

In a September 19, 2007 letter, advising appellant that he would be paid temporary total disability compensation, the Office stated:

“OVERPAYMENTS. To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.” (Emphasis in the original.)

Appellant stopped work on December 3, 2007, when he underwent left rotator cuff repair surgery. The Office commenced him appropriate compensation for temporary total disability.

On May 8, 2008 appellant returned to work on light duty.

On July 3, 2008 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$2,538.48 for the period May 8 through June 7, 2008 because he received compensation to which he was not entitled. 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 May 8, 2008, that the payments he had been receiving were incorrect. The Office calculated the amount of the overpayment by taking the net compensation he was paid for the period April 13 through June 7, 2008, \$4,585.28 and subtracting the net compensation to which he was actually entitled for the period, \$2,047.01. This created an overpayment of \$2,538.48. The record indicates that appellant received direct deposit payments for the period April 13 through May 7, 2008 and May 8 through June 7, 2008. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. It further advised appellant that if 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. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to it or request a preresoupment 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 May 18, 2005 letter. Appellant did not respond to this letter within 30 days.

In a decision dated August 13, 2008, the Office finalized the preliminary determination regarding the overpayment of \$2,538.48.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose 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 \$2,538.48 for the period May 8 through June 7, 2008. The record shows that appellant received an overpayment during the period in question because he continued to receive temporary total disability compensation after he returned to work on May 8, 2008. The Office calculated the \$2,538.48 overpayment by totaling the amount of temporary total disability compensation appellant received during the period May 8 through June 7, 2008, \$4,585.28, and subtracting the net compensation to which he was actually entitled for the period, \$2,047.01, in accordance with the procedure outlined above. 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 20 C.F.R. § 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 applied the third standard in determining that appellant was at fault in creating the overpayment.

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 expected to know he was not entitled to.⁶ Appellant was informed by the Office in its September 19, 2006 letter that he was required to notify the Office as soon as he returned to work and to return any payment of compensation to the Office in order to avoid an overpayment of compensation. He returned to work on May 8, 2008, but did not return any compensation received after that date, even though he knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to work.

The Board has held however that an employee who receives payments 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.⁷ After appellant's receipt of the first direct deposit, for which fault may not be imputed to him, it could be presumed that he knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled. However, the Office became aware that it was erroneously sending compensation checks to appellant immediately after it sent him the first direct deposit check following his return to work. In this case appellant only received one direct deposit payment for the period of time after he had returned to work, May 8 to June 6, 2008. Therefore, for receipt of the first direct deposit, the Board finds that appellant was without fault. While appellant accepted the overpayment by gaining control of the funds deposited into his checking account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which 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. As the first direct deposit was the only one containing an erroneously issued compensation payment, appellant is without fault with regard to the overpayment of \$2,538.48 for the period May 8 through June 7, 2008.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,538.48 for the period May 8 through

⁶ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁷ That 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 are incorrect. See *Tammy Craven*, 57 ECAB 689 (2006). The Board notes that it is not appropriate to make a finding that a claimant has accepted 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.

June 7, 2008. The Board finds that appellant was not at fault in creating the overpayment. This case must therefore be remanded to the Office for consideration of waiver.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2008 decision of the Office of Workers' Compensation Programs be affirmed in part and reversed and remanded in part.

Issued: June 15, 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