

rotator cuff syndrome.¹ On August 31, 2005 appellant signed a form, indicating that any wage-loss compensation should be directly deposited to his bank. On September 9, 2005 he underwent authorized surgical repair and stopped work that day. By letter dated September 18, 2005, appellant was placed on the compensation roll, effective September 10, 2005. The letter stated: “To avoid an overpayment of compensation: NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK.” (Emphasis in the original.)

On November 15, 2005 the employing establishment informed the Office that appellant had returned to work on November 14, 2005. A telephone memorandum in the record dated November 22, 2005 indicates that a voicemail was left advising appellant that it was his responsibility to return the compensation check covering the period October 30 to November 26, 2005 and by letter dated November 22, 2005, the Office informed him that, as he had returned to work on November 14, 2005, “you will be receiving one last 28[-]day compensation check that partially covers a period following your return to work (the period covered by the check is printed on its face.) In order to avoid an overpayment, you should return this check....” In a January 22, 2006 letter, appellant stated that he received compensation by direct deposit and asked that the Office inform him of the amount he owed so that he could return the overpayment.

On February 24, 2006 appellant was granted a schedule award for a nine percent permanent impairment of his left upper extremity. The schedule award decision explained the period of the award, the number of weeks of compensation and the weekly pay rate. By letter dated August 3, 2006, the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$1,171.76. The Office noted that he received compensation benefits for the period covering October 30 through November 26, 2005 yet returned to work on November 14, 2005. The Office found appellant to be at fault in the creation of the overpayment because he accepted a payment by direct deposit that he knew or should have known was incorrect. An overpayment worksheet and an overpayment memorandum contained in the record provide that, for the period October 30 through November 26, 2005, appellant received compensation totaling \$2,523.80 but should have received compensation for the period October 30 through November 14, 2005 or \$1,352.04, yielding an overpayment in compensation in the amount of \$1,171.76. On August 13, 2006 appellant requested a hearing and submitted an overpayment questionnaire.

At the hearing, held on February 28, 2007, appellant testified that because he made inquiries of the Office about the amount of the overpayment upon receiving the notice in November 2005 and because the Office did not respond, he assumed that the overpayment would be deducted from his schedule award. By decision dated May 3, 2007, an Office hearing representative finalized the determination that an overpayment in compensation in the amount of \$1,171.76 had been created and that appellant was at fault because he was aware that he was not entitled to receive compensation payments after his return to work. Appellant was advised that the overpayment was payable in full.²

¹ Appellant has two other accepted conditions, a right shoulder impingement syndrome, adjudicated by the Office under file number 062065186 and an emotional condition, adjudicated under file number 062047159. The instant case was adjudicated under file number 062146143.

² An overpayment repayment schedule was established on June 13, 2001.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act³ defines the limitations on the right to receive compensation benefits. This section of the Act provides that while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ Section 10.500 of the Office's regulations provides that "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."⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$1,171.76. The record supports that appellant returned to work on November 14, 2005 and that he continued to receive compensation from the date of his return to work through November 28, 2005. For this period he received compensation in the amount of \$1,171.76. As appellant was not entitled to compensation after his return to work, the Office properly found that an overpayment in compensation in the amount of \$1,171.76 had been created.⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in 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."⁷

Section 10.433(a) of the Office's regulations provides that the Office:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (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

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ 5 U.S.C. §§ 8101-8110.

⁷ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”⁸

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant’s account. The Office 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. It is only with the claimant’s intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.⁹

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$1,171.76 overpayment, the Office stated that he should have known that the payment he received by direct deposit for the period through November 28, 2005 was not proper because he had returned to work on November 14, 2005. By letter dated November 22, 2005, the Office informed him that, as he had returned to work on November 14, 2005, “you will be receiving one last 28-day compensation check that partially covers a period following your return to work (the period covered by the check is printed on its face.) In order to avoid an overpayment, you should return this check...” In this case, however, appellant received his compensation benefits by direct deposit.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁰ Appellant acknowledged that he was not entitled to receive compensation after his return to work but that he assumed the overpayment was deducted from his schedule award. The February 24, 2006 schedule clearly explained the period of the award, the number of weeks of compensation and the weekly pay rate. There is, therefore, nothing to support appellant’s assumption that the overpayment was deducted from his schedule award.

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹¹ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or

⁸ 20 C.F.R. § 10.433 (1999); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

⁹ *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

¹⁰ *William E. McCarty*, 54 ECAB 525 (2003).

¹¹ See *Karen K. Dixon*, 56 ECAB 145 (2004).

notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹²

In this case, only one compensation payment by direct deposit is at issue. It is unclear, however, whether the deposit was made before or after the Office informed appellant on November 22, 2005 that he was overpaid. Since Office regulations define 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 the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence of record to show when appellant received the direct deposit in question.¹³ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period. The Board, therefore, finds that this case is not in posture for decision regarding whether appellant was at fault in the creation of the overpayment in compensation in the amount of \$1,171.76 because the record does not show when the direct deposit in question was made. The case must be remanded to the Office to determine when the direct deposit was made. If it was after November 22, 2005, the date that the Office informed appellant of the incorrect payment, a finding of fault can be made and he would not be entitled to waiver. If, however, the deposit was made before the Office informed appellant that the deposit was incorrect, fault cannot be imputed for the reasons stated above. If, on remand, appellant is found to be not at fault, the Office should then determine if he is entitled to waiver of the overpayment in compensation.

CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$1,171.76 had been created. The Board further finds that the case is not in posture for decision regarding whether appellant was at fault for the overpayment period covered by a direct deposit and is remanded for a determination of fault and, if appropriate, whether he is entitled to waiver for this period.

¹² See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹³ See generally *Karen K. Dixon*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2007 be affirmed in part, vacated in part and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: April 17, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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