

FACTUAL HISTORY

On July 11, 2003 appellant, then a 53-year-old letter carrier, sustained an employment-related dislocation of her right elbow when she fell from her postal vehicle. She stopped work that day and was placed on the periodic rolls.¹

The Office continued to develop the claim and in April 2005 referred appellant to Dr. Thomas Schmitz, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Schmitz' opinion that appellant had no right upper extremity abnormalities or residuals other than numbness at the surgical incision site and no restrictions to her physical activity, on November 3, 2005 the Office proposed to terminate appellant's "entitlement to all benefits, including medical treatment, and compensation for wage loss due to disability." Appellant was given 30 days to submit additional medical evidence. In response, she stated that she disagreed with the proposed termination and submitted no additional medical evidence. On December 13, 2005 the Office terminated appellant's compensation benefits. The Office explained that her entitlement to compensation and medical benefits for the July 11, 2003 employment injury was terminated effective that day. On January 3, 2006 appellant filed a schedule award claim. By letter dated October 20, 2006, the Office informed appellant that she was not entitled to a schedule award because she had no residuals of the accepted condition.

On November 22, 2006 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$26,493.22 had been created for the period December 13, 2005 through November 25, 2006. The Office explained that the overpayment resulted because appellant had continued to receive wage-loss compensation until November 25, 2006, after her compensation benefits were terminated on December 13, 2005. The Office found appellant to be at fault in the creation of the overpayment because she accepted payments that she knew or should have known were incorrect. A worksheet contained in the record provides that appellant received check payments for wage-loss compensation totaling \$26,493.22 for this period.

On November 28, 2006 appellant requested a prerecoumpment hearing and submitted an overpayment questionnaire that listed no assets, monthly income of \$2,148.00 in workers' compensation benefits and expenses totaling \$2,050.00. At the hearing held on March 21, 2006, appellant testified that she thought she was entitled to continue to receive compensation because she had submitted a schedule award claim. She submitted additional financial information, and another overpayment questionnaire in which she listed no income or assets and monthly expenses of \$2,198.36. By decision dated June 11, 2007, an Office hearing representative found that appellant was at fault in the creation of an overpayment in compensation in the amount of \$26,493.22 because she should have known she was not entitled to further wage-loss compensation after the December 13, 2005 termination of benefits. Because she was at fault, the hearing representative found that she was not entitled to waiver. The hearing representative reduced the overpayment by compromise to \$20,675.30 and set the repayment schedule at \$100.00 per month.

¹ This case has previously been before the Board. By decision dated June 25, 2007, the Board dismissed an appellant's January 29, 2007 application for review because the record before the Board did not contain an appealable decision. Docket No. 07-774. The law and the facts of the previous Board order are incorporated herein by reference.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act² provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ 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.⁴

ANALYSIS -- ISSUE 1

The record in this case establishes that appellant's compensation benefits were terminated effective December 13, 2005 and that she continued to receive check payments for wage-loss compensation until November 25, 2006. These check payments totaled \$26,493.22. There is nothing in the record to support that appellant continued to be entitled to wage-loss compensation after her benefits were terminated on December 13, 2005. As she was not entitled to receive wage-loss compensation after her benefits were terminated, an overpayment in compensation in the amount of \$26,493.22 was created.

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."⁵

Section 10.433(a) of the Office's regulations provide 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; or (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

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8129(a).

⁵ 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).”⁶

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines 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.⁷ In applying the tests to determine fault, the Office applies a “reasonable person” test.⁸

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment because she knew or should have known she was not entitled to wage-loss compensation after her compensation benefits were terminated on December 13, 2005. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.⁹ The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹⁰ Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment that the employee knew or should have been expected to know he or she was not entitled.¹¹

In this case, both in the November 3, 2005 preliminary notification that appellant’s compensation benefits would be terminated and in the final termination decision dated December 13, 2005, appellant was clearly informed that she would no longer be entitled to either wage-loss compensation or medical benefits. The Board finds appellant’s assumption that she continued to be entitled to wage-loss compensation because she had filed a schedule award claim not credible. While the Office may have been negligent in making the incorrect payments, this did not excuse appellant from accepting payments she knew or should have known to be incorrect.¹² Appellant was thus at fault in creating the overpayment and, as such, was not entitled to waiver.¹³

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

⁷ 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

⁸ *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁹ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁰ *Sinclair L. Taylor*, *supra* note 6.

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

¹² *See William E. McCarty*, 54 ECAB 525 (2003).

¹³ *Melvin E. Gibbs*, 54 ECAB 473 (2003).

CONCLUSION

The Board finds that an overpayment in compensation of \$26,493.22 occurred because appellant continued to receive compensation benefits after these were terminated.¹⁴ The Board further finds that the Office properly found appellant to be at fault in the creation of the overpayment.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 11, 2007 be affirmed.

Issued: April 1, 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

¹⁴ The Office hearing representative compromised the amount of the overpayment in compensation to \$20,875.30. Under Office procedures, compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment by more than 35 percent. Such a determination is made at the time the repayment schedule is established. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Compromise of Principal*, Chapter 6.300.6 (May 2004); see *Jorge O. Diaz*, 53 ECAB 403 (2002). The hearing representative in this case, therefore, permissibly compromised the amount of the overpayment in compensation. Regarding repayment of the overpayment in compensation, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act. *Danny E. Haley*, *supra* note 9.

¹⁵ Regarding appellant's schedule award claim, even though her compensation benefits were terminated based on the medical evidence, she is not precluded from a subsequent schedule award. A claimant may have an employment-related condition that results in a permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, without any disability for work or need for continuing medical treatment. *B.K.*, 59 ECAB ____ (Docket No. 07-1545, issued December 3, 2007). In this case, Dr. Schmitz, who performed a second opinion evaluation for the Office, noted some residual numbness at the incision site on appellant's right elbow.