

Appellant stopped work on April 15, 2008 and underwent right shoulder arthroscopy on April 18, 2008. The Office paid compensation benefits. As a result of being on extended temporary total disability, the Office eventually placed appellant on the periodic rolls.

By letter dated January 23, 2009, the Office informed appellant of her entitlement to compensation payments and advised her that she must notify the Office immediately when she returned to work. Appellant was additionally advised of her responsibility to return any payment issued which included any payment of compensation after she returned to work or an overpayment of compensation would result. She was informed that each payment showed the period for which payment was made. On February 4, 2009 appellant acknowledged that she read the information contained in the Form EN1049 and understood the conditions under which she may receive compensation and the items she must report to the Office in connection with her claim.

On June 30, 2009 appellant returned to work in a full-time light-duty position.¹ On July 4, 2009 she received a payment in the net amount of \$2,165.68 for the period June 7 through July 4, 2009. On July 7, 2009 appellant informed the Office that she had returned to work on June 30, 2009.

In a letter dated August 17, 2009, the Office advised appellant that it made a preliminary determination that she received a \$386.73 overpayment of compensation that arose because she had returned to full-time modified work on June 30, 2009 but continued to receive compensation for total disability until July 4, 2009. It preliminarily found that she was at fault in the creation of the overpayment on the basis that she was aware or reasonably should have been aware that she was not entitled to compensation for total disability after her return to work on June 30, 2009. In attached work sheets, the Office found that appellant was paid a net amount of \$2,165.68 for the period June 7 to July 4, 2009 but should have been paid a net amount of \$1,778.95 for the period June 7 to June 29, 2009. It therefore calculated an overpayment of \$386.73 for the period June 30 to July 4, 2009. Appellant was informed of her right to inspect and copy the Office records with respect to the debt and to dispute any information contained in those records concerning the debt. She was also informed of her right to challenge the amount of the overpayment or request a waiver of the overpayment. If appellant wished a waiver of the overpayment, she was specifically directed to submit financial information by completing an overpayment recovery questionnaire.²

On September 16, 2009 appellant contacted the Office regarding her overpayment. She agreed that there was an overpayment and wanted to repay the overpayment by sending \$100.00 a month for three months and then \$86.00 for the final payment.

By decision dated September 17, 2009, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$386.73 that arose because

¹ On June 16, 2009 appellant returned to work for one hour; however, she was told no modified work was available.

² On August 18, 2009 the Office paid appellant \$53.18 for the period June 30 to August 6, 2009 for 3.68 hours at \$14.45 hourly compensation rate.

she returned to work on June 30, 2009 but continued to receive compensation for total disability until July 4, 2009. It further found that appellant was at fault in the matter of the overpayment as she had accepted payments she knew or reasonably should have known that she was not entitled as she had returned to work. The Office ordered repayment by having her pay \$100.00 each month for three months and then a final payment of \$86.00 as discussed in the September 16, 2009 telephone call.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation as specified for the disability or death of an employee resulting from personal injury sustained while in the performance of duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.⁴ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The record establishes that appellant received an overpayment of compensation in the amount of \$386.73. The record reflects that she returned to work on June 30, 2009 but that she continued to receive payments for compensation for temporary total disability through July 4, 2009. When an employee has earnings from employment, appellant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁶ As appellant was not entitled to receive compensation after she returned to work, the Office properly found that an overpayment of compensation was created.

The Office, as noted, indicated that appellant received net compensation for the period June 7 to July 4, 2009 in the amount of \$2,165.68. It indicated that she was entitled to \$1,778.95 for the period June 7 to 29, 2009, as she returned to work on June 30, 2009. The Office subtracted the amount appellant should have received, \$1,778.95, from the amount she actually received, \$2,165.58, to determine that the amount of the overpayment is \$386.73.

Consequently, appellant received an overpayment of compensation from June 30 to July 4, 2009 in the amount of \$386.73. 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.

³ 5 U.S.C. §§ 8101-8193, 8102(a).

⁴ *Id.* at § 8116(a).

⁵ *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁶ *L.S.*, 59 ECAB ____ (Docket No. 07-1961, issued February 14, 2008); *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁷ 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. The Office's regulations provide that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who: (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 to be incorrect.⁸

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.⁹

Section 10.430(a) of the Office's regulations advises that 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 period for which payment is being made. Section 10.430(b) notes that, by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment.¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or should have known to be incorrect. As noted, appellant was not entitled to wage-loss compensation during the period June 30 to July 4, 2009 because she had actual earnings from employment during that same period.

The Office notified appellant in a January 23, 2009 letter, when she was placed on the periodic compensation rolls, that she was to immediately inform the Office upon her return to work to avoid an overpayment in compensation and that, if she worked during any period covered by a compensation payment, she had to return the payment to the Office. Under these circumstances, appellant should have known that she could not receive wage-loss compensation during any period that she worked.¹¹ While she notified the Office of her return to work, she did

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

¹⁰ *Id.* at § 10.430.

¹¹ *See Neill D. Dewald, 57 ECAB 451 (2006).*

not return the compensation she received by check for the period June 7, 2009 through July 4, 2009, which covered the period following her return to work.¹²

Furthermore, the Office includes on each periodic check a clear indication of the period for which payment is being made. By doing this, it puts the recipient on notice that a payment was made and the amount of the payment.¹³ This is evidence that appellant should have been aware that, when she accepted the compensation for the period in question, she was not entitled to receive wage-loss compensation for total disability for a period when she worked.

The Board finds that appellant knew or should have known after she returned to work that she was not entitled to concurrently receive a salary and wage-loss compensation. Appellant had an obligation to return payments that she knew or should have known to be incorrect. She was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment in compensation.¹⁴

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period June 30 to July 4, 2009 in the amount of \$386.73 for which she was at fault in creating the overpayment.¹⁵

¹² The fact that the Office may have been negligent in making payment to a claimant does not relieve the employee of fault in accepting an incorrect payment. *See Ricky Greenwood*, 57 ECAB 462 (2006).

¹³ *J.R.*, 60 ECAB ____ (Docket No. 08-1107, issued June 15, 2009). 20 C.F.R. § 10.430.

¹⁴ *Supra* note 8.

¹⁵ The Board has no jurisdiction over recovery of the overpayment of compensation as the Office has not sought to recover the overpayment from compensation benefits. *See J.K.*, 60 ECAB ____ (Docket No. 08-1761, issued January 8, 2009) (the Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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