

was also accepted. Appellant stopped work on July 6, 2000. By letters dated November 20 and December 19, 2000, the Office placed him on the periodic rolls. It noted that the first payment would be for the period October 21 through November 4, 2000 and regular compensation payments would be paid every four weeks thereafter. The Office instructed appellant to provide immediate notification if he returned to work and to return any payment received to avoid an overpayment.

In June 2002, appellant started limited-duty, part-time work. The Office adjusted his monthly compensation based on his actual earnings effective June 25, 2002. In a November 13, 2002 letter, it informed appellant that his monetary compensation would be reduced effective November 3, 2002 based on his actual earnings. Appellant returned to full-time limited-duty work August 23, 2005. He continued to be paid on the periodic compensation rolls through January 21, 2006 at the rate of \$1,253.00 every four weeks. The record reflects that the Office issued six checks, dated September 3, October 1 and 28, November 28 and December 24, 2005 and January 21, 2006 each in the amount of \$1,253.00 from August 7, 2005 to January 21, 2006.

On May 22, 2007 the Office made a preliminary determination that a \$6,802.00 overpayment of compensation had occurred for the period August 23, 2005 through January 21, 2006. It found that appellant had returned to full-time employment on August 23, 2005 but continued to receive compensation for wage loss through January 21, 2006. Appellant received a net amount of \$7,518.00 for the period August 7, 2005 through January 21, 2006 but was entitled to only \$716.00, which it subtracted to arrive at a total overpayment of \$6,802.00. The Office found that appellant was at fault in creating the overpayment because he knew or should reasonably have known that he was not entitled to compensation benefits for disability upon his return to full-time work on August 23, 2005. It informed appellant that, if he disagreed with the decision, he could submit evidence or argument to the Office or request a prerespondent hearing.

In a June 14, 2007 statement, appellant requested waiver of the recovery of the overpayment. He contended that the compensation checks were for adjusted pay until he was able to work a full eight-hour day. Appellant stated that, when he first returned to work, he worked four hours a day and received four hours of compensation a day. He subsequently worked six hours a day and received two hours of compensation a day. After returning to full duty, appellant realized something might be wrong and called the Department of Labor.¹ Appellant returned a January 21, 2006 compensation check in the amount of \$1,253.00 for the period December 25, 2005 through January 21, 2006. He also completed an overpayment recovery questionnaire listing his monthly income and an itemization of his monthly expenses. Appellant reiterated that he had been employed in a part-time capacity and became confused, believing the payments represented the difference between full- and part-time work.

In a December 13, 2007 letter, the Office advised appellant that it received the check totaling \$1,253.00. It informed him that the overpayment was reduced to reflect a new amount of \$5,549.00.

¹ The record does not contain any Office memorandum documenting this call.

By decision dated December 27, 2007, the Office found that an overpayment in the amount of \$5,549.00 had occurred during the period August 23 through December 24, 2005.² It finalized its fault finding and determined that the recovery of the overpayment could not be waived.

LEGAL PRECEDENT -- ISSUE 1

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 his duty.³ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

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 may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,549.00 for the period August 23 through December 24, 2005. The record establishes that appellant received an overpayment during this period as he received checks for partial disability after returning to full-time work on August 23, 2005. Appellant received a net amount of \$7,518.00 for the period August 7, 2005 through January 21, 2006. As he was entitled to \$716.00 for the period August 7 through 22, 2005, this was subtracted from the \$7,518.00 received to total an overpayment of \$6,802.00. The Office subsequently subtracted the \$1,253.00 check appellant returned, which covered the period December 25, 2005 to January 21, 2006. This resulted in an overpayment of \$5,549.00. The Office properly found that appellant received an overpayment of compensation in the stated amount during that period. Appellant does not dispute the fact or the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

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

² The Office noted that the original overpayment was in the amount of \$6,802.00 and appellant had returned a check in the amount of \$1,253.00, covering the inclusive period of December 25 2005 to January 21, 2006. Thus, the original overpayment of \$6,802.00 was offset by \$1,253.00 for a total of \$5,549.00.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ 5 U.S.C. § 8116(a).

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 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

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

In this case, appellant went from limited-duty, part-time work to limited-duty, full-time work on August 23, 2005. He continued to be paid on the periodic compensation rolls through January 21, 2006. Even if the overpayment resulted from the negligence on the part of the Office, this does not excuse appellant from accepting a payment which he knew or should have known to be incorrect.⁸ Although he returned to full-time work August 23, 2005, he received and kept the compensation payments issued on September 3, October 1 and 28, November 28 and December 24, 2005.⁹ While appellant believed the compensation checks were a pay adjustment until he was able to work a full eight-hour day, he did not submit evidence supporting his assertion and this does not account for the fact the compensation checks were issued in the amount of \$1,253.00 every four weeks, the amount he was receiving before he returned to work. Appellant acknowledged that, after several months, he believed the payments might be incorrect and eventually returned one check. He did not have any reasonable expectation to receive compensation for disability following his return to full duty on August 23, 2005. Appellant knew or should have known that he was accepting incorrect payments. Additionally, it is presumed that he received a notification with each check of the time period for which payment was being made.¹⁰ This put appellant on notice that each compensation check covered was for the time period noted on each check, each of which was also a period in which he worked.

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.433(b).

⁸ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ As noted, appellant returned the January 21, 2006 compensation check for the period December 25, 2005 through January 21, 2006.

¹⁰ 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 with each supplemental check which states ... the period for which payment is being made." 20 C.F.R. § 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."

Under these circumstances, the Board finds that appellant knew or should have known that he was accepting incorrect compensation payments for periods in which he worked full time and had no loss in wage-earning capacity. Upon his receipt of the September 3, 2005 check and thereafter, appellant had a duty to contact the Office and inquire as to whether acceptance of each payment was appropriate. As appellant worked full time during the period covered by the check, and did not return the payment, he accepted compensation payments which he knew or should have known to be incorrect.

For these reasons, the Office properly found that appellant was at fault in the overpayment of September 3 to December 24, 2005. As he was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$5,549.00, may not be waived.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$5,549.00 and that he was at fault in creating the overpayment, thereby precluding waiver of the recovery.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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