

compensation rolls effective October 29, 2006. Appellant underwent lumbar spinal fusion on February 22, 2007, which the Office authorized. On August 21, 2007 she returned to work in a part-time, limited-duty capacity. Following appellant's return to work, she regularly submitted CA-7 forms (claims for compensation) for intermittent wage loss.¹ However, the Office did not pay her based on the CA-7s she submitted. Instead, appellant remained on the periodic compensation rolls and continued to receive wage-loss compensation for temporary total disability. After approximately seven months, the Office realized the mistake and removed her from the periodic compensation rolls retroactive to August 21, 2007.

On June 4, 2008 the Office issued a preliminary determination that appellant received an overpayment of \$5,373.80 for the period August 21, 2007 through March 15, 2008.² It explained that the overpayment occurred because appellant continued to receive wage-loss compensation for total disability following her August 21, 2007 return to part-time work. The Office found that appellant was at fault in creating the overpayment because she should have been aware she was not entitled to receive compensation for total disability upon returning to work.

On July 1, 2008 appellant requested that the Office make a final decision based on the written evidence. She also submitted an overpayment recovery questionnaire. Appellant reported monthly earnings of \$1,800.00 and monthly expenses of \$2,075.70. Additionally, she reported no assets other than a checking account balance of \$100.00. As to the issue of fault, appellant indicated that it was her understanding that the monies she had received from the Office represented "just a portion of [her] pay." When she "return[ed] to work and continued to receive the same pay from the [Office]," she thought the Office was "just making up the percentage [they had] held back." Appellant claimed she did not realize she was being overpaid.

The Office issued a final overpayment decision on July 30, 2008. It found that appellant received an overpayment of \$5,373.80 because she was compensated for temporary total disability when in fact she was only out of work part time. As to the issue of fault, the Office found that appellant knew or should have know she was receiving compensation for total disability, to which she was not entitled.

LEGAL PRECEDENT -- ISSUE 1

If an employee returns to work and has earnings, she is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period.³

¹ Appellant was restricted to performing sedentary work five hours per day, five days per week. She was also required to attend physical therapy. Appellant's CA-7s routinely included lost time for three hours a day due to her limited-duty status plus whatever additional time she spent attending physical therapy. On November 12, 2007 her work week was reduced to 20 hours. Appellant's physician advised that she should work two days, five hours each day, then take one day off, followed by another two days of work.

² Based on the numerous CA-7s appellant submitted, the Office found that she was entitled to 606.5 hours of wage-loss compensation during the period August 27, 2007 through March 14, 2008. This amounted to \$6,278.55. However, appellant had received \$11,652.35.

³ 20 C.F.R. § 10.403(a), (c) (2008); *Daniel Renard*, 51 ECAB 466, 469 (2000).

ANALYSIS -- ISSUE 1

The overpayment arose when appellant returned to work in a part-time, limited-duty capacity on August 21, 2007, and the Office continued to pay her for temporary total disability through March 15, 2008. During this timeframe appellant worked approximately 20 hours per week. The Office paid appellant total disability in the amount of \$11,652.35 during the period August 21, 2007 through March 15, 2008. Based on her CA-7s, appellant was only entitled to compensation for 606.5 hours of lost wages, totaling \$6,278.55. The difference represents an overpayment of \$5,373.80. Appellant is not entitled to both her earned part-time wages and wage-loss compensation for total disability for the same period. Consequently, the Board finds that she received an overpayment of \$5,373.80 for the period August 21, 2007 through March 15, 2008.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁴ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁵ A recipient will be found to be at fault with respect to creating an overpayment if the individual “[a]ccepted a payment which he or she knew or should have known to be incorrect.”⁶

ANALYSIS -- ISSUE 2

Appellant accepted a payment she knew or should have known to be incorrect. In her July 1, 2008 letter to the Office, she acknowledged that she received the same amount of wage-loss compensation when she was not working as she did after she returned to work in August 2007. Appellant purportedly believed she had previously been underpaid and the Office was “just making up the percentage [they had] held back.” In November 2006, the Office advised her that she was being placed on the periodic compensation rolls effective October 29, 2006. The notification clearly outlined how appellant’s benefits were calculated. Appellant regularly received benefits for the next 16 months, apparently without objection as to the amounts disbursed. Under the circumstances, her July 1, 2008 explanation that she believed she was somehow entitled to approximately seven months worth of make-up benefits is implausible. The Board, therefore, agrees with the Office’s finding that appellant was at fault in creating the overpayment of benefits. Appellant knew or should have known she was not entitled to receive the same amount of monthly benefits regardless of her part-time work status. Because she was at fault, she is not eligible for a waiver of recovery of the overpayment.

⁴ 20 C.F.R. § 10.433(a).

⁵ *Id.*

⁶ 20 C.F.R. § 10.433(a)(3).

CONCLUSION

The Board finds that appellant received an overpayment of \$5,373.80 for the period August 21, 2007 through March 15, 2008. The Board further finds that appellant was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 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