

leg went sideways. The Office accepted her claim for bilateral knee sprains with degenerative joint disease and paid compensation. Effective January 2, 1997, the Office reduced her compensation based on her actual earnings as a case worker assistant, with a capacity to earn \$12,000.00 a year on a full-time basis. On the prior appeal of this case,¹ the Board found that this reduction was proper. The facts of this case, as set forth in the Board's prior decision, are hereby incorporated by reference.

On July 13, 2001 appellant completed a (Form CA-1032) stating that she worked for the El Paso Independent School District as a substitute teacher on a call basis only at the rate of \$54.00 a day from January 31 through June 15, 2001. She also indicated that she was employed as a substitute teacher from June 15 through July 13, 2001.

On January 13, 2003 the Office notified appellant that her compensation was being suspended as of December 29, 2002, for failing to complete and return CA-1032 forms sent to her on July 2 and August 5, 2002. Appellant wrote to the Office on February 6, 2003. She stated that she was "knowledgeable about the regulations that require the claimant to report earnings from my employment." Appellant stated that when she received a Form CA-1032 on August 5, 2002, she filled it out and sent in a timely response. On February 19, 2003 the Office advised that her case file did not contain such a Form CA-1032.

Appellant completed a Form CA-1032 on March 7, 2003. She stated that since January 1, 2002 she earned \$26,500.00 a year at Burnham Wood High School. An April 30, 2003 investigative memorandum from the Office of the Inspector General showed specific earnings beginning in August 2001. A payroll journal detailed appellant's earnings by check beginning in August 2001. On April 15, 2004 Burnham Wood High School confirmed that appellant gained the title "Site Manager" on August 1, 2001 with an annual salary of \$26,000.00.

On March 12, 2004 the Office noted that appellant was a GS-3, Step 4 when she was injured at work on December 11, 1991 and that this position paid \$20,696.00 as of May 1, 2001. The Office also noted that the position of case worker assistant, for which she was rated in 1997, paid \$16,670.00 as of May 1, 2001. Because appellant earned more than this in her job as a site manager beginning in 2001, the Office determined that she had no loss of wage-earning capacity, though she continued to receive compensation under the loss of wage-earning capacity determination.

On May 11, 2004 the Office issued a preliminary determination that appellant received a \$6,841.09 overpayment because her earnings from the El Paso School District became equal to or greater than her salary as a cashier with the Department of Defense. As she was not entitled to monetary compensation on or after August 1, 2001, the Office calculated the amount of the overpayment based on all monies paid after that date. The Office made a preliminary determination that appellant was with fault in the matter because "you continued to accept monetary payments which you knew or should have known were incorrect and provided misleading and untrue statements concerning your earnings on [F]orm CA-1032."

¹ Docket No. 98-0935 (issued May 3, 2000).

Appellant completed an overpayment recovery questionnaire on June 5, 2004 and explained why she thought the incorrect payment was due her:

“I have disabilities on arms and legs. I had already told [the claims examiner] about my job. I thought he had change[d] the amount because I was getting \$356.20 and he was taking away \$50.00 a month for overpayment.”

Appellant stated that she reported her change in circumstance by telephone when she started working, by the Form CA-1032, by a personal letter and by a federal court sending the claims examiner information and notes from her doctor about her job. In a statement dated June 5, 2004, appellant argued that the overpayment occurred through no fault of hers. She appeared before an Office hearing representative on October 26, 2004 and argued her case further.

In a decision dated February 14, 2005, the Office hearing representative found that appellant received a \$6,841.09 overpayment from August 1, 2001 to December 28, 2002 and that she was with fault in the matter “because she failed to provide a timely report of her new job and salary increase and continued to receive compensation that she should have known was incorrect.”

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² As used in the Act, the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.³ When an employee ceases to have a wage loss, she is no longer entitled to compensation for wage loss.⁴

ANALYSIS -- ISSUE 1

Appellant’s December 11, 1991 employment injury caused disability for work and the Office paid her monetary compensation for her incapacity to earn the wages she was earning on the date of injury. Effective January 2, 1997, the Office reduced this compensation based on her actual earnings of \$12,000.00 a year on a full-time basis as a case worker assistant. Because she continued to have a partial loss of wage-earning capacity as a result of her employment injury and received monetary compensation.

Her circumstances changed on August 1, 2001. Appellant obtained the title “[s]ite [m]anager” and began earning wages of \$26,000.00 a year, according to Burnham Wood High

² 5 U.S.C. § 8102(a).

³ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁴ *See Donney T. Gala*, 39 ECAB 1357 (1988); *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); *Chauncey L. Moore, Jr.*, 34 ECAB 553 (1983).

School. Her earnings were more than her date-of-injury job would have paid in 2001 and more than her rated job as a case worker assistant would have paid. At this point, then, she ceased being disabled and due any wage-loss compensation as a result of her December 11, 1991 employment injury. For this reason she was no longer entitled to receive any monetary compensation for wage loss.⁵

The record shows, however, that the Office continued to pay compensation for a partial loss of wage-earning capacity after August 1, 2001. For example, the Office issued a check dated October 6, 2001 for \$367.80. The following year, after a cost-of-living allowance in January, the Office issued checks for \$372.80. Indeed, appellant continued to receive these checks through December 28, 2002, when the Office suspended her compensation for failing to submit CA-1032 forms. The Board will therefore affirm fact of overpayment. Further, the amount of the overpayment, \$6,814.09, accurately reflects compensation paid at these rates over the approximately 5.86 pay periods remaining in 2001 and the relevant 12.5 pay periods in 2002. The Board will also affirm the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

The Office may 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 received 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 with respect to 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 (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).⁶

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 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.⁷

ANALYSIS -- ISSUE 2

In its May 11, 2004 preliminary determination, the Office found that appellant was with fault on two grounds: "you continued to accept monetary payments which you knew or should have known were incorrect and provided misleading and untrue statements concerning your earnings on [F]orm CA-1032." This corresponds to grounds number 3 and 1, as noted in the

⁵ The term "disability" under the Act means the incapacity because of injury in employment to earn the wage which the employee was receiving at the time of injury. See *Merle J. Marceau*, 53 ECAB 197 (2001); *Alfonso G. Montoya*, 44 ECAB 193 (1992).

⁶ 20 C.F.R. § 10.433(a) (1999).

⁷ *Id.* § 10.433(b).

Legal Precedent. In its final decision on February 14, 2005, the hearing representative also found that appellant was with fault on two grounds: “because she failed to provide a timely report of her new job and salary increase and continued to receive compensation that she should have known was incorrect.” This corresponds to grounds number 2 and 3 above.

Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁸ The Board has held that the Office may not change the grounds for fault to a standard to which the claimant has had no opportunity to respond.⁹ As grounds number 3, “accepted a payment which he or she knew or should have known to be incorrect,” is the only grounds given in both the preliminary determination and the final decision of the Office, the Board may affirm the finding of fault only on this basis.

The record in this case supports appellant’s continuing receipt of compensation for a partial loss of wage-earning capacity after she had no loss of wage-earning capacity in her job as site manager beginning August 1, 2001. The only matter left to be determined is whether appellant accepted payments she knew or should have known to be incorrect after beginning work as a site manager.

The Board finds that appellant was at fault in creating the overpayment that occurred from August 1, 2001 through December 28, 2002. She stated in her February 6, 2003 letter to the Office that she was knowledgeable about the regulations that require a claimant to report earnings from employment. Appellant knew from her reemployment as a case worker assistant in 1997 that increased earnings would affect the amount of compensation to which she was entitled. A previous overpayment occurred in 1997 when appellant began work as a case worker assistant and continued to receive compensation for temporary total disability, so she understood the basic relationship between wages earned and compensation due. Further, the Form CA-1032 she completed on July 13, 2001 required her to report all employment for which she received a salary, wages, income, sales commission, piecework or payment of any kind. It required her to report what she was paid. It warned that penalties may be applied for failure to report all work activities thoroughly and completely. The cover letter explained the significance of this information:

“The information requested in this letter is required in connection with your benefits under the Act (FECA), 5 U.S.C. 8101 *et seq.* This information will be used to decide whether you are entitled to continue receiving these benefits, or whether your benefits should be adjusted.”

Appellant therefore had explicit notice only two weeks before she began work as a site manager that her earnings would have an effect on her compensation benefits. This, together with the previous reduction of her compensation due to increased earnings in 1997 and the overpayment that arose because she earned wages in 1997 while continuing to receive compensation for total disability, support the finding that appellant knew or should have known that the continuing compensation payments she accepted after August 1, 2001 were incorrect.

⁸ See generally FECA Circular No. 82-48, “Overpayments and Waiver” (December 1, 1982).

⁹ *Dorothy F. Ellis*, 41 ECAB 296 (1989).

On these grounds the Board will affirm the Office's February 14, 2005 decision on fault. Inasmuch as appellant is with fault in the creation of the overpayment from August 1, 2001 through December 28, 2002, she is not eligible for waiver. The Office is required by law to recover this overpayment.

Appellant asserts that she is not at fault, that she did everything the Office required her to do and that if fault lies anywhere, it lies with the Office. Even if the Office knew, from medical reports or otherwise, about appellant's new position as a site manager a month before that employment began -- an allegation not supported by the evidence -- the fact that the Office may have erred in making the overpayment does not relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.¹⁰ In other words, any negligence by the Office in continuing to pay compensation does not excuse appellant's acceptance of the payments where she knew or should have known that the payments were incorrect.

CONCLUSION

The Board finds that appellant was with fault in a \$6,841.09 overpayment of compensation that occurred from August 1, 2001 through December 28, 2002. She accepted payment of compensation which she knew or should have known was incorrect. Appellant is therefore not eligible for waiver.¹¹

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ The Board has no jurisdiction to review whether the Office properly recovered the overpayment from appellant's entitlement to a schedule award.