

On April 18, 2002 Dr. Rommell G. Childress, a treating physician, noted that appellant's back problems had improved such that he was able to return to work with restrictions. Appellant returned to limited-duty work on April 19, 2002.

In a March 21, 2005 overpayment memorandum, the Office determined that appellant received compensation in the amount of \$1,705.61 during the period April 22 through May 18, 2002, following his return to work.

In a letter dated March 21, 2005, the Office advised appellant of a preliminary determination that an overpayment of \$1,705.61 was created. The Office stated that appellant was paid for temporary total disability from April 22 to May 18, 2002, but had returned to work effective April 22, 2002. 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.

On April 11, 2005 appellant requested a prerecoupment hearing, which was held on July 26, 2006. At the hearing, he testified that he had been on the automatic payroll at the time of the overpayment.

Subsequent to the hearing appellant submitted an overpayment recovery questionnaire. He noted monthly income of \$1,370.00 from military retired pay and no resources.¹ Appellant reported monthly expenses of \$550.00 for food, \$923.33 for mortgage, \$41.00 for gas/fuel, \$287.00 for electric, \$21.00 for water, \$41.00 for telephone, \$469.00 for auto loan payment,² \$560.00 for gas and oil, \$324.00 for insurance, \$121.00 for insurance; \$57.60 for cable TV; \$38.00 for home warranty and \$18.75 for charitable contributions.³ Under other liabilities he reported monthly payments of \$440.49 for a second mortgage, \$188.00 for a consolidated loan, \$110.00 for Capitol One and \$60.00 for AA fee.

By decision dated September 13 2006, the Office hearing representative finalized the preliminary overpayment determination. He found that appellant was not without fault in the creation of the overpayment in the amount of \$1,705.61 that occurred from April 22 to May 18, 2002. The Office hearing representative noted that appellant did not contest the amount or fact of overpayment. Appellant stated that he would have returned the check if he had known that he was not entitled to it. The Office hearing representative found that appellant should have been aware that he was no longer entitled to receive compensation for temporary total disability after returning to work. He also found that appellant was capable of paying \$200.00 per month towards repayment of the overpayment.

¹ Appellant did not provide any information on his salary he receives from the employing establishment.

² Appellant noted that his auto loan payment would be paid off in August 2007.

³ This was noted as \$75.00 paid three times a year which works out to \$18.75 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act⁴ 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.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,705.61 for the period April 22 to May 18, 2002. The record shows and appellant does not dispute, that he received an overpayment of wage-loss compensation during that period because he received a check in the amount of \$1,705.61 for temporary total disability compensation after returning to full-time work effective April 19, 2002. He 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 \$1,705.61 during that period.

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.⁶ 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.⁷ 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.⁸ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.⁹ Whether or not the Office

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8116(a).

⁶ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁷ 20 C.F.R. § 10.433.

⁸ *Id.*

⁹ *Id.* at § 10.433(a)(3).

determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁰

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 he was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.¹¹

The Board finds that appellant is not with fault in creating the overpayment. The evidence of record is insufficient to establish that appellant knew or should have been expected to know that he accepted an incorrect payment. As noted, the overpayment of compensation occurred during the period April 22 through May 18, 2002 when appellant accepted a compensation check for wage loss after he returned to work on April 22, 2002. The record does not contain any letters from the Office indicating that appellant should return Office payments intended for periods he worked after returning to the employing establishment and that appellant reasonably should have known that he received improper payments. In addition, there is no photocopy of the compensation check in question in the record. Thus, there is no evidence to show whether the period of wage loss from April 22 to May 18, 2006 was imprinted on the check. This would have put appellant on notice that the compensation check was payment for a period of wage loss to which he was not entitled as well as establish fault. There is no evidence of record indicating that any information or letter accompanied the check with the above information. For these reasons, the Board finds that appellant was not at fault in creation of the overpayment.

Since the Board finds that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act¹² if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹³ The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$1,705.61 overpayment. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

¹⁰ *Id.* at § 10.433(b).

¹¹ *Diana L. Booth*, 52 ECAB 370 (2001).

¹² 5 U.S.C. § 8129(b).

¹³ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,705.61 during the period April 22 through May 18, 2002. The Board, however, finds that he was not at fault in the creation of the overpayment

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2006 is affirmed with respect to the fact and amount of the overpayment. The decision is set aside with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 19, 2007
Washington, DC

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

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