

**United States Department of Labor  
Employees' Compensation Appeals Board**

A.H., Appellant	)	
	)	
and	)	<b>Docket No. 09-564</b>
	)	<b>Issued: September 16, 2009</b>
<b>DEPARTMENT OF THE NAVY, NORTH</b>	)	
<b>ISLAND NAVAL SUPPLY, San Diego, CA,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 23, 2008 appellant filed a timely appeal of the September 23, 2008 merit decision of the Office of Workers' Compensation Programs, finding that he received an overpayment in the amount of \$1,038.12 for which he was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the overpayment.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,038.12 from November 15 through 26, 2005 after he returned to work; and (2) whether the Office properly found that appellant was at fault in creating the overpayment and, therefore, ineligible for waiver of the recovery.

**FACTUAL HISTORY**

By letter dated April 18, 2005, the Office accepted that on March 9, 2005 appellant, then a 63-year-old industrial equipment repairer, sustained bilateral wrist fractures, bilateral small subdural hematoma hemorrhage, closed right frontal sinus fracture of the malar and maxillary bones, closed skull fracture with no mention of intracranial injury, open forehead

wound/laceration with no complication, right wrist abscess and benign paroxysmal positional vertigo while in the performance of duty. On July 19, 2005 the Office placed him on the periodic rolls. Appellant was advised to notify the Office immediately when he returned to work to avoid an overpayment of compensation, and that, if he worked during any period covered by a compensation payment, he must return the payment to the Office. He returned to full-time light-duty work on November 15, 2005.

On August 12, 2008 the Office made a preliminary determination that appellant received an overpayment in the amount of \$1,038.12, from November 15 through 26, 2005, because he received wage-loss compensation for total disability after his return to full-time work and salary. An overpayment worksheet noted a periodic payment for the stated period in the amount of \$1,038.12 by direct deposit. Appellant was found at fault in the creation of the overpayment. He was advised that he 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 he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. Appellant did not respond within the allotted time period.

By decision dated September 23, 2008, the Office finalized the determination that appellant received an overpayment for which he was at fault in the amount of \$1,038.12 for the period November 15 through 26, 2005. It directed him to either repay the overpaid amount in full or contact the Office within 30 days to arrange a repayment plan.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>2</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>3</sup>

Section 10.500 of the Office's regulations provides 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>4</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Id.* at § 8102(a).

<sup>3</sup> *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

<sup>4</sup> 20 C.F.R. § 10.500.

## **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,038.12 from November 15 through 26, 2005. The record supports that he received wage-loss compensation for temporary total disability after he returned to full-time light-duty work on November 15, 2005 at his regular salary. As noted, a claimant is not entitled to compensation after returning to work at wages equal to or exceeding those earned on the date of injury. The Board, therefore, finds that appellant's receipt of compensation created an overpayment in the amount of \$1,038.12 for the stated period.

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

Section 8129(b) of the Act<sup>5</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>6</sup> The Office may not waive the overpayment of compensation unless appellant was without fault.<sup>7</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>8</sup>

On the issue of fault, section 10.433 of the Office's regulations, provides 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>9</sup>

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides 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

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<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>7</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>8</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>9</sup> 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."<sup>10</sup>

### ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment because he knew or should have known he was not entitled to wage-loss compensation for total disability during the period November 15 through 26, 2005 when he also earned his full salary. In order for the Office to establish that he was at fault in creating the overpayment of compensation, it must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.<sup>11</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 however should have known that he received an incorrect payment for total temporary disability because he had been advised to return any money he received after returning to work. Appellant returned to work on November 15, 2005, but did not return 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 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>12</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 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.<sup>13</sup>

In this case, appellant received an overpayment of compensation in the amount of \$1,038.12 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>14</sup> Appellant had no reason to suspect at the time the \$1,038.12 overpayment was deposited into his checking account that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.<sup>15</sup> As the funds were deposited directly into his bank account, he was not in a position to immediately decline acceptance of the amount paid by the Office. The Board finds

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<sup>10</sup> *Id.* at § 10.433(b); *Diana L. Booth*, *supra* note 8.

<sup>11</sup> *Diana L. Booth*, *supra* note 8.

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

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

<sup>14</sup> *See Karen K. Dixon*, *supra* note 12.

<sup>15</sup> *See Tammy Craven*, 57 ECAB 689 (2006).

that appellant was not at fault in either creating or accepting the overpayment of \$1,038.12 for the period November 15 through 26, 2005.<sup>16</sup>

Since 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>17</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>18</sup> The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$1,038.12 overpayment. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the recovery of the overpayment should be waived.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,038.12, during the period November 15 through 26, 2005 because he received wage-loss compensation after he returned to work at full salary. The Board, however, finds that the Office improperly found that appellant was at fault in creating the overpayment. The case is remanded to determine whether waiver of the recovery of the overpayment is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 23, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed and remanded in part.

Issued: September 16, 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

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

<sup>17</sup> 5 U.S.C. § 8129(b).

<sup>18</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.