

The Office paid continuing compensation for loss of premium pay every 28 days commencing January 20, 2009 until appellant's medical condition allowed return to full duty.

On March 19, 2009 the Office issued a preliminary determination that appellant received a \$924.68 overpayment in compensation because she received \$1,958.22 in net compensation for 16 days of wage loss from January 8 to 29, 2009 but was entitled to only \$977.67 in compensation for seven days of wage loss from January 8 to 17, 2009 plus \$55.87 for loss of premium pay from January 20 to 29, 2009. It acknowledged that it committed an error in paying compensation through January 29, 2009, as appellant had claimed compensation only through January 17, 2009. The Office found that appellant was also at fault in the creation of the overpayment because she was aware or reasonably should have been aware when she returned to work on January 20, 2009 that she was not entitled to receive further wage-loss benefits and should not have accepted compensation to which she was not entitled.

During a telephone conference held on April 28, 2009, the Office reviewed appellant's overpayment questionnaire and determined that she had \$134.47 more in monthly income than in monthly expenses (household expenses plus loan repayments).

In a decision dated June 15, 2009, the Office finalized its preliminary determination that appellant was at fault in the creation of the \$924.68 overpayment that arose when she returned to work on January 20, 2009. "The Office did cause an overpayment by paying you into the future. However, the fault issue relates to the fact that you did receive an overpayment and are therefore considered to be responsible for repaying the amount that you were overpaid." The Office determined that the overpayment should be recovered by deducting \$130.00 from continuing compensation payments of \$139.68.

On appeal, appellant makes no argument. She simply submits a copy of the Office's June 15, 2009 decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act places limitations on the right to receive compensation. While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.¹ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.² "Temporary total disability" is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.³

¹ 5 U.S.C. § 8116(a).

² *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

³ 20 C.F.R. § 10.400(b).

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”⁴

Thus, the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. 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 she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect.⁵

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that she is being overpaid.⁶

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁷ However, the Office may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because: (1) the individual relied on misinformation given in writing by the Office (or by another government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations; or (2) the Office erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.⁸

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.433(a).

⁸ *Id.* at § 10.435.

ANALYSIS

Fact of overpayment is not in dispute. Appellant returned to work on January 20, 2009 and received compensation for total disability through January 29, 2009. No employee is entitled to compensation for temporary total disability after returning to work. So an overpayment arose.

The Office fully explained its calculation of the overpayment in the memorandum attached to its March 19, 2009 preliminary determination. It paid \$1,958.22 in net compensation for 16 days of wage loss from January 8 to 29, 2009. Appellant was entitled to only \$977.67 in compensation for seven days of wage loss from January 8 to 17, 2009 plus \$55.87 for loss of premium pay from January 20 to 29, 2009, or \$1,033.54. The difference, \$924.68, represents the amount of the overpayment.

The Office explained, however, that it should not have deducted \$276.44 from appellant's compensation for insurance premiums. Rather than pay her the \$276.44 improperly deducted, representing an underpayment, the Office credited the amount against the gross compensation paid from January 8 to 29, 2009 (\$2,234.66) to arrive at its net compensation figure of \$1,958.22. This had the effect of reducing the amount of the overpayment by \$276.44.

Although such an offset appears administratively straightforward, the Board has held that it may circumvent established legal procedures and protections if the claimant is entitled to consideration of waiver. Such an offset could allow the Office an unrestricted recovery of the offset portion of the overpayment without regard to the claimant's due process rights.⁹ As the Board will explain below, appellant is entitled to consideration of waiver. For this reason, the Board finds that the amount of the overpayment is properly \$924.68 plus \$276.44, or \$1,201.12, and will so modify the Office's June 15, 2009 decision. The Office shall pay appellant the \$276.44 improperly deducted from her compensation.

The Office found that appellant was at fault in the creation of the overpayment because she was aware or reasonably should have been aware when she returned to work on January 20, 2009 that she was not entitled to receive further wage-loss benefits. Appellant was entitled to receive further wage-loss benefits. As the Office determined, she was entitled to continuing compensation for loss of premium pay every 28 days effective January 20, 2009. So the mere fact that she received a compensation check covering the period January 8 to 29, 2009 is not sufficient to establish that she knew or should have known the payment was incorrect.¹⁰ Had she returned to work with no wage loss and no entitlement to further compensation, the period covered by the payment would have put her on notice that she was receiving more compensation than she was entitled to receive. Given her entitlement to continuing benefits, the Board finds that the Office has failed to establish that appellant accepted a payment which she knew or

⁹ *Robert L. Curry*, 54 ECAB 675 (2003); *Michael A. Grossman*, 51 ECAB 673 (2000).

¹⁰ In addition to providing narrative descriptions to recipients of benefits paid or payable, the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. 20 C.F.R. § 10.430(a).

should have known to be incorrect. The Board will set aside the Office's finding of fault and remand the case for consideration of waiver. As appellant's eligibility for waiver is unresolved, it is premature to collect the overpayment from continuing compensation. The Board will set aside the Office's finding that recovery should be made from continuing compensation at the rate of \$130.00 every 28 days.

CONCLUSION

The Board finds that the Office has not established that appellant was at fault in creating the \$1,210.12 overpayment that arose in January 2009. Appellant is entitled to \$276.44 improperly deducted from her compensation.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed as to fact of overpayment, is modified as to amount of overpayment, is set aside on the issues of fault and recovery, and is remanded for further action consistent with this opinion.

Issued: April 6, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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