

By letter dated July 7, 2004, the Office accepted appellant's claim for a herniated disc at L4-5. The Office advised her that she was expected to return to work including light-duty or part-time work if available, as soon as she was able. Appellant was advised that, once she returned to work, or obtained new employment, to notify the Office immediately. The Office advised that full compensation benefits were only payable while appellant could not perform the duties of her regular job because of her accepted employment-related injury. Appellant was advised to immediately return any compensation checks which included payment for a period she had worked, to prevent an overpayment of compensation.

On January 24, 2005 Dr. David L. Eisenberg, an attending Board-certified internist, released appellant to return to full-time limited-duty work with restrictions effective January 31, 2005. She returned to work on January 31, 2005.

On February 10, 2006 the Office issued a preliminary determination that an overpayment in the amount of \$31,840.28 had occurred because appellant continued to receive compensation for temporary total disability through January 21, 2006 after returning to full-time limited-duty work on January 31, 2005. The Office found that appellant was at fault in the creation of the overpayment, as she was informed by its July 7, 2004 letter, that once she returned to duty she would no longer be entitled to any compensation for total disability and would be expected to return compensation checks to the Office. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. Appellant did not respond within the allotted time period.

By decision dated March 13, 2006, the Office finalized the preliminary overpayment determination. It found that appellant was not without fault in the creation of the overpayment in the amount of \$31,840.28 that occurred from January 31, 2005 to January 21, 2006 because she was aware that, after she returned to work, she was no longer entitled to receive compensation for temporary total disability. The Office directed appellant to repay the overpayment as she was no longer receiving compensation benefits.

On March 10, 2006 appellant requested an extension to respond to the Office's February 10, 2006 overpayment letter and a telephone conference regarding the overpayment. The Office advised her that a final decision had already been issued but it would hold the requested conference.

An Office claims examiner prepared a memorandum regarding a March 21, 2006 telephone conference with appellant who advised that, when she was initially injured, she had to wait for her compensation checks to arrive. When appellant began receiving compensation, she was confused at first as to the period covered by the payments. She stated that, when she returned to work, the checks kept coming and she felt she was entitled to them. Appellant indicated that she did not complete CA-7 forms for compensation and, as the Office was sending her checks, she must have been entitled to them. She did not realize that the period for which she was being paid was printed on the checks. Appellant related that she did not think it was

unusual that she received a pay check and a compensation check at the same time. She believed that she was entitled to the latter payment since she was not filing claims for compensation. Appellant stated that everyone knew she was working so if she was receiving money she must have been owed money.

The claims examiner reviewed a history of appellant's compensation payments and confirmed that her initial compensation check for the period August 16 through 20, 2004 was issued on September 24, 2004. The claims examiner stated that this was the only payment that involved a period of delay greater than one month. Subsequent compensation checks were issued on a regular basis. She noted that, once the checks were issued to appellant, it was reasonable to assume that appellant would review the checks and the period for which she was being paid. There was no record to establish that appellant ever contacted the Office questioning any payments issued. The claims examiner confirmed that the July 7, 2004 letter advised appellant about her need to return any checks received once she returned to duty. The claims examiner determined that appellant's reasons for accepting the compensation checks in question were insufficient to absolve her of fault in the creation of the overpayment. Appellant explained that it would be difficult for her to repay the overpayment because she had other garnishments attached to her checks at that time. The claims examiner stated that the Office's March 13, 2006 finding of fault would be affirmed based on the telephone conference and her review of the records.

A March 20, 2006 investigative report from the employing establishment's inspector general's office revealed that appellant completed paperwork to receive compensation after returning to work on January 31, 2005. She believed that the Office still owed her money because they were behind in paying her. Appellant noted that, when she was working, she was paid twice each month and that the Office was only paying her once each month. She was unable to determine whether her compensation check covered a one-month period because she was getting paid 75 percent of her pay rate. Appellant could not recall the amount of the compensation checks but indicated that her pay check was about \$1,000.00 after deductions. She noted the difficulty in contacting her claims examiner throughout the claim process and that an Office nurse assisted her with paperwork and in obtaining compensation checks. Appellant contended that she never filled out additional paperwork or requested compensation since she returned to work on January 31, 2005. She reiterated her belief that the payments she received were hers since the Office was behind in paying her. Appellant was shown the Office's July 7, 2004 letter regarding her obligation to immediately notify the Office about her return to work and to return compensation checks to avoid the creation of an overpayment. She responded that she told an Office nurse about her return to work and believed that the nurse would inform the Office about her return. Appellant indicated that her compensation checks were in the amount of \$2,000.00 to \$2,200.00 each, which was the equivalent of her overtime pay. She was shown each check she had cashed which was clearly marked with the period covered by the checks. Appellant stated that she was not aware of this notation. Her March 16, 2006 affidavit accompanied the Office's memorandum and copies of the compensation checks she received from August 8 to October 1, 2004 and October 30, 2004 to January 21, 2006.

On April 27, 2006 the Office issued a corrected decision to reflect the amount of the overpayment as \$30,477.40. The original overpayment did not reflect the correct amount deducted for health benefits and optional life insurance and basic life insurance premiums. The

Office found that appellant was at fault in the creation of an overpayment because she was aware that, once she returned to work, she was no longer entitled to receive compensation for temporary total disability. It directed her to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Office regulations, at 20 C.F.R. § 10.500(a), provide 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.”

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to full-time limited-duty work on January 31, 2005. She received her regular salary with no wage loss. However, she received compensation for temporary total disability from January 31, 2005 to January 21, 2006. The Office issued checks which covered the period in question in the gross amount of \$31,952.65. In calculating the overpayment, the Office deducted from the January 31, 2005 to January 21, 2006, payments health benefits and optional life insurance and basic life insurance premiums totaling \$1,475.25. This resulted in an overpayment of \$30,477.40. As she had returned to work from January 31, 2005 to January 21, 2006, and had no entitlement to compensation for that period, the Office properly calculated the \$30,477.40 overpayment. Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation or contesting the existence and amount of the overpayment. The Office properly determined that appellant received an overpayment of compensation in the amount of \$30,477.40.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees’ Compensation Act¹ provides 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.”² The Office may not waive the overpayment of compensation unless appellant was without fault.³ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁴

¹ 5 U.S.C. § 8129(b).

² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁴ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(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 was incorrect.”⁵

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“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.”⁶

ANALYSIS -- ISSUE 2

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.⁷

Appellant returned to work on January 31, 2005. As noted, she received an overpayment of compensation during the period January 31, 2005 to January 21, 2006. On July 7, 2004, the date the Office accepted appellant's claim for a herniated disc at L4-5, it notified appellant of her entitlement to compensation and her responsibility to return to work. The Office advised appellant that to minimize the possibility of an overpayment, she should notify it immediately when she returned to work and if she worked for any portion of a period covered by compensation to return the payment to the Office. Appellant was specifically advised that her compensation checks covered the period January 31, 2005 to January 21, 2006 as the checks were clearly marked with the period covered by each check. As she returned to work on January 31, 2005, she knew or reasonably should have known that she was accepting an

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ See *Diana L. Booth, supra* note 4.

incorrect payment.⁸ Additionally, appellant was informed that her compensation payments for total disability were only payable while she could not perform the duties of her job because of her accepted work-related injury. The Board finds that the evidence establishes that appellant accepted payments which she knew or should have known were incorrect. She is at fault in creating the overpayment such that waiver of the overpayment is not possible.

On appeal, appellant argues that she was without fault in creating the overpayment. She contends that she did not know why the Office did not know about her return to work as the Office referral nurse knew that she had returned to work. However, the Board has held that the fact that the Office may have been negligent in issuing a check for temporary total disability after being informed by a claimant of a return to work, does not excuse the claimant's acceptance of such checks which she knew or should have been expected to know to be incorrect.⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$30,477.40. 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.¹⁰

⁸ This case is distinguished from those cases where appellant was not apprised of the specific period of compensation. *See, e.g., Michael R. Nixon*, 40 ECAB 398 (1988). *See also Marlene R. Pavlo*, 38 ECAB 716 (1987) (where the Board found that appellant was without fault, where the record contained no evidence indicating that appellant was apprised by the Office, as of the time she received the compensation check, of the specific period the check covered so as to put her on notice that she was being paid incorrectly for a period of time during which she worked); *John DeLuca*, 36 ECAB 337 (1984) (where the Board found, in determining that appellant was not at fault, that there was no indication in the record that appellant was apprised by the Office of the specific period that the check in issue covered so that appellant would have had notice that an incorrect payment was received during a period of time in which he worked).

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

¹⁰ As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board