

and she stopped work on December 7, 2000, when she underwent a partial lateral meniscectomy. The Office entered appellant on the periodic rolls on January 9, 2001 and requested that she inform it immediately if she returned to work to avoid an overpayment of compensation. It stated, "Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result." Appellant returned to work on November 26, 2001 for four hours a day. She sustained a recurrence of disability from January 24 to February 2, 2003. Appellant returned to work on February 3, 2003, again at four hours a day. In a letter dated May 18, 2005, the Office informed appellant that she was placed on the periodic rolls based on her capacity to earn wages as a part-time manager of distribution operations. It stated that if appellant received an increase in pay she should notify it immediately. The Office stated, "Failure to do so could cause an overpayment of compensation."

In a letter dated September 21, 2005, the Office informed her that the employing establishment had provided her with suitable modified work for eight hours a day. It allowed appellant 30 days to accept the position. She declined the position on October 15, 2005. On October 25, 2005 the Office informed appellant that she had 15 days to accept the position. In a letter dated November 16, 2005, the employing establishment informed the Office that appellant had increased her workday from four hours a day to eight hours a day effective November 5, 2005.

In a letter dated May 22, 2007, the Office informed appellant of a preliminary determination that she had received an overpayment of compensation in the amount of \$3,584.57 because she returned to full-time work effective November 5, 2005 but continued to receive compensation for partial disability through December 24, 2005. It found that appellant was at fault in the creation of the overpayment. The Office calculated the amount of the overpayment, noting that appellant received compensation in the amount of \$3,936.00 from October 30 through December 24, 2005. It determined that she was entitled to compensation for the period October 30 to November 4, 2005 in the amount of \$351.43. The Office concluded that appellant received an overpayment in the amount \$3,584.57. It found that appellant received notification on May 18, 2005 of her obligation to report her change of work status and to return any checks covering a period after she began full-time work. The Office determined that she was at fault in the creation of the overpayment as she knew or should have reasonably known that she was not entitled to accept compensation benefits for partial disability after her return to full-time work on November 5, 2005.

Appellant requested a precoupment hearing on July 19, 2007 and disagreed that the overpayment had occurred and the amount of the overpayment and requested waiver. She submitted a completed overpayment recovery questionnaire and indicated that she had monthly income of \$2,914.00 and monthly expenses of \$2,989.89. Appellant submitted documentation of her monthly expenses. She stated that she was denied work from September 19 through November 4, 2005 and that she was informed by the employing establishment that the Office

would compensate her for the additional four hours. Appellant stated that she received \$3,514.29, which she believed to be the appropriate compensation for this period.¹

On November 14, 2007 appellant testified that the Office was notified and in possession of information that she had returned to full duty before it made the payment covering the period October 30 to December 24, 2005. She disagreed with the amount of the overpayment, noting that the Office failed to consider that there were 31 days in October rather than 30 and that she was entitled to compensation in the amount of \$421.71 rather than \$351.43 for that month. The hearing representative allowed appellant 30 days to submit additional financial information. Appellant submitted an itemized list on November 21, 2007 including health insurance payments of \$573.00, medical costs of \$85.00 and automobile expenses of \$302.00.

By decision dated December 28, 2007, the hearing representative found that appellant had received an overpayment of compensation. He found that she was at fault in the creation as she knew or should have known that she was not entitled to compensation benefits after returning to full duty. The hearing representative agreed with appellant that the Office had miscalculated the amount of the overpayment and found an overpayment in the amount of \$3,514.29. Finally, he determined to recover the overpayment at the amount of \$100.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act² provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period."³ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁴

ANALYSIS -- ISSUE 1

Appellant does not dispute that she returned to full-time work on November 4, 2004 and that she received compensation benefits for partial disability through December 24, 2005. As noted, she is not entitled to receive compensation for total disability after she returned to work. Appellant therefore received an overpayment of compensation for this period.

Appellant disputed the amount of the overpayment before the hearing representative. He found that the Office had improperly calculated the amount of the overpayment and adjusted the amount to reflect appellant's calculations. She has asserted that she received an overpayment of

¹ At the oral hearing appellant testified that she received compensation for this period from the Office in 2005.

² 5 U.S.C. §§ 8101-8193, 8102(a).

³ 5 U.S.C. § 8116(a).

⁴ *Danney E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

no more than \$3,514.29 as she was entitled to compensation for the six days from October 30 to November 4, 2005 in the amount of \$421.71. The Board finds that this represents the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ provides: Adjustment or recovery by the United States may not be made when 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.”

The Office may 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 received 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 or the amount of benefits. 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 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 knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁶

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on 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

ANALYSIS -- ISSUE 2

Appellant stated that the employing establishment informed the Office of her return to work in a timely manner and that therefore she should not be held responsible for the overpayment. The finding of fault, however, is based on her acceptance of a payment which she knew or should have known to be incorrect pursuant to 20 C.F.R. § 10.433(a). In this regard, the Board notes that appellant was clearly advised on January 9, 2001 and May 18, 2005 that to avoid an overpayment of compensation she must notify the Office of any return to work. Appellant was further advised that if she worked during any period covered by the payment she must return the payment to the Office. The evidence of record establishes that she knew or should have known that any compensation payments received after she returned to work on November 4, 2005 were incorrect. Although the Office apparently failed to respond to the information provided by the employing establishment, any negligence on its part does not relieve

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* § 10.433(b).

appellant of the obligation to return payments that she knew or should have known to be incorrect.⁸

Based on the evidence of record, the Board finds that appellant accepted payments she knew or should have known were incorrect. Under section 10.433(a) of the Office's regulations, she is properly found not to be "without fault" pursuant to 5 U.S.C. § 8129 and is not entitled to waiver of the overpayment. The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered at the rate of \$100.00 per month. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.⁹ Since the Office is not attempting to recover the overpayment from continuing compensation, the issue is not before the Board.

CONCLUSION

The Board finds that a \$3,514.29 overpayment of compensation was created during the period November 4 through December 24, 2005. The Board further finds that appellant is not entitled to waiver of the overpayment because she accepted a payment she knew or should have known was incorrect.

⁸ *Neill D. DeWald*, 57 ECAB 451, 455 (2006).

⁹ *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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