



finger, thumb and arm which she attributed to her federal employment. Appellant stopped work on May 10, 2007. By letter dated July 24, 2007, the Office accepted appellant's claim for left carpal tunnel syndrome (CTS) and aggravation of degenerative disc disease at C5-6 and C6-7. On April 9, 2008 appellant returned to limited-duty work at the employing establishment.

On May 6, 2008 the Office issued a compensation check for total disability in the amount of \$3,859.65 for the period March 22 through May 10, 2008 by direct deposit. By letter dated May 22, 2008, it notified appellant of the periodic payments she would receive, including the \$3,859.65 payment for March 22 through May 10, 2008. Appellant was advised to notify the Office immediately when she returned to work to avoid an overpayment of compensation and that, if she worked during any period covered by a compensation payment, she must return the payment to it. She was also advised of the penalties for accepting compensation payments to which she was not entitled.

On June 5, 2008 the Office made a preliminary determination that appellant received an overpayment in the amount of \$2,044.06 from April 9 through May 10, 2008 because she knew or should have known that she was not entitled to wage-loss compensation for total disability after her return to limited-duty work. A May 29, 2008 overpayment worksheet noted that appellant received a periodic payment in the amount of \$3,859.64 for the period March 22 through May 10, 2008. As she returned to full-time limited-duty work on April 9, 2008, she should have only received compensation in the amount of \$1,467.54 from March 22 through April 8, 2008. During the period April 9 through May 10, 2008 appellant received compensation in the amount of \$2,392.11, which was reduced by a \$348.05 refund she made for duplicate deductions of her health benefits and basic and optional life insurance premiums made from her compensation. This resulted in an overpayment of compensation in the amount of \$2,044.06. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of the letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. Appellant did not respond.

By decision dated July 7, 2008, the Office found that appellant was at fault in the creation of an overpayment in compensation in the amount of \$2,044.06 for the period April 9 through May 10, 2008. It directed appellant to repay the overpaid amount in full within 30 days.<sup>1</sup>

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an

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<sup>1</sup> Following the issuance of the Office's July 7, 2008 decision, it received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to it and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> 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 or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>4</sup>

Section 10.500 of the Office's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>5</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$2,044.60. The record supports that she returned to work on April 9, 2008 and worked through May 10, 2008. Appellant received wage-loss compensation for the period March 22 through May 10, 2008. As she was not entitled to compensation for the period after she returned to work, the compensation she received from April 9 through May 10, 2008 represents an overpayment of compensation.<sup>6</sup> Appellant received a check in the net amount of \$3,859.65. The Office determined that she should have been paid \$1,467.54. Subtracting what appellant should have been paid for this period, \$1,467.54 and her refund of \$348.05 for duplicate deductions for health and insurance premiums, from what she was paid \$3,859.65, equals an overpayment of \$2,044.06. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board finds that an overpayment occurred in the amount of \$2,044.06 as appellant returned to work but received wage-loss compensation from April 9 to May 10, 2008.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>7</sup> provides that an overpayment of compensation shall be recovered by the Office 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.<sup>8</sup> Thus, it may not waive the overpayment of compensation unless appellant was without fault.<sup>9</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>10</sup>

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<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

<sup>5</sup> 20 C.F.R. § 10.500.

<sup>6</sup> *W.F.*, 57 ECAB 705 (2006).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>9</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>10</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

On the issue of fault, section 10.433 of the Office's regulations provide that an individual will be found at fault if he or she has done any of the following:

“(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 was incorrect.”<sup>11</sup>

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provide in relevant part:

“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>12</sup>

### **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for it to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time she received the compensation check in question, she knew or should have known that the payment was incorrect.<sup>13</sup>

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The Office found that appellant should have known that she received an incorrect payment for total temporary disability because she had been advised to return any money she received after returning to work. 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>14</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that an overpayment had occurred. This awareness may be established either through documentation such as a bank

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<sup>11</sup> 20 C.F.R. § 10.433(a).

<sup>12</sup> *Id.* at § 10.433(b); *Diana L. Booth, supra* note 10.

<sup>13</sup> *Diana L. Booth, supra* note 10.

<sup>14</sup> *See Karen K. Dixon, 56 ECAB 145 (2004).*

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>15</sup>

In this case, appellant received an overpayment of compensation in the amount of \$2,044.06 by direct deposit. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.<sup>16</sup> Appellant had no reason to suspect at the time the \$2,044.06 overpayment was deposited into her checking account that the Office had issued an incorrect payment.<sup>17</sup> As the funds were deposited directly into her bank account, she was not in a position to immediately decline acceptance of the amount paid by the Office. The Board finds that appellant was not at fault in creating the overpayment of \$2,044.06 for the period April 9 through May 10, 2008.<sup>18</sup>

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act<sup>19</sup> if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.<sup>20</sup> The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$2,044.06 overpayment. After such further development as it may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,044.06, during the period April 9 through May 10, 2008, because she incorrectly received temporary total disability compensation after she returned to work. The Board, however, finds the Office improperly found that appellant was at fault in creating the overpayment.

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<sup>15</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>16</sup> See *Karen K. Dixon*, *supra* note 14.

<sup>17</sup> See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> 5 U.S.C. § 8129(b).

<sup>20</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to fact and amount of overpayment and is set aside and the case remanded for further proceedings consistent with this decision of the Board with respect to fault in the creation of the overpayment.

Issued: May 11, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board