United States Department of Labor
Employees' Compensation Appeals Board

TAMMY CRAVEN, Appellant	)	
and	)	**Docket No. 05-249**
	)	**Issued: July 24, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, OK, Employer	)	

Appearances:
Tammy Craven, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER GRANTING PETITION FOR RECONSIDERATION. DENYING DIRECTOR'S REQUEST FOR ORAL ARGUMENT AND REAFFIRMING PRIOR BOARD DECISION

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
A. PETER KANJORSKI, Alternate Judge

On June 20, 2005 the Board issued a decision and order in the above-captioned case finding that appellant was not at fault in creating an overpayment of $14,282.66. The Board found that, although appellant had notice of the incorrect payment on March 9, 2004, only four days after the check was directly deposited to her bank account, she had no reason to suspect at the time the deposit was made that the Office of Workers' Compensation Programs had issued an incorrect payment. The Board affirmed the Office's August 3, 2004 decision on fact of overpayment and reversed the Office's finding that appellant was at fault in creating the overpayment.

On July 20, 2005 the Director of the Office filed a petition for reconsideration. He argued that the Board had applied incorrect analysis in determining that appellant was not at fault in creating the overpayment. Noting the Board's focus on the date of deposit, the Director argued that the Board should have determined whether appellant had an opportunity to make a decision on the deposit prior to the Office's preliminary finding of fault. The Director argued that appellant had notice on March 9, 2004 that the payment was incorrect, that she knew the exact amount of the overpayment, that she had an opportunity to make a decision on the deposit prior to the Office's April 28, 2004 preliminary finding of fault and that she nonetheless chose to

keep a payment that she knew was incorrect. The Director requested oral argument before the Board.

Appellant responded that, if notice was mailed on March 9, 2004 from Dallas, Texas, it would take three to four days to be delivered to her home in Muskogee, Oklahoma. She stated that she did not know the payment was incorrect. And she explained that she had submitted two Form CA-7 claims for compensation, so she assumed the Office awarded her the correct amount for these two claims through direct deposit.

The Board grants the Director's petition in order to clarify the law in this area. But because granting his request for oral argument before the Board would delay finality in this case and would not serve the ends of justice, the request for oral argument is denied.[1]

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. Adjustment or recovery by the United States may not be made, however, when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.[2] Thus, if an individual is at fault, the Office may not consider waiver.

A recipient who has accepted a payment which he or she knew or should have known to be incorrect will be found to be at fault with respect to creating an overpayment.[3]

The Director notes that, prior to the use of direct deposit, when claimants received compensation checks in the mail, the Office found fault when a claimant received a check that he or she knew or should have known was incorrect and nonetheless deposited the check rather than return it to the Office. *Michael R. Nixon*, 40 ECAB 398 (1988), is one such case. It is instructive not only because of its application of the relevant fault standard in compensation check cases, but also because the basic facts of the case mirror those in the present appeal.

In *Nixon*, the Office sent the claimant a compensation check dated March 12, 1988 covering the period February 14 through March 12, 1988. When the Office learned that the claimant had returned to work on February 29, 1988, it telephoned him on March 17, 1988, only five days after issuing the check, to advise that there was an overpayment of about $700.00. The Office confirmed in its memorandum of telephone contact that the claimant had received the check. The Office subsequently found the claimant at fault in creating the overpayment because he was notified by telephone on March 17, 1988 of the overpayment and because he should have been aware that he was not entitled to benefits while working full time.

The Board reversed the Office's decision in *Nixon*, finding that "the evidence must establish that at the time appellant accepted the compensation check he knew or should have

[1] 20 C.F.R. § 501.7(b).

[2] 5 U.S.C. § 8129.

[3] 20 C.F.R. § 10.433(a)(3) (1999). This provision applies only to the overpaid individual.

known the compensation check included payment for a period of wage loss for which he was not entitled." The Office had relied on its March 17, 1988 telephone call informing the claimant of the overpayment. Although the memorandum of this call revealed that the claimant had received the check and that he was informed of the overpayment, the Board explained that the problem with using that type of evidence to substantiate a finding of fault was that the memorandum did not show that the telephone call occurred prior to claimant "having accepted, deposited and cashed the check." The Board explained that "there is nothing in the telephone call memorandum that established appellant knew at the time he accepted the check that it included payment for periods of wage loss to which he was not entitled." Indeed, the claimant reported in his overpayment recovery questionnaire that no notice of the overpayment was given to him until after he had deposited and cashed the compensation check. The Board therefore found that the March 17, 1988 telephone call was not probative on the issue of fault.

In the present case, the Office directly deposited a compensation payment of $20,830.58 to appellant's bank account on March 5, 2004. On March 9, 2004, only four days later, the Office wrote appellant to advise that the payment was incorrect, that the payment should have been only $6,547.92. So, as in *Nixon*, the Office notified the claimant of the incorrect payment after the funds were cashed or deposited. This is a critical point because the deposit of compensation into appellant's bank account marked the moment that she gained control of the funds from the U.S. Treasury. This is when the money changed hands, and strictly speaking this is when the overpayment was created.

In compensation check cases, the claimant can hold the check in her hands. She can consider the amount of the check and the period of the compensation printed thereon. If she knows or should know that the payment is incorrect, she need not negotiate the check. If she nonetheless deposits the funds into her account, she accepts the incorrect payment and is at fault in creating the overpayment. In such cases, the cashing or depositing of the check establishes the acceptance necessary under 20 C.F.R. § 10.433(a)(3) (1999).[4]

The same principle applies in direct deposit cases. With direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. But it is not fair to say, as the Director states in his petition, that there is no action required on the part of the claimant to acquire the funds. The agency may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. And so it is only with the claimant's intent that these payments are deposited to his or her account. This is something more than receipt; it is acceptance. The payment follows a different route to the account than does a hardcopy check, but in both cases the claimant must do something to gain

[4] *David E. Wilkinson*, Docket No. 93-322 (issued December 16, 1993). In *Wilkinson*, the Board found that the claimant "accepted those checks by depositing them in his savings account." Further, the Board explained, the fact that he later returned the amount of the checks, although commendable, did not negate that he first accepted the compensation payments during a time when he was employed. The Board ruled that the claimant was at fault. *See also Victor R. Thurman*, Docket No. 96-1219 (issued November 13, 1998) ("when he received the checks, he deposited them and accepted payment").

control of the funds from the U.S. Treasury. When control of the funds passes to the claimant upon deposit, the acceptance necessary under 20 C.F.R. § 10.433(a)(3) (1999) is established.[5]

Because the regulation defines fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases, but not necessarily all, the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.[6] A finding of no fault does not mean, of course, that the claimant gets to keep the money, only that the Office must consider whether the claimant is eligible for waiver. Again, it is not fair to say, as the Director states in his petition, that this analysis will result in a finding of no fault in every case. In cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from the Office or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.[7] Each case must be judged on its merits. 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.[8]

[5] Cases such as *Margaret P. Frink*, Docket No. 05-1841 (issued January 6, 2006), and *Otha J. Brown*, Docket No. 03-1916 (issued December 23, 2004), stating that "the Board has found" that the mere direct deposit by the Office is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the check before it was deposited to his account, are not probative on this point, in part because they do not identify the alleged precedent, but mostly because they conflate the elements of acceptance and requisite knowledge under the fault standard. "Personal review of the actual check" is not a condition precedent to acceptance in any case. It is relevant instead to determining what the claimant knew or should have known. *Eli Deleston*, Docket No. 04-1908 (issued February 24, 2005), cites to *William F. Salmonson*, 54 ECAB 152 (2002), as clearly supporting the "mere direct deposit" language. Although *Salmonson* fairly describes how a claimant with direct deposit receives no check in the mail and has no opportunity to make a decision on the check before it is deposited to his account, the Board in that case did not hold that direct deposit precludes acceptance. Rather, the Board broadly found that the evidence was not sufficient to establish that the claimant "accepted a payment which he knew or should have known to be incorrect." This does not clearly support the "mere direct deposit" language found in *Deleston* and other cases.

[6] The Board has found no fault in cases involving one or two incorrect payments over a short period of time immediately following the employee's return to work. *William G. Frink*, Docket No. 94-736 (issued December 15, 1996) (employee received compensation for approximately eight weeks after returning to work); *Jack Polcyn*, Docket No. 98-1516 (issued June 5, 2000) (about six weeks); *William F. Salmonson*, 54 ECAB 152 (2002) (about three weeks); *Leotis Hall*, Docket No. 02-2140 (issued February 5, 2004) (about three weeks).

[7] The Board has found fault in cases involving payments over longer periods of time or for substantially greater amounts than previously received. *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002) (employee received compensation for approximately 16 months after returning to work); *George A. Hirsch*, 47 ECAB 520 (1996) (augmented compensation paid over 11 months after divorce); *George L. Darden*, Docket No. 01-1970 (issued April 23, 2002) (augmented compensation for over 17 months following divorce); *Charlie Carruth*, Docket No. 99-660 (issued May 19, 2000) (compensation for total disability paid for 3 months after election to receive severance payments); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000) (duplicative payment of survivor benefits for son paid for 23 months); *Patricia A. Williams*, Docket No. 98-2390 (issued November 16, 2000) (after receiving periodic compensation of $98.00 under an LWEC, the employee received two payments of $1,900.00).

[8] 20 C.F.R. § 10.433(b) (1999).

In the present case, appellant accepted a $20,830.58 payment of compensation on March 5, 2004, when she gained control of the funds upon deposit to her account and pursuant to her authorization. The question is whether, at that time, she knew or should have known that she would receive an incorrect payment. The Board reaffirms its finding that, although appellant was on notice of the incorrect payment after the funds were deposited, she had no reason to suspect on March 5, 2004 that the Office would issue an incorrect payment. Appellant, therefore, is not at fault under 20 C.F.R. § 10.433(a)(3) (1999). The Office's March 9, 2004 letter notifying her of the incorrect payment and of the exact amount of the overpayment is simply not probative as to fault, just as the Office's subsequent telephone call was not probative in *Nixon*. The March 9, 2004 letter does not bear on what appellant knew or should have known when she accepted the payment on March 5, 2004.

The Director argues in his petition that what the Board needs to determine is "whether appellant had an opportunity to make a decision on the deposit prior to OWCP's preliminary finding of fault in this case." The Director emphasizes that appellant had over seven weeks to return the money. He states: "It is apparent appellant refused to return the money and she admits to spending the money even though it is clear she was aware that the payment was incorrect." The fundamental problem with this analysis is that it equivocates the meaning of acceptance and disassociates it from the actual creation of the overpayment. Acceptance is broadened to include continuing possession and is no longer established by deposit of the funds into one's account. And the overpayment is not created, apparently, until the claimant chooses, at some ill-defined point after notice, to keep the payment. In the Board's view, this faults appellant not for creating the overpayment, as regulations require, but for not allowing recovery of an alleged overpayment before the Office formally adjudicates the matter, with possible consideration of waiver. The Board finds that this is not a proper interpretation of 20 C.F.R. § 10.433(a)(3) (1999). That appellant spent the money or had more than ample opportunity to return it before the preliminary finding of fault is immaterial to whether she was at fault in creating the overpayment.

IT IS HEREBY ORDERED THAT the Director's petition for reconsideration is granted. The Board reaffirms its prior decision. The Director's request for oral argument before the Board is denied. The case is remanded to the Office to determine whether appellant is eligible for waiver.[9]

Issued: July 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

A. Peter Kanjorski, Alternate Judge
Employees' Compensation Appeals Board

[9] A. Peter Kanjorski participated in the original decision but was no longer a member of the Board effective August 31, 2005 and did not participate in the preparation of this order.