



## **FACTUAL HISTORY**

On January 23, 2007 appellant, then a 32-year-old border patrol agent, sustained injury when he fell into an irrigation ditch and fractured his left ankle. On January 29, 2007 he had surgery for a left ankle open reduction and internal fixation of the lateral malleolus. The Office accepted appellant's claim for left ankle fracture. On March 27, 2007 it placed appellant on its periodic rolls in receipt of compensation every 28 days.

By letter dated April 5, 2007, the Office informed appellant that he would receive \$2,984.37 in gross compensation every 28 days. Appellant was advised that his compensation would continue so 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." If appellant worked for any portion of the period for which compensation was received, he was to return the check to the Office or an overpayment of compensation would result. The record reflects that he received wage-loss compensation through direct deposit. Appellant returned to work on July 30, 2007.

On April 28, 2008 the Office has made a preliminary finding that appellant received an overpayment of \$575.20 because he returned to work on July 30, 2007 but received compensation benefits for total disability through August 4, 2007. On an attached April 25, 2008 worksheet, it noted that appellant received gross compensation for the period July 8 to August 4, 2007 in the amount of \$2,984.37. The Office deducted \$268.60 for health benefits, \$14.40 for basic life insurance and \$17.10 for optional life insurance, for a net payment of \$2,684.27. It divided the net payment of \$2,684.27 by the 28-day periodic rolls cycle to find appellant's daily entitlement of \$96.87. The Office multiplied \$96.87 by six days of overpayment for the period July 30 to August 4, 2007 to find an overpayment of \$575.20.<sup>2</sup> It 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. Appellant was 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.

On May 20, 2008 appellant submitted a completed overpayment recovery questionnaire.

In a decision dated June 6, 2008, the Office finalized the overpayment in the amount of \$575.20. It further found that appellant was at fault as he knew or should have known that he was not entitled to dual compensation from the Office and the employing establishment. The Office directed repayment in full.

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<sup>2</sup> The Board notes that this amounts to \$575.19, which the Office rounded up to \$575.20.

The record reflects that on July 21, 2008 appellant agreed to repay the overpayment at a rate of \$100.00 per month. On appeal, he contests the Office's June 6, 2008 decision.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116 of the Federal Employees' Compensation 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.<sup>4</sup> A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment in compensation in the amount of \$575.20. The record reflects that he returned to work effective July 30, 2007; however, he received compensation for temporary total disability through August 4, 2007. As noted, appellant is not entitled to receive wage-loss compensation for temporary total disability after he has returned to work and resumed earning his salary.<sup>6</sup> Accordingly, an overpayment of compensation has been created.

The Board notes that the Office records show that appellant received gross compensation for the period July 8 to August 4, 2007 in the amount of \$2,984.37. It indicated that the amount of \$268.60 was deducted for health benefits, \$14.40 for basic life insurance and \$17.10 for optional life insurance for a net payment of \$2,684.27. The Office divided the net payment of \$2,684.27 by the 28-day periodic rolls cycle to find appellant's daily entitlement of \$96.87, which when multiplied by 6 days of overpayment for the period July 30 to August 4, 2007, resulted in an overpayment of \$575.20.<sup>7</sup>

Consequently, appellant received an overpayment of compensation from July 30 through August 4, 2007 in the amount of \$575.20. 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.

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<sup>3</sup> Appellant submitted a check dated July 21, 2008 made out to the Office for \$100.00. The Clerk of the Board returned this check to appellant on August 4, 2008 as the Office and the Board are separate agencies within the Department of Labor. The Board notes that its jurisdiction only extends to reviewing final decisions of the Office arising under the Act. *See* 20 C.F.R. § 501.2(c).

<sup>4</sup> 5 U.S.C. § 8116(a).

<sup>5</sup> *Danny E. Haley*, 56 ECAB 393 (2005). *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>6</sup> *See Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>7</sup> *See supra* note 2.

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides that 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.<sup>8</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>9</sup>

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who:

- (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 the individual knew or should have been expected to know was incorrect.”<sup>10</sup>

With respect to whether an individual is without fault, 20 C.F.R. § 10.433(b) of the Office’s regulations provides in relevant part:

“(b) 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.”<sup>11</sup>

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.<sup>12</sup> 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

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<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>10</sup> *See Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>11</sup> 20 C.F.R. § 10.433(b).

<sup>12</sup> *See Karen K. Dixon*, 56 ECAB 145 (2004).

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.<sup>13</sup>

### 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 \$575.20 based on its finding that he knew or should have known that the payments received by direct deposit from July 30 through August 4, 2007 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.<sup>14</sup> Appellant was apprised by letter dated April 5, 2007 that he must “NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK.” The Office also indicated that, if appellant worked for any portion of the period for which compensation was received, appellant must return the check to it or an overpayment of compensation would result.

The record reflects that appellant received a direct deposit on August 4, 2007 in the gross amount of \$2,984.37 containing the portion of the overpayment covering the period July 30 through August 4, 2007. 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.<sup>15</sup> 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.<sup>16</sup> It is not appropriate to make a finding that a claimant has accepted an overpayment through direct deposit until such time as a reasonable person would have been aware that an overpayment has occurred. This awareness may 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.<sup>17</sup>

The Board finds that appellant was without fault in creating the overpayment. While he accepted the overpayment by gaining control of the funds deposited into his bank account, he did not know that he would receive an incorrect payment on that day.<sup>18</sup> 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.<sup>19</sup> There is no evidence of record in this case to show

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<sup>13</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006). See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>14</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>15</sup> See *Karen K. Dixon*, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *Tammy Craven*, *supra* note 13.

<sup>19</sup> *Id.*

that appellant was aware that he had accepted an incorrect payment by direct deposit for the compensation payment that included the period July 30 through August 4, 2007. A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider his eligibility for waiver for this period. The case will be remanded to the Office to determine whether he is entitled to waiver of the overpayment.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period July 30 through August 4, 2007 in the amount of \$575.20. The Board further finds that appellant was without fault in the creation of the overpayment for the period July 30 through August 4, 2007.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 6, 2008 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: May 7, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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