

accepted her claim for injury to the cutaneous sensory nerves of the lower left limb contusion the of left toe and Achilles tendinitis. Appellant filed claims for compensation for various time periods, including the period September 6 through 29, 2007.

On September 28, 2007 the Office issued a check in the amount of \$1,265.71 for compensation for the period May 16 through July 26, 2007. On October 5, 2007 it issued a compensation check for the period September 6 through 29, 2007 in the amount of \$1,999.36. In telephone calls on October 2 and 9, 2007 and a letter dated October 9, 2007, appellant informed the Office that she had not received her check and was in dire need of funds. The Office issued a tracer on the checks. A note to the file dated October 11, 2007 indicated that appellant's checks were sent to the wrong zip code. On October 18, 2007 the Office issued an emergency payment to cover the two missing checks in the amount of \$3,265.07.

By facsimile received by the Office on October 19, 2007, appellant indicated that she had received a check for \$1,999.36 and that payment should not be reissued. She noted that, if she received a duplicate check, she would return it to the Office. Appellant also noted that she had still not received the check for \$1,265.74 for the period May 17 through July 26, 2007.

In a note of an October 22, 2007 telephone call, appellant advised the Office that she received the check for \$3,265.07, which covered payments for the periods May 16 through July 26, 2007 and September 6 through 29, 2007. The Office explained to appellant that she now had an overpayment of \$1,999.36 and she indicated that she would write a check for that amount and send it to the Office.

By letter dated October 30, 2007, the Office made a preliminary determination that appellant was overpaid in the amount of \$1,999.36 because she was paid \$1,999.36 for the period September 6 through 29, 2007 and also received a check for \$3,265.07 which covered the same period. It made a preliminary determination that appellant was with fault in the creation of this overpayment. The Office sent appellant financial forms to complete and told her the proper method for challenging the overpayment.

On November 23, 2007 appellant requested a pre-recoupment hearing. She indicated that she believed that the overpayment occurred through no fault of her own and requested a waiver. Appellant noted that she was placed at a financial disadvantage because it took so long to receive the payment, that she was a diabetic and needed her medicine, that she was behind in rent and had no groceries and that she required counseling due to this experience. She requested that the payment not be reissued but since it was, she used it to pay bills. Appellant objected to the finding that she was at fault in the creation of the overpayment because she noted that she tried to stop the payment. She also completed the financial form.

At the telephonic hearing held on March 11, 2008, appellant conceded that an overpayment occurred but argued that she was without fault. She noted that she contacted the Office immediately once she received the first check and asked the Office not to reissue payment. Appellant denied saying that she would return the check and argued that the Office should have offered her direct deposit and then the check would never have been lost. She contended that she should not have to repay the overpayment back because she was slandered and insulted. Appellant also answered questions with regard to her financial status.

By decision dated May 6, 2007, the Office found that an overpayment in the amount of \$1,999.36 had occurred for which appellant was not without fault and not entitled to waiver. The hearing representative directed appellant to pay \$200.00 a month until the outstanding balance of \$1,999.36 had been repaid.

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.¹ 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.²

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.³ When a claimant receives a duplicative compensation payment for a period that she has already received compensation for wage loss, an overpayment of compensation is created.⁴

ANALYSIS -- ISSUE 1

The evidence establishes that appellant received a duplicative compensation payment in the amount of \$1,999.36 for the period September 6 through 29, 2007. The duplicative payment occurred because the original check was delayed in the mail so the Office reissued payment in the amount of \$3,265.07, of which \$1,999.36 was a duplicate payment. Appellant did not return the duplicate payment. Accordingly, the Office properly found that she received an overpayment in the amount of \$1,999.36.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides: Adjustment or recovery by the United States may not be made when 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.⁵

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

¹ 5 U.S.C. § 8102(a).

² *Id.* at § 8129(a).

³ *Id.* at § 8116(a).

⁴ See *Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

⁵ 5 U.S.C. § 8129(b).

received 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; 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 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

Appellant received the original check of \$1,999.36 and notified the Office of this fact on October 19, 2007. She asked that the Office not reissue the check. However, the Office had already begun the process of making an emergency payment in the amount of \$3,265.07 to cover the two missing checks. Although appellant did initially notify the Office of the potential error, she also indicated that, when the deposit was made for \$3,265.07, she used this money to pay her bills. Accordingly, she is not without fault in the creation of the overpayment as she accepted a payment which she knew to be incorrect. When appellant received the overpayment, it was her responsibility to return it to the Office. She did not do so and is not without fault in the creation of the overpayment.⁸ As appellant is not without fault in the creation of the overpayment, she is not eligible for waiver of the recovery. The Office is required by law to recover this overpayment.⁹

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,999.36 for the period September 6 through 29, 2007 for which she was not without fault. Appellant is not entitled to waiver of the recovery of the overpayment.

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.433(b).

⁸ *Id.* at § 10.433(a).

⁹ The repayment of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); *see also Joan Ross*, 57 ECAB 694 (2006); *Bob R. Gilley*, 51 ECAB 377 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2008 is affirmed.

Issued: June 10, 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