

FACTUAL HISTORY

On March 27, 2002 appellant, then a 53-year-old letter carrier, sustained a cervical strain, laceration to the left hand and bilateral lumbosacral radiculopathy when he was injured in an employment-related motor vehicle accident. He stopped work that day, was placed on the periodic rolls and received his compensation payments by check. Appellant returned to full-time restricted duty on April 7, 2003. He received one additional compensation check covering the period April 7 to 19, 2003.¹ Appellant retired in January 2004.

By letter dated June 9, 2004, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$1,142.14 for the period April 7 through 19, 2003 because he received disability compensation during a period in which he had returned to work. It found him at fault in the creation of the overpayment because he should have known he was not entitled to wage-loss compensation after his return to work. Appellant thereafter submitted two overpayment questionnaires.

In May 2005, appellant received a third-party settlement. The statement of recovery provides that Office disbursements totaled \$51,485.35 and there was a \$25,770.87 balance available to refund the Office. A check in that amount was transmitted to the Office on June 21, 2005.

On December 5, 2007 the Office finalized the preliminary determination that appellant was at fault in creating the \$1,142.14 overpayment because he received wage-loss compensation after his return to work.

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.³ Section 8116 of the Act 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 provide that "compensation for wage

¹ By decision dated August 7, 2003, the Office terminated appellant's compensation benefits on the grounds that the medical evidence established that he was capable of returning to his preinjury position. Appellant, through his attorney, timely requested a hearing. In a December 29, 2003 decision, an Office hearing representative set aside the August 7, 2003 decision and remanded the case to the Office to obtain an electromyographic (EMG) examination. Appellant cancelled the scheduled examination and by letter dated March 10, 2004, his attorney informed the Office that, as he had retired, he no longer wished to pursue his workers' compensation claim. By decision dated April 13, 2004, the Office notified appellant that his claim was closed for medical and compensation benefits resulting from the March 27, 2002 employment injury.

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

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 Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$1,142.14. The record supports that he returned to work on April 7, 2003 also received wage-loss compensation through April 19, 2003. As noted, both the Act and Office's implementing federal regulations provide that a claimant may not receive wage-loss compensation concurrently with a federal salary.⁷ Computer printouts and overpayment worksheets of record support that appellant received compensation in the amount of \$1,142.14 from April 7 through 19, 2003. Appellant therefore received an overpayment in compensation in that amount.

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."⁸

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; (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)."⁹

⁵ 20 C.F.R. § 10.500.

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁷ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

⁸ 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

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

In determining whether a claimant is at fault in creating an overpayment, the Office will consider the circumstances surrounding the overpayment. The degree of care expected by a recipient of compensation may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment because he accepted a payment he knew or should have known was incorrect. He was not entitled to wage-loss compensation for the period April 7 through 19, 2003 when he also worked and received his salary. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.¹¹ 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.¹²

On appeal, appellant contends that the evidence of record does not support that he knew or should have known that he was not entitled to the \$1,142.77 payment. However, the Office notified him when his claim was accepted and, in an August 26, 2002 letter, notified him that he was placed on the periodic rolls. It clearly advised appellant that he was to immediately inform the Office upon his return to work to avoid an overpayment in compensation and that, if he worked during any period covered by a compensation payment, he had to return the payment to the Office. Under these circumstances, he however should have known that he could not receive wage-loss compensation during any period that he worked.¹³ While appellant notified the Office upon his return to work on April 7, 2003, he did not return the compensation he received by check for the period April 7 through 19, 2003.¹⁴ The Board finds that he knew or should have known after he returned to work that he was not entitled to concurrently receive wage-loss compensation. Appellant had an obligation to return payment that he knew or should have known was incorrect.¹⁵ Under section 10.433(a) of the Office's regulations, he is at fault and is not entitled to waiver of the overpayment in compensation.¹⁶

While appellant, through his attorney, argues on appeal that the June 21, 2005 reimbursement to the Office of appellant's third-party settlement satisfied any overpayment, with respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act.

¹⁰ *Id.* at § 10.433(b); see *Neill D. Dewald*, 57 ECAB 451 (2006).

¹¹ *Danny E. Haley*, *supra* note 4.

¹² *Sinclair L. Taylor*, *supra* note 9.

¹³ *Neill D. Dewald*, *supra* note 10.

¹⁴ The fact that the Office may have been negligent in making payment to a claimant does not relieve the employee of fault in accepting an incorrect payment. See *Ricky Greenwood*, 57 ECAB 462 (2006).

¹⁵ *Id.*

¹⁶ *Id.*

CONCLUSION

The Board finds that the Office properly found appellant at fault in the creation of an overpayment in compensation in the amount of \$1,142.14 for the period April 7 to 19, 2003 because he continued to receive wage-loss compensation after his return to work and was not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 5, 2007 is affirmed.

Issued: December 8, 2009
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