

duodenal ulcer and temporary aggravation of left shoulder bursitis. Appellant returned to work on May 19, 1970 and worked intermittently until September 9, 1974. The Office placed appellant on the periodic rolls for temporary total disability beginning May 10, 1974.¹

On June 27, 2005 the employing establishment offered appellant a light-duty air traffic assistant position in St. Louis, Missouri, which he accepted. Appellant was placed on the employing establishment's pay roll effective August 21, 2005 and returned to work on August 22, 2005. On September 3, 2005 a compensation payment of \$2,477.94 was direct deposited into appellant's bank account. The record reveals that payment represented temporary total disability from August 21 to September 3, 2005, but appellant was not personally notified of this.

In a letter dated September 7, 2005, the Office advised appellant of a preliminary determination that an overpayment of \$2,477.94 was created. The Office stated that appellant was paid for temporary total disability from August 21 to September 3, 2005, but had returned to work effective August 21, 2005. With respect to fault, the Office made a preliminary determination that appellant was at fault because he knew or should have known he was not entitled to receive temporary total disability after he had returned to work.

By decision dated November 2, 2005, the Office finalized its preliminary determination that an overpayment of \$2,477.94 was created and that appellant was at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act² provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,477.94, for the period August 21 to September 3, 2005. The record shows that appellant received an overpayment during that period

¹ In a March 14, 2003 decision, the Board reversed an April 12, 2002 hearing representative's decision, which affirmed an April 30, 2001 decision terminating appellant's wage-loss compensation benefits and a June 25, 2002 decision denying appellant's request for reconsideration. Docket No. 03-52 (issued March 14, 2003).

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8116(a).

because he received a check in the amount of \$2,477.94 for temporary total disability compensation after returning to full-time work effective August 21, 2005. Appellant was not entitled to wage-loss compensation after that date. The Office properly found that appellant received an overpayment of compensation in the amount of \$2,477.94 during that period.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, 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.⁴ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ The regulations further provides that 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.⁶ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he accepted a payment which he knew or should have known to be incorrect.⁷ 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.⁸

ANALYSIS -- ISSUE 2

The Office determined that appellant accepted compensation payments he knew or should have known were incorrect because he accepted a payment following his return to work effective August 21, 2005. When the Office finds a claimant at fault in creating the overpayment on the grounds that he accepted a payment which the individual knew or should have been expected to know was incorrect, it must establish that, at the time the claimant received the compensation payment, the claimant knew or should have known the payment was incorrect.⁹

The record establishes that the payment from the Office for the period August 21 to September 3, 2005, was deposited directly into appellant's bank account. The Office stated that appellant should have known that he was not entitled to full compensation at the same he was working full time. The payment in this case, however, was a direct deposit payment into his bank account. The direct deposit case is distinguishable from those in which a claimant returns to work, subsequently receives a compensation check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation but decides

⁴ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436 and 10.437.

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.*

⁷ 20 C.F.R. § 10.433(a)(3).

⁸ 20 C.F.R. § 10.433(b).

⁹ See *Otha J. Brown*, 56 ECAB ____ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

nonetheless to cash or deposit the check.¹⁰ The record does not establish that any information was provided to appellant as to the specific period covered by the payment. Appellant had been receiving direct deposit compensation payments for a period of time with no specific knowledge as to the period covered for each payment. When a claimant has a further payment deposited into his account after a return to work, the Office cannot make a finding of fault without additional probative evidence that he accepted a payment he knew or should have known was incorrect.¹¹ The Office did not present such evidence in this case.

The Board therefore finds that the Office did not establish that appellant was at fault and therefore not entitled to waiver of the overpayment. The case will be remanded for a proper determination as to waiver. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that an overpayment of compensation of \$2,477.94 was created during the period August 21 to September 3, 2005 because appellant received compensation for that period when he had returned to work effective August 21, 2005. The Board further finds that, under the circumstances of this case, appellant is not at fault in the creation of the overpayment because the evidence does not establish that he knew or should have known the payments were incorrect. The case will be remanded for the Office to consider waiver of the overpayment to be followed by an appropriate decision.

¹⁰ See *William F. Salmonson*, 54 ECAB 152 (2002).

¹¹ See *Otha J. Brown*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 2, 2005 is affirmed with respect to fact and the amount of the overpayment. The Office's finding of fault is set aside and the case is remanded for consideration of waiver of the overpayment.

Issued: May 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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