

fell down in a twisting motion in performance of duty. He stopped work on February 25, 2000 and returned to work in a light-duty capacity on March 24, 2000.

The Office accepted the claim for aggravation of preexisting degeneration of the spine. Appellant underwent authorized back surgery on June 26, 2000.¹ He underwent an authorized laminectomy and L4-S1 fusion. Appellant filed for disability retirement which was approved on September 15, 2000.² On January 23, 2003 the Office authorized posterior lumbar interbody fusion; spinal implementation; laminectomy; and iliac bone graft harvesting. Appellant's claim expanded to include degenerative disc disease and lumbar spondylosis. He returned to full-time modified duty on March 31, 2005. On January 24, 2006 appellant underwent spinal cord stimulator trial and epidural placement of spinal cord stimulator leads. On February 16, 2006 he underwent spinal cord stimulator and programming. The record reflects that appellant was received wage-loss compensation through direct deposit. Appropriate compensation benefits were authorized and paid.

By letter dated February 22, 2006, the Office informed appellant that he would receive \$2,880.00 in gross compensation every 28 days. Appellant was also advised that his compensation would continue as long as the medical evidence supported his inability to work. Additionally, he was advised that he must "NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK." Appellant was advised that, if he worked for any portion of the period for which compensation was received, he must return the check to the Office or an overpayment of compensation would result.

The record reflects that appellant returned to full-time modified duty on work on September 5, 2006 with the employing establishment.

In a letter dated September 29, 2006, the Office advised appellant that, since he returned to work on September 5, 2006, he must return his last 28-day compensation check to avoid an overpayment and a new one with the appropriate date would be reissued.

On November 8, 2006 the Office made a preliminary finding that an overpayment of \$5,198.89 arose because appellant returned to work on September 5, 2006 but continued to receive full compensation benefits for total disability through October 28, 2006. It advised him that he was only entitled to receive full compensation for disability through September 4, 2006. The Office found that appellant was with fault in the creation of the overpayment because he accepted a payment for total disability which he knew or reasonably should have known was incorrect.

In a memorandum to the file also dated November 8, 2006, the Office noted that appellant returned to work at the employing establishment on September 5, 2006 but continued to receive compensation benefits for total disability through October 28, 2006. It noted that

¹ The record reflects that appellant had a prior history of back problems, obesity, coronary artery disease with angioplasty in 1999, seasonal asthma, gastroesophageal reflux disease and noninsulin-dependent diabetes mellitus controlled with diet. Additionally, he has a history of chronic lumbar pain dating back to 1979.

² Appellant returned to work in the private-sector in March 2001 and was laid off in December 2001. The record reflects that he underwent nonwork-related arthroscopies to the right knee in 2001 and 2002.

appellant was advised by letter dated February 22, 2006 of the conditions for which wage loss was paid. The Office noted that appellant was specifically advised that full compensation was only payable while he was unable to work and that, if he received a compensation check which included a payment for a period in which he worked, he must return the check immediately to prevent an overpayment of compensation. It advised appellant that, since he did not return the check, an overpayment was created. The Office indicated that for the period September 3 to October 28, 2006 appellant received \$5,962.00. It indicated that the amount of \$542.36 was subtracted for health benefits and \$28.20 was deducted for life insurance. The Office indicated that appellant should have received \$212.93 as payment for the period September 3 to 4, 2006, with deductions of \$19.37 for health benefits and \$1.01 for life insurance. It subtracted the amount that he received for the period that he was working and determined that the overpayment was equal to \$5,198.89. The Office found that appellant was at fault in creating the overpayment because he knowingly accepted a payment which he knew or should have known to be incorrect. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment. If he wished a waiver of the overpayment, he was specifically directed to submit financial information by completing an overpayment recovery questionnaire.

Copies of the payments that appellant received via direct deposit were also included and reflect that, on September 30, 2006, he received a direct deposit of \$2,981.00 for the period September 3 to 30, 2006 and on October 28, 2006 he received \$2,981.00 for the period October 1 to 28, 2006.

Appellant requested a telephonic prerecoupment hearing, which was held on June 6, 2007. During the hearing, he alleged that he believed that the compensation checks that he received were for an earlier period of time. Appellant explained that he contacted the Office on several occasions because he believed that the money was for the period October 25 to January 24, 2006, because he had undergone an approved surgery, but had not received compensation.³ His wife confirmed that his payments were received via direct deposit and that they knew they would have to mail it back, but she wanted a hearing. She indicated that medical documentation was provided, but that he did not receive compensation for that time frame. Appellant testified that he had no income. His wife indicated that she had a net monthly income of \$1,800.00 per month and also provided testimony regarding their income, assets and expenses.⁴

In a decision dated August 22, 2007, the Office hearing representative finalized its preliminary findings on the fact and amount of overpayment. The Office hearing representative found that appellant was with fault because he accepted compensation that he knew or should have known that he was not entitled to receive. The Office determined that, because he was no

³ Appellant was advised by the Office hearing representative that this was outside the period under review and that the recurrence would be addressed separately.

⁴ Appellant also completed the recovery sheet and indicated that he had monthly income of \$6,023.24, expenses in the amount of \$6,525.00 and assets comprised of cash and stocks in the amount of \$42,610.00. No documentation regarding the alleged expenses was submitted.

longer receiving compensation, the payment was required in full. The Office hearing representative requested the Office request repayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ A claimant, however, is not entitled to receive compensation for temporary total disability and actual earnings for the same period.⁶ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$5,198.89. The record reflects that appellant returned to work effective September 5, 2006. The record reflects that he continued to receive payments for compensation for temporary total disability through October 28, 2006. As noted above, appellant is not entitled to receive compensation for temporary total disability after he has returned to work. Accordingly, an overpayment of compensation has been created.

The Office indicated that appellant received gross compensation for the period September 3 to October 28, 2006 in the amount of \$5,962.00. It indicated that the amount of \$542.36 was subtracted for health benefits and \$28.20 was deducted for life insurance. The Office indicated that appellant should have received \$212.93 as payment for the period September 3 to 4, 2006, with deductions of \$19.37 for health benefits and \$1.01 for life insurance. It subtracted the amount that he received for the period that he was working, noting credits for health and life insurance benefits and determined that this resulted in a \$5,198.89 overpayment of compensation.

Consequently, appellant received an overpayment of compensation from September 5 to October 28, 2006 in the amount of \$5,198.89. There is no contrary evidence regarding the fact of and the amount of the overpayment. The Board will affirm the Office's finding on the fact and the amount of the overpayment. Accordingly, appellant received an overpayment, as he returned to work and continued to receive compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁸ provides that "[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault

⁵ 5 U.S.C. § 8102(a).

⁶ *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008); *Danny E. Haley*, 56 ECAB 393 (2005).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004). *See id.*

⁸ 5 U.S.C. § 8129(b).

and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations⁹ provide that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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.”

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.¹⁰

The 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 were incorrect.¹¹ It is not appropriate, however, to make a finding that a claimant has accepted an 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.¹²

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. It determined that appellant was at fault in creating the overpayment of \$5,198.89 based on its finding that he knew or should have known that the payments received by direct deposit from September 5 through October 28, 2006 were not proper because he had returned to work. 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 known that he was not entitled.¹³ Appellant was apprised by letter dated February 22, 2006, he was clearly advised that he must “NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU

⁹ 20 C.F.R. § 10.433.

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ See *Karen K. Dixon*, 56 ECAB 145 (2004).

¹² See *K.H.*, Docket No. 06-191 (issued October 30, 2006). See *Tammy Craven*, 57 ECAB 689 (2006).

¹³ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

RETURN TO WORK.” The Office also indicated that, if appellant worked for any portion of the period for which compensation was received, he must return the check to the Office or an overpayment of compensation would result.

The record reflects that appellant received a direct deposit on September 30, 2006 in the amount of \$2,981.00 containing the portion of the overpayment covering the period September 5, through 30, 2006. The Board has held that an employee who receives payment 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.¹⁴ The Board has found a 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 were incorrect.¹⁵ It is not appropriate, however, to make a finding that a claimant has accepted an 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.¹⁶

Regarding the overpayment of compensation for the period September 5 through 30, 2006, the Board finds that appellant was without fault in creating the overpayment. While appellant accepted the overpayment by gaining control of the funds deposited into his bank account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day.¹⁷ Although the Office sent appellant a letter on September 29, 2006, there is no evidence that he received it before September 30, 2006 when the funds were direct deposited. Unlike the situation where 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.¹⁸ There is no specific evidence of record in this case to show that appellant had notice that he was aware that he had accepted an incorrect payment via direct deposit for the compensation payment that included the period September 5 through 30, 2006. A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period. The case will thus be remanded to the Office to determine whether he is entitled to waiver for this period.

After appellant’s receipt of the first direct deposit, for which fault may not be imputed to him, he knew or should have known that the subsequent direct deposits were in error under the reasonableness standard addressed above. When he received the second check on October 28, 2006, in the amount of \$2,981.00 for the period October 1 to 28, 2006, he had worked for around

¹⁴ See *Karen K. Dixon*, *supra* note 11.

¹⁵ *Id.*

¹⁶ See *supra* note 12.

¹⁷ See *Tammy Craven*, *supra* note 12.

¹⁸ *Id.*

seven weeks. Appellant has not argued or offered any probative evidence that he believed that these payments for temporary total disability were correct. Rather, he alleged that he believed that he was entitled to receive these payments as he had not received compensation for an earlier period of time. However, in a September 29, 2006 letter, the Office clearly advised to return his compensation payment as he had returned to work. Also, as noted, it advised appellant on February 22, 2006 that he could not receive compensation for a period in which he also worked. In determining fault the Office applies a reasonable person test.¹⁹ It was not reasonable for appellant to believe that he could continue to receive compensation after he returned to work and enough time had passed for him to review confirmation of the incorrect payments in his bank account. Furthermore, appellant's hearing testimony indicates that he was aware that there was a question as to whether he was entitled to the compensation payment. The Board finds that appellant knew or should have known that the deposit received covering the period October 1 through 28, 2006 was incorrect. Therefore, appellant was at fault in creating this portion of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period September 5 to October 28, 2006, in the amount of \$5,198.89. The Board further finds that appellant was without fault in the creation of the overpayment for the period September 5 to 30, 2006 but is with fault in creating the overpayment for the period October 1 through 28, 2006.

¹⁹ See *L.C.*, 59 ECAB ___ (Docket No. 08-209, issued June 16, 2008).

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 10, 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