

In the July 20, 2007 letter, advising appellant that she would be paid temporary total disability compensation, the Office stated:

“You are expected to return to work (including light[-]duty or part-time work, if available) as soon as you are able. Once you return to work, or obtain new employment, notify this Office 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.”

The Office commenced compensation for temporary total disability and placed appellant on the periodic rolls. Appellant returned to light duty with the employing establishment on December 5, 2008. The Office, however, continued to pay her temporary total disability compensation until December 20, 2008. A periodic roll payment was issued by check in the amount of \$1,680.96 on December 20, 2008.

By letter dated December 18, 2008, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$960.55, covering December 5 to 20, 2008.¹ It found that appellant should have been aware, after returning to work on December 5, 2008, that she was no longer entitled to periodic roll payments. The Office calculated the amount of the overpayment by taking her net monthly, 28-day compensation payment from November 23 to December 20, 2008, \$1,680.96 and subtracting \$720.41, the amount she was paid from November 23 to December 5, 2008, the date she returned to work, which amounted to \$960.55. It advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised her that, when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. It informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the December 18, 2008 letter. She did not respond to this letter within 30 days.

In a decision dated January 21, 2009, the Office finalized the preliminary determination regarding the overpayment of \$960.55.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the 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

¹ The Board notes that the preliminary notice of overpayment was made on December 18, 2008, while the periodic roll check was issued on December 20, 2008.

² 20 C.F.R. § 10.401(a) (2003).

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 \$960.55 for the period December 5 through 20, 2008. The record shows that appellant received an overpayment during the period in question because she received temporary total disability compensation after she returned to work on December 5, 2008. The Office calculated the \$960.55 overpayment by totaling the amount of temporary total disability compensation appellant received during the period November 23 through December 20, 2008, \$1,680.96, and subtracting \$720.41, the amount she was paid from November 23 to December 5, 2008, the date she returned to work. This amounted to an overpayment of \$960.55. 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 Act⁴ 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.⁵

In determining whether an individual is with fault, section 10.433(a) of the Office regulations provide 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.⁶

³ *Id.* at § 500(a) (2003).

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁶ 20 C.F.R. § 10.433(a).

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 she knew or should have known she was not entitled.⁷ Appellant was informed by the Office in its July 20, 2007 letter that she was required to notify the Office as soon as she returned to work and to return any payment of compensation to the Office in order to avoid an overpayment of compensation. She was also apprised by the preliminary notice of overpayment on December 18, 2008 that she would receive a periodic roll check issued on December 20, 2008 which would create an overpayment of compensation. Appellant returned to work on December 5, 2008 but did not return any compensation received after that date, even though she knew or should have known that an overpayment would be created if she accepted compensation benefits after her return to work. The Board notes that she did not respond to the Office's December 18, 2009 preliminary notice of overpayment.

The Board finds that at the time appellant received the compensation check in question she should have know that the payment was incorrect. Appellant was advised by the Office of the penalty provision for accepting compensation to which she was not entitled. She was notified of the period covered by each compensation check⁸ and should have been reasonably aware that she could not receive wage-loss compensation for the period after she had returned to work. As appellant was at fault in the matter of the overpayment, it cannot be waived.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$960.55 for the period December 5 to 20, 2008. The Board finds that appellant was at fault in creating the overpayment and the overpayment can not be waived.⁹

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ 20 C.F.R. § 10.430(a) provides that the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient of each supplemental check which states the period for which payment is being made. This regulation at 10.430(b) notes that by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment.

⁹ The Board notes that on appeal appellant states that she wishes to establish a repayment plan with the Office for repayment of this overpayment. The Board's jurisdiction over recovery is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Albert Pineiro*, 51 ECAB 310 (2000). As appellant is no longer receiving continuing compensation benefits the Board has no jurisdiction over recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 2, 2009
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