

and walking in the course of her employment. The Office accepted her claim and paid compensation for temporary total disability on the periodic rolls. On August 9, 2005 it advised appellant:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result.”

The Office provided appellant a schedule of checks for the 2006 calendar year and explained when each check would be issued. The schedule showed that checks would cover the periods September 3 to 30, 2006, October 1 to 28, 2006 and October 29 to November 25, 2006.

On September 26, 2006 appellant returned to work for four hours a day. The Office, however, continued to pay compensation for total disability through November 25, 2006.

On June 5, 2008 the Office made a preliminary determination that appellant received a \$2,872.85 overpayment because she returned to work four hours a day effective September 26, 2006 but continued to receive compensation for total disability through November 25, 2006. It found that appellant was with fault in the creation of the overpayment because she knowingly accepted compensation to which she was not entitled.

Appellant completed an overpayment recovery questionnaire showing monthly income of \$2,200.00 and monthly expenses of \$2,118.00. She listed additional expenses in a June 22, 2008 attachment.¹ Appellant requested a decision on the written evidence. She did not contest that the overpayment occurred or the amount of the overpayment, but she did contest the finding of fault.

Appellant explained that she was unable to drive when she returned to work on September 26, 2006. When she did become able to retrieve her mail and do other daily activities, she became aware of the payment. Appellant stated that she contacted the Office in writing to advise that she wished to be taken off the rolls.² She argued that repaying the debt would be an extreme financial hardship. Appellant’s home suffered major damage in September 2005 from Hurricane Rita. She lost her car in September 2007 to Hurricane Humberto. Appellant’s gas was turned off in March 2007 for nonpayment, and she could not have it reconnected without spending \$2,000 for repairs, which she could not afford. She stated that she was living without hot water, a stove or a dryer for the past 15 months. Several health issues in 2007 to 2008 prevented her from saving money and she was scheduled to have surgery on July 10, 2008 with six weeks of recovery. Appellant stated that she did not have enough leave to cover her absence, and it would be another financial hardship trying to pay her monthly bills during that period. She submitted a number of bills showing balances and amounts due.

¹ Appellant added \$485.00 in dental expenses, \$2,200.00 in needed dental work not covered by insurance, \$250.00 in gasoline expense, \$500.00 for repairs on her nonworking car, \$4,749.00 in credit card debt and \$1,000 in real estate taxes.

² Appellant made this request on December 12, 2006.

In a decision dated July 18, 2008, the Office found that appellant was with fault in the creation of a \$2,872.85 overpayment from September 26 through November 26, [sic] 2006.³ It found that appellant was with fault because she accepted payments for total disability after she returned to work and she knew or should have known that this was incorrect. The Office determined that it would be reasonable to recover the overpayment by deducting \$46.15 from appellant's wages each pay period, as this would resolve the debt within a guideline of three years without undue financial hardship.

LEGAL PRECEDENT

The Federal Employees' Compensation Act places limitations on the right to receive compensation: While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.⁴ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁵ "Temporary total disability" is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.⁶

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 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 with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which she knew or should have known to be incorrect; (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁷

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 she is being overpaid.⁸

³ This appears to be a typographical error. The period of the overpayment is September 26 through November 25, 2006.

⁴ 5 U.S.C. § 8116(a).

⁵ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

⁶ 20 C.F.R. § 10.400(b) (1999).

⁷ *Id.* at § 10.433(a).

⁸ *Id.* at § 10.433(b).

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled.⁹

ANALYSIS

Appellant does not contest the fact or amount of the overpayment. Both are well established. After appellant returned to work for four hours a day on September 26, 2006, she continued to receive compensation for total disability through November 25, 2006. She was not entitled to compensation for total disability after she returned to work, so effectively half the compensation she received after September 26, 2006 was an overpayment. The Board will affirm the Office's July 18, 2008 decision on the issues of fact and amount of overpayment.

The most contested issue in this case is whether appellant was at fault in creating this overpayment. The Office found that she was with fault because she accepted payments which she knew or should have known were incorrect. The record supports this finding. When the Office put appellant on the periodic rolls in August 2005, it explained how payments were going to be made. She would be receiving regular automated payments for total disability. The Office provided her with a schedule of checks for the 2006 calendar year. It told her when the checks would be issued and the period of disability covered. Relevant to the overpayment, the schedule showed that payments would cover the periods September 3 to 30, 2006, October 1 to 28, 2006, and October 29 to November 25, 2006. Further, the Office advised appellant: "If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result."

The Board finds that appellant knew or should have known that any check she continued to receive after returning to work was incorrect and would result in an overpayment. When appellant returned to work on September 26, 2006, she knew or should have known that another check for total disability would soon be issued covering the period through September 30, 2006. Yet, she accepted that check into her account through direct deposit, just as she would accept the next two checks for periods through November 25, 2006.¹⁰ Because appellant accepted a payment which she knew or should have known was incorrect, the Board will affirm the Office's July 18, 2008 decision on the issue of fault.

As to recovery appellant was working full time at the time of the Office's decision. She was not receiving compensation and the Office cannot adjust later payments of compensation. Under these circumstances, the Board lacks jurisdiction to review the amount of recovery the Office determined to be reasonable. The Board can review the Office's collection of a debt only when the claimant is receiving compensation and the Office deducts an amount from continuing benefits.¹¹

⁹ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

¹⁰ Appellant notes that she asked to be taken off the periodic rolls, but she did not make this request until December 12, 2006, after the Office discovered the overpayment and stopped compensation for total disability.

¹¹ *Supra* note 9.

CONCLUSION

The Board finds that appellant was with fault in the creation of a \$2,872.85 overpayment from September 26 through November 25, 2006.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 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