic surgery, who provided an impartial evaluation for the Office.

On October 27, 2003 the Office issued a preliminary finding of an overpayment in compensation totaling \$1,703.82. The Office noted that appellant received compensation based on total disability for the period September 27, 2001 through November 2, 2001, after she had returned to part-time work. She received \$4,862.80 in compensation for the period when, based on time analysis submitted with her CA-7 claim forms, she was only entitled to \$3,158.98, resulting in an overpayment of \$1,703.82. The Office found that she knew or should have

¹ In a report dated October 5, 2005, stamp received by the Office on October 11, 2005, a field nurse reported that appellant had returned to part-time light duty on September 28, 2001. A time analysis form indicated that she worked 2.9 hours on September 27, 2001.

known she was not entitled to receive compensation based on total disability after her return to work. The Office also indicated that appellant had three prior accepted claims under which she received wage-loss compensation and that she was familiar with the workers' compensation process. An overpayment worksheet reported that she was due 104 hours of temporary total disability from September 8 through 26, 2001 and 103 hours from September 27 through November 2, 2001, for a total of \$3,158.98, noting that she had received \$4,862.80 in compensation for that period.

Appellant requested a hearing regarding both the preliminary overpayment finding and the decision terminating her compensation benefits. At the hearing held on June 30, 2004, appellant testified that she received wage-loss compensation for total disability prior to her return to work but that she did not receive compensation from the end of November 2001 until January 25, 2002 and had spoken with Ms. Kero. She stated that Ms. Kero told her that she was not receiving compensation because she had an overpayment, and that she would not receive further compensation until the overpayment was repaid. Appellant testified that, after receiving two checks, she realized that she was receiving too much compensation, and again contacted the employing establishment. She stated that Ms. Kero told her she would "take care" of the overpayment and that the lapse in compensation checks between November 2001 and January 2002 was to recover the overpayment. Appellant acknowledged that she knew how much compensation to which she was entitled and recognized that she was receiving an overpayment.

Subsequent to the hearing, appellant submitted an overpayment questionnaire indicating that she had a monthly income of \$4,600.00 and monthly expenses of \$4,200.00, with \$2,300.00 in savings.

By decision dated November 8, 2004, the hearing representative affirmed that appellant was at fault in the creation of an overpayment in compensation in the amount of \$1,703.82. The hearing representative, however, set aside the termination decision and remanded the case for further development of the medical record to determine if her work-related condition had resolved.²

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 No further compensation for wage loss is payable if he or she can earn equivalent wages.⁵

² This appeal to the Board is only in regard to the overpayment finding, as the issue of her continuing disability is in an interlocutory position pending further development. *See* 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.515(a).

ANALYSIS -- ISSUE 1

Appellant does not dispute that she received an overpayment in compensation. The record indicates that for the period September 27 to November 2, 2001 she was working approximately four hours per day but received wage-loss compensation based on total disability in the amount of \$4,862.80. The record contains CA-7 forms and time analysis forms which reveal that appellant was due temporary total disability for 104 hours from September 8 through 26, 2001, and 103 hours from September 27 through November 2, 2001, a total of \$3,158.98 in compensation for temporary total disability. As she was not entitled to compensation for total disability the Office properly found an overpayment in the amount of \$1,703.82.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Federal Employees' Compensation 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."⁶

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

"[M]ay 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; 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. (This provision applies only to the overpaid individual)."⁷

Section 10.435 of the Office's regulations provides:

"(a) The fact that [the Office] may have erred in making the overpayment, or that the overpayment may have resulted from an error by another Government agency, does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.

⁶ 5 U.S.C. § 8129.

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

“(b) However, [the Office] may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because:

(1) The individual relied on misinformation given in writing by [the Office] (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Federal Employees’ Compensation Act or its regulations; or

(2) [The Office] erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.”

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard, that appellant accepted a payment which she knew or should have been expected to know was incorrect, in finding that she was at fault in the creation of the overpayment. Although the Office may have been negligent in issuing appellant compensation checks for total disability after it had been informed that appellant had returned to work and had earnings, this does not excuse appellant’s acceptance of the checks for amounts which she knew or should have known to be incorrect.⁸ The record of appellant’s correspondence in December 2001 and her testimony at the June 30, 2004 hearing, acknowledge the fact that she knew that an overpayment in compensation had been created. At no time, however, did appellant contact the Office regarding her compensation payments. The record also reflects that she had previously accepted claims under which she received compensation and thus had an understanding of the workers’ compensation process. Although she testified that she was told that Ms. Kero would “take care” of the overpayment, the Board does not find that this excuses her acceptance of payments she knew to be incorrect. Appellant testified that she knew how much compensation she was to receive for total disability and recognized that she was receiving an overpayment.

The record indicates that appellant received total disability compensation commencing July 8, 2001, receiving checks in the amount of \$1,709.20 for the period July 8 through July 27, 2001, \$2,426.24 for the period July 28 through August 29, 2001, and \$1,215.70 for the period August 25 through September 7, 2001. She continued to receive total disability compensation in checks covering the period September 8 through October 5, 2001 for \$2,431.40, October 6 through October 19, 2001 for \$1,215.70 and October 20 through November 2, 2001 for \$1,215.70, even though she returned to work on September 27, 2001. As the amounts after her return to work are very similar to those received for similar periods before her return to work. The record supports that appellant knew or should have known the amount of compensation to which she was entitled and that she was overpaid for the period September 27 through November 2, 2001.

⁸ 20 C.F.R. § 10.435(a); *Henry Baskin*, 53 ECAB 719 (2002).

As each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that the payments he or she receives from the Office are proper,⁹ the Board finds that the Office correctly found appellant to be at fault under the facts and circumstances of this case. The record supports the Office's finding that appellant knew or reasonably should have known that she was not entitled to receive compensation for total disability compensation after she returned to work on September 27, 2001. As appellant was at fault in the creation of the overpayment, she was not entitled to waiver.¹⁰

Regarding recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where, as here, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹¹

CONCLUSION

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of compensation in the amount of \$1,703.82 as she continued to receive compensation for total disability after she returned to part-time work on September 27, 2001.

⁹ *Andrew R. Schwarz*, 54 ECAB ____ (Docket No. 03-399, issued March 10, 2003).

¹⁰ *Id.*

¹¹ *Robert K. Swett*, 53 ECAB 615 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 8, 2004 be affirmed regarding the finding that appellant was at fault in the creation of an overpayment in compensation in the amount of \$1,703.82.

Issued: September 14, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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