

**United States Department of Labor
Employees' Compensation Appeals Board**

M.A., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Los Angeles, CA, Employer**

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**Docket No. 08-498
Issued: June 6, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated May 18, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$5,261.77 for the period January 2 through February 18, 2006; (2) whether the Office properly found appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 39-year-old customs inspector, injured his left shoulder and right elbow on January 31, 2005 when he became lightheaded and fell down an escalator. He filed a claim for benefits on the date of injury, which the Office accepted for contusion of the left shoulder and

upper arm and contusion of the right elbow and forearm. In its April 26, 2005 letter accepting the claim, the Office advised:

“Once you return to work or obtain new employment, notify this [O]ffice immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, *return it to us immediately to prevent an overpayment of compensation.*” [Emphasis added].

The Office paid appellant appropriate compensation for total disability and placed him on the periodic rolls. Appellant returned to full duty without restrictions with the employing establishment on January 2, 2006. The Office, however, continued to pay him temporary total disability compensation until February 18, 2006.

By letter dated April 7, 2006, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$5,261.77, covering January 2 to February 18, 2006. The Office found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to receive compensation payments after he returned to work. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office or request a preresumption hearing with the Branch of Hearings and Review. He did not respond to this letter.

On February 6, 2007 the Office called appellant at his home and conducted a teleconference regarding the overpayment. The Office advised him that it had sent him the preliminary overpayment notice in April 2006 but that he had failed to respond.¹ The Office advised appellant that he owed an overpayment in the amount of \$5,261.77 and that he would have to repay the money with a payment plan.

In a decision dated May 18, 2007, the Office finalized the preliminary determination regarding the overpayment of \$5,261.77. The Office also found that appellant was at fault in creating the overpayment of compensation in the amount of \$5,261.77 for the period January 2 through February 18, 2006. The Office stated that appellant knew or reasonably should have known that he was not entitled to receive compensation checks after he returned to work on January 2, 2006.

¹ A January 31, 2007 Office memorandum indicates that a claims examiner called appellant at home on January 31, 2007 and left a message, requesting that he return the call as soon as possible. Appellant did not return the call.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.² Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,261.77 for the period January 2 through February 18, 2006. The record shows that appellant received an overpayment during the period in question because he continued to receive checks for temporary total disability compensation after returning to full-time work on January 2, 2006. The Office calculated the \$5,261.77 overpayment by totaling the amount of temporary total disability compensation appellant received from December 25, 2005 to February 18, 2006, \$6,229.38 and subtracting the amount of compensation to which he was entitled from December 25, 2005 to January 1, 2006, \$967.61, for an overpayment of \$5,261.77.⁴ Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁶

² 20 C.F.R. § 10.401(a) (2003).

³ *Id.* at § 500(a) (2003).

⁴ The Office arrived at these amounts by taking the net amount of his compensation check for the period December 25, 2005 through January 21, 2006, \$3,132.22 and adding it to the net amount of his compensation check for the period January 22 through February 18, 2006, \$3,097.16, for a total of \$6,229.38. It then subtracted the amount to which appellant was entitled while still disabled from December 25, 2005 to January 1, 2006, \$967.61, to arrive at the total overpayment of \$5,261.77.

⁵ 5 U.S.C. § 8129(a)-(b).

⁶ *Bonnye Mathews*, 45 ECAB 657 (1994).

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”⁷

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have expected to know he was not entitled.⁸ Appellant was informed by the Office on April 26, 2005 that he was to immediately report to the Office a return to work and return any compensation received after a return to work or otherwise an overpayment of compensation would be created. He returned to work on January 2, 2006 but did not report his return to work to the Office; he therefore knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to work.

Appellant's receipt of the January 21, 2006 direct deposit in the amount of \$3,132.22 contained the first overpayment of \$2,154.61, covering 20 days from January 2 to 21, 2006. The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his account, as the acceptance of the resulting overpayment lacks the requisite knowledge.⁹ After appellant's

⁷ 20 C.F.R. §10.433(a).

⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ That 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 are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted 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 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. In the instant case, by the time appellant accepted the February 18, 2006 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for him to become aware of the fact that the checks contained an overpayment.

receipt of the first direct deposit, for which fault may not be imputed to him, it could be presumed that he knew the amount of compensation contained in subsequent direct deposit checks exceeding the amount to which he was entitled. Therefore, for receipt of the January 21, 2006 direct deposit, the Board finds that appellant was without fault. While the appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, appellant was not on notice of the amount of the payment until after it was deposited electronically into his account.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found appellant at fault for the overpayment after January 21, 2006. However, the Office improperly found that appellant was at fault in the creation of the overpayment in the amount of \$2,164.61, the portion of the overpayment directly deposited into his account on January 21, 2006. As appellant was without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$2,164.61 may be considered for waiver. Thus, the May 18, 2007 Office decision is affirmed, as modified.¹⁰

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,261.77 for the period January 2 through February 18, 2006. The Board further finds that the Office properly found that appellant was at fault for the overpayment paid after January 21, 2006, but reversed as to fault for the portion of the overpayment paid from January 2 to 21, 2006. The case is remanded for determination of waiver on the portion of the overpayment for which appellant was found to be at fault.

¹⁰ The Board notes that appellant submitted additional evidence to the record following the May 18, 2007 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2007 decision of the Office of Workers' Compensation Programs is affirmed, as modified and remanded for further proceedings consistent with this opinion.

Issued: June 6, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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