



right leg pain when he bent over to pick up a freight bill. The Office accepted his claim for aggravation of a lumbar strain and lumbar herniated disc. Appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability effective May 18, 2003.

On February 6, 2004 the employing establishment offered appellant a permanent light-duty position which he declined on February 20, 2004.

On May 25, 2004 the Office terminated appellant's compensation benefits effective May 16, 2004 on the grounds that he refused an offer of suitable work.

On November 28, 2006 the Office notified appellant that an audit of his file revealed that payments for compensation benefits should have stopped on June 13, 2004 following termination of his compensation for failure to accept suitable employment. However, the Office continued to issue compensation checks to him.

By letter dated December 12, 2006, the Office advised appellant of its preliminary determination that there was a \$58,390.90 overpayment of compensation.<sup>1</sup> It found that he accepted compensation for wage loss for the period June 13, 2004 to November 25, 2006 following termination of his compensation for refusing suitable employment. The Office found that appellant was at fault in the creation of the overpayment because he accepted payments which he knew or should have known to be incorrect. Appellant was aware or reasonably should have been aware that he was not entitled to compensation following the May 25, 2004 termination decision. The May 25, 2004 decision stated that compensation would cease after issuance of the decision. The Office stated that the period of compensation covered by each check was printed on the face of the check.<sup>2</sup> Appellant was given 30 days in which to request a telephone conference, a precoupment hearing before the Branch of Hearings and Review or a final decision. If he agreed that he had received an overpayment, he was instructed to send a check or money order for the full amount to the Office. If appellant was unable to pay the full amount, he was instructed to send a completed Form OWCP-20, Overpayment Recovery Questionnaire, so that the Office could determine a fair repayment method.

On December 18, 2006 appellant contested the preliminary finding of an overpayment, stating that he never received a letter from the Office to the Office of Personnel Management

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<sup>1</sup> The Office stated that compensation should have been paid to appellant through June 12, 2004 but he was paid through November 25, 2006. The total gross amount paid for the period May 18, 2003 to November 25, 2006 was \$83,520.46 less basic life insurance premiums of \$455.40, leaving \$83,065.06. The correct amount should have been for the period May 18, 2003 to June 12, 2004, which was (gross) \$24,812.76 less basic life insurance of \$138.60, leaving \$24,674.16. The difference between the two amounts, compensation which was paid for the period June 13, 2004 to November 25, 2006, to which appellant was not entitled, was \$58,390.90.

<sup>2</sup> Office regulations provide that, "In addition to providing narrative descriptions to recipients of benefits paid or payable, [the Office] includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from the recipient's financial institution.... Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment, whether mailed or transmitted electronically." 20 C.F.R. § 10.430.

(OPM) showing that he was electing disability retirement benefits.<sup>3</sup> He asserted that he was not at fault in the creation of the overpayment and requested waiver of recovery of the overpayment.

By decision dated January 22, 2007, the Office found that there was a \$58,390.90 overpayment of compensation for the period June 13, 2004 through November 25, 2006 and that appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.<sup>4</sup> The Office instructed appellant to send a check in the amount of \$450.00 each month until the overpayment was repaid.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of the Federal Employees' Compensation Act provides that, 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 Office by decreasing later payments to which the individual is entitled.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office correctly determined that an overpayment occurred in this case for the period June 13, 2004 to November 25, 2006. The record establishes that appellant received wage-loss compensation from the Office in the amount of \$58,390.90 for the period June 13, 2004 to November 25, 2006. However, he was not entitled to any disability compensation from the Office following termination of his compensation benefits by the Office. Thus, appellant received an overpayment of compensation for the period June 13, 2004 to November 25, 2006.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of the Act and the implementing regulation, 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.<sup>6</sup> Section 10.433 of the implementing regulations 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.<sup>7</sup> The regulation 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.<sup>8</sup> Under the regulations, a recipient will be found to

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<sup>3</sup> A field nurse noted on July 26, 2003 that appellant was planning to retire effective January 2004.

<sup>4</sup> Appellant submitted additional evidence subsequent to the Office decision of January 22, 2007. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>7</sup> 20 C.F.R. § 10.433(a).

<sup>8</sup> *Id.*

be at fault with respect to creating an overpayment if he or she “[a]ccepted a payment which he or she knew or should have known to be incorrect.”<sup>9</sup> Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>10</sup>

### ANALYSIS -- ISSUE 2

The Office determined that appellant accepted compensation payments he should have known were incorrect because he accepted the payments following termination of his compensation benefits as of June 12, 2004. When the Office finds a claimant at fault in creating the overpayment on the grounds that he or she 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.<sup>11</sup>

The Board finds that appellant was at fault in creating the overpayment for the period June 12, 2004 to November 25, 2006. The record establishes that the Office issued compensation checks to appellant for the period June 13, 2004 to November 25, 2006. The evidence establishes that he was aware that the Office terminated his compensation benefits by decision dated May 25, 2004. The Board finds that appellant is with fault in the creation of the overpayment from June 13, 2004 to November 25, 2006 on the grounds that he accepted a payment that he knew or should have known to be incorrect. That the Office may have negligent in issuing the payments does not mitigate this finding.<sup>12</sup> As appellant is with fault in the creation of the overpayment from June 13, 2004 to November 25, 2006, he is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.<sup>13</sup>

On December 18, 2006 appellant contested the preliminary finding of an overpayment, stating that he never received a letter from the Office to OPM showing that he was electing disability retirement benefits. Appellant’s receipt of an OPM letter regarding election of retirement benefits does not excuse his acceptance of payments which he knew or should have known to be incorrect. The termination of Office benefits was based upon a refusal of suitable work; the termination of Office benefits was not based upon election of OPM retirement benefits. Appellant is at fault in the creation of the overpayment of compensation.

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<sup>9</sup> 20 C.F.R. § 10.433(a)(3).

<sup>10</sup> 20 C.F.R. § 10.433(b).

<sup>11</sup> 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).

<sup>12</sup> See 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

<sup>13</sup> Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board’s jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); see also *Bob R. Gilley*, 51 ECAB 377 (2000).

**CONCLUSION**

The Board finds that an overpayment of compensation of \$58,390.90 was created during the period June 13, 2004 to November 25, 2006 because appellant received compensation for that period following the termination of his compensation as of June 12, 2004. The Board further finds that, under the circumstances of this case, appellant is at fault in the creation of the overpayment and is not entitled to waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 22, 2007 is affirmed.

Issued: July 10, 2007  
Washington, DC

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

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

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