

In the September 19, 2008 letter advising appellant that he 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.”

Appellant underwent arthroscopic surgery, abrasive chondroplasty, on his left knee on October 16, 2008. He returned to light duty with the employing establishment on January 13, 2009. The Office however continued to pay appellant temporary total disability compensation until January 17, 2009.

By letter dated January 26, 2009, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$615.78, covering January 13 to 17, 2009. It found that appellant was at fault in the matter because he continued to receive compensation for temporary total disability when he should have been aware, after returning to work on January 13, 2009, that the payment he received was incorrect. The Office calculated the amount of the overpayment by taking his 28-day payment from December 21, 2008 to January 17, 2009, \$3,448.35, dividing this amount by 28 days, which totaled \$123.55, then multiplying this figure times the 5 days that he worked full time during the 28-day period from January 13 to 17, 2009, creating an overpayment of \$615.78. It advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. The Office further advised him that, when he 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 he disagreed with the decision he 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 he wished to make with regard to the overpayment should be submitted within 30 days of the January 26, 2009 letter. Appellant did not respond to this letter within 30 days.

In a decision dated March 13, 2009, the Office finalized the preliminary determination regarding the overpayment of \$615.78.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lost pay.¹ Compensation for wage loss due to disability is

¹ 20 C.F.R. § 10.401(a) (2003).

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.²

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$615.78 for the period January 13 to 17, 2009. The record shows that appellant received an overpayment during the period in question because he received temporary total disability compensation after he returned to work on January 13, 2009. The Office calculated the \$615.78 overpayment by taking his 28-day payment from December 21, 2008 to January 17, 2009, \$3,448.35, dividing this amount by 28 days, which totaled \$123.55, then multiplying this figure times the 5 days that he worked full time during the 28-day period January 13 to 17, 2009. This amounted to an overpayment of \$615.78. 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 Act³ 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.⁴

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."⁵

² *Id.* at § 500(a) (2003).

³ 5 U.S.C. § 8129(a)-(b).

⁴ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁵ 20 C.F.R. § 10.433(a).

ANALYSIS -- ISSUE 2

The Office issued a direct deposit payment on January 17, 2009 covering the period December 21, 2008 to January 17, 2009. Appellant had returned to work on January 13, 2009. The Office applied the third standard in determining that appellant was at fault in creating the overpayment. Its preliminary determination of overpayment and fault was issued on January 26, 2009.

Where the Office finds a claimant at fault in creating the overpayment because he or she accepted a payment which the individual knew or should have been expected to know was incorrect, it must establish at the time the claimant received the compensation that the claimant knew or should have known that the payment was incorrect. The record establishes that the January 17, 2009 payment was deposited directly into appellant's bank account. The Board has distinguished such a situation from one in which a claimant receives a check in the mail covering a period of employment and knows or should have known that he is not entitled to such compensation but decides nonetheless to cash or deposit the check. The Board has found that the mere direct deposit by the Office is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the check before it was deposited to his account.⁶ Furthermore, it is not established that appellant had an opportunity to review written bank statements and determine that the deposit had been made because the Office's preliminary determination of fault was made on January 26, 2009 some nine days after the deposit was made.⁷ The Board therefore finds that appellant was not at fault in the creation of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$615.78 for the period January 13 to 17, 2009. The Board also finds that the Office has not established that appellant was at fault in the creation of the overpayment. The Board will set aside the Office's finding of fault and remand the case to the Office for further development and a final decision on the issue of waiver.

⁶ *W.P.*, 59 ECAB___(Docket No. 08-202, issued May 8 2008).

⁷ *Otha J. Brown*, 56 ECAB 228 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2009 decision of the Office of Workers' Compensation Programs be affirmed in part and is set aside regarding the finding of fault and remanded for further development consistent with this decision.

Issued: December 9, 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