

additional financial information requested by an Office hearing representative. She further contends that she is not at fault in the creation of the \$5,503.81 overpayment because she was not aware that she was not entitled to receive it.

FACTUAL HISTORY

On August 9, 2007 appellant, then a 29-year-old nursing assistant, filed a traumatic injury claim alleging that on July 30, 2007 she hurt her lower back, hips and legs while pivoting a patient onto a bed. She stopped work on August 3, 2007. On September 26, 2007 the Office accepted appellant's claim for acute lumbar sprain/strain. On September 18, 2007 it placed her on the periodic rolls. By letter dated December 18, 2007, 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 check to the Office.

The record indicates that appellant was enrolled in health benefit insurance (HBI) code ED1 for individual coverage at the time of injury. The Office deducted health benefits premiums based on plan code ED1. In a November 6, 2008 form, appellant changed her individual health insurance coverage under HBI plan ED1 to family coverage under HBI plan ED5 effective May 12, 2008. She added her husband to her health insurance coverage.¹ The Office continued to deduct at the single rate until October 25, 2008.

On December 11, 2008 the Office calculated that, for the period May 11 to October 25, 2008, it should have deducted \$2,170.44 from appellant's compensation for family coverage under plan code ED5. Instead, it deducted only \$927.72 based on plan code ED1. The underdeduction of \$1,242.72 constituted an overpayment of compensation.

On December 19, 2008 the Office notified appellant of its preliminary determination that she received an overpayment of \$1,242.72 because premiums for health benefits were not properly deducted from May 11 to October 25, 2008. It found that she was without fault in the creation of the overpayment.² The Office requested that appellant complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On January 3, 2009 appellant requested a prerecoupment hearing and waiver of the \$1,242.72 overpayment. She submitted the overpayment questionnaire. Appellant had no monthly income or assets. She listed monthly expenses of \$850.00 for rent or mortgage, \$200.00 for food, \$760.00 for utilities and \$100.00 for other expenses, totaling \$1,910.00. Appellant contended that she was not at fault in the creation of the overpayment.

¹ The Office corrected the amount of appellant's health benefits deduction from plan code ED1 to ED5 for the pay period October 26 to November 22, 2008.

² The Office mailed its December 19, 2008 notice to appellant's new address, 2213 Watkins Street, Philadelphia, Pennsylvania 19145.

On April 30, 2009 appellant accepted the employing establishment's job offer to return to full-time work as a telephone operator effective May 11, 2009.³

At the May 29, 2009 hearing, appellant requested waiver of the \$1,242.72 overpayment, contending that she could not afford to repay it. She testified that she received compensation benefits through direct deposit. Appellant received monthly statements from her bank and the Office regarding the deposits. She testified that she was no longer receiving compensation benefits because she had returned to work. Appellant further testified about a change in her monthly expenses and financial information she had omitted in her overpayment recovery questionnaire. She stated that she did not have any significant assets. Appellant testified that her monthly income did not allow her to meet monthly expenses. An Office hearing representative requested that she complete a new overpayment recovery questionnaire and submit supporting financial documents. On May 29, 2009 the Office mailed an overpayment questionnaire to appellant's new address of record. Appellant was afforded 30 days to submit the requested evidence. She did not respond.

By decision dated August 14, 2009, an Office hearing representative finalized its determination that appellant received an overpayment of \$1,242.72 for the period May 11 to October 25, 2008 because premiums for health benefits were not properly deducted. She found that, although appellant was not at fault in creation of the overpayment, she was not eligible for waiver as she did not submit financial information as requested. The hearing representative directed appellant to repay the debt in full within 30 days or make arrangements for its recovery.

On October 1, 2009 the Office notified appellant of its preliminary determination that she received an overpayment of \$5,503.81 for the period May 11 to August 1, 2009 because she received wage-loss compensation for disability during a period in which she had returned to work. It found her at fault in the creation of the overpayment because she accepted a payment that she knew or should have known was incorrect. The Office requested that appellant complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoument hearing.

In an October 1, 2009 memorandum to the file, the Office noted that appellant returned to full-time work at the employing establishment on May 11, 2009. It indicated that, while she was on the periodic rolls from May 10 to August 1, 2009, she received wage-loss compensation for total disability in the amount of \$5,570.22. On June 6, 2009 appellant received net compensation in the amount of \$1,856.74 for the period May 10 to June 6, 2009. On July 4, 2009 she received net compensation in the amount of \$1,856.74 for the period June 7 to July 4, 2009. On August 1, 2009 appellant received net compensation in the amount of \$1,856.74 for the period July 5 to August 1, 2009. The payments totaled \$5,570.22. However, appellant should have been paid \$66.41 during the stated period, thus an overpayment was created. The Office calculated that the difference between the amount paid for the stated period and the amount to which she was entitled resulted in a total overpayment of \$5,503.81 (\$5,570.22 minus \$66.41).

³ The record indicates that appellant did not have any wage loss, as the salary for her telephone operator position was the same as the salary for her date-of-injury nursing assistant position.

By decision dated November 5, 2009, the Office finalized the overpayment determination in the amount of \$5,503.81 for the period May 11 to August 1, 2009. Appellant was found at fault because she received wage-loss compensation for total disability after her return to work on May 11, 2009. The Office noted that she did not respond to the October 1, 2009 preliminary overpayment determination. It directed appellant to repay the debt in full within 30 days or make arrangements for its recovery.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of the Act provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter 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.⁶

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefit program, provide guidelines for registration, enrollment and continuation of enrollment of federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides:

“[A]n employee or annuitant is responsible for payment of the employee or annuitant share of the cost of enrollment for every pay period during which the enrollment continues. An employee or annuitant incurs an indebtedness due the United States in the amount of the proper employee or annuitant withholding required for each pay period that health benefit withholdings or direct premium payments are not made but during which the enrollment continues.”⁷

In addition, 5 C.F.R. § 890.502(c) provides:

“An agency that withholds less than the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected contributions and applicable agency contributions required under section 8906 of Title 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”⁸

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.⁹ An agency that withholds less than the proper

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ 5 C.F.R. § 890.502(a)(1).

⁸ *Id.* at § 890.502(c).

⁹ *Id.* at § 890.502(a)(1).

health benefits contribution must submit an amount equal to the sum of the uncollected deductions.¹⁰ The Board has recognized that, when an underwithholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,242.72 from May 11 to October 25, 2008. The record reveals that, when appellant sustained an employment-related lumbar sprain/strain on July 30, 1997, she was enrolled in health insurance under plan code ED1 for individual coverage. After she changed her health insurance coverage under plan code ED1 to family coverage under plan code ED5 effective May 12, 2008, the record establishes that \$927.72 in premiums for health benefits for individual coverage under plan code ED1 were deducted rather than \$2,170.44 for health benefits for family coverage under plan code ED5 for the period May 11 to October 25, 2008, a difference of \$1,242.72. Thus, an overpayment was created by the underdeduction of premiums for the health benefits appellant elected. The Board finds, therefore, that the Office properly determined that appellant received a \$1,242.72 overpayment for the stated period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act¹² provides that an overpayment must be recovered 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. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹³

Section 10.436 of the implementing federal regulations¹⁴ provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of the Act.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on

¹⁰ *Id.*

¹¹ *T.S.*, 60 ECAB ___ (Docket No. 08-1604, issued March 13, 2009); 5 C.F.R. § 890.502.

¹² 5 U.S.C. § 8129.

¹³ *Wade Baker*, 54 ECAB 198 (2002).

¹⁴ 20 C.F.R. § 10.436.

such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁵

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office, as this information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁶ This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

ANALYSIS -- ISSUE 2

In its December 19, 2008 preliminary determination regarding the \$1,242.72 overpayment, the Office informed appellant of actions available to her if she believed that she should receive a waiver. It advised her to submit a completed overpayment recovery questionnaire, as well as, information and evidence regarding her income, expenses and assets.

Appellant submitted a completed overpayment recovery questionnaire with financial information outlining her income, expenses and assets. However, at the May 29, 2009 hearing, the Office hearing representative requested additional information related to her monthly income and expenses. The Office also mailed a new overpayment recovery questionnaire to appellant at her address of record. Appellant did not submit the requested information.

As appellant did not submit complete financial information, there was insufficient evidence before the Office establishing that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹⁸ As she failed to submit the requested information, as required by section 10.438 of its regulations, she was not entitled to a waiver.¹⁹ The Board finds that the Office properly denied waiver of recovery of the \$1,242.72 overpayment of compensation.

On appeal, appellant contends that she did not receive the Office's second overpayment recovery questionnaire. She submitted a change of address to the Office and the overpayment recovery questionnaire was mailed to her new address of record. Appellant did not establish that the address of record used by the Office was incorrect. In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have been received at the mailing address

¹⁵ *Id.* at § 10.437.

¹⁶ *Id.* at § 10.438(a).

¹⁷ *Id.* at § 10.438(b).

¹⁸ *See id.* at § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹⁹ *Id.*

in due course. This is known as the mailbox rule.²⁰ As the overpayment recovery questionnaire was properly mailed to appellant's address of record, there is no evidence to substantiate her allegation of nonreceipt on appeal.²¹

With respect to the recovery of the \$1,242.72 overpayment in compensation, the Board's jurisdiction over recovery is limited to reviewing those situations where the Office seeks recovery from continuing compensation under the Act.²² As appellant returned to work on May 11, 2009 and is no longer receiving monetary compensation, the Board has no jurisdiction over the repayment in this case.

LEGAL PRECEDENT -- ISSUE 3

The Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.²³ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.²⁴

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.²⁵

ANALYSIS -- ISSUE 3

The Board finds that appellant received an overpayment of compensation in the amount of \$5,503.81 from May 11 to August 1, 2009. The record supports that she received wage-loss compensation for temporary total disability after she returned to full-time work on May 11, 2009 as a telephone operator at the same salary as her date-of-injury nursing assistant position. 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 finds, therefore, that appellant's receipt of compensation created an overpayment in the amount of \$5,503.81 for the stated period.

²⁰ *C.T.*, 60 ECAB ____ (Docket No. 08-2160, issued May 7, 2009); *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

²¹ *Id.*

²² *L.D.*, 59 ECAB 673 (2008).

²³ *Supra* note 5.

²⁴ *L.S.*, 59 ECAB 350 (2008). See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

²⁵ 20 C.F.R. § 10.500.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of the Act²⁶ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulations²⁷ 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; or

“(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.”

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.²⁸

ANALYSIS -- ISSUE 4

The Office found that appellant was at fault in creating the \$5,503.81 overpayment for the period May 11 to August 11, 2009 as she had returned to full-time work as of May 11, 2009 and knew or should have known that she was not entitled to the entire wage-loss payment.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.²⁹ The Board has held that an employee who receives payments from the Office in the

²⁶ 5 U.S.C. § 8129(b).

²⁷ 20 C.F.R. § 10.433.

²⁸ *Id.* at § 10.433(b).

²⁹ *J.K.*, 60 ECAB ____ (Docket No. 08-1761, issued January 8, 2009); *William E. McCarty*, 54 ECAB 525 (2003).

form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.³⁰

With regard to appellant's receipt of the June 6, 2009 direct deposit, which covered the period May 10 to June 6, 2009, the Board finds that she was without fault. While she accepted the overpayment by gaining control of the funds deposited into her checking account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account. The Board finds that the Office improperly determined that she was at fault in the creation of the June 6, 2009 overpayment. The Office has not presented sufficient evidence to establish that appellant accepted a payment which she knew or should have known to be incorrect. The Board will, therefore, reverse the Office's finding of fault regarding the June 6, 2009 payment and remand the case for further development and a final decision on the issue of waiver of this portion of the overpayment.³¹

The Board finds that appellant was at fault in the creation of the overpayment resulting from subsequent direct deposits covering the period through August 11, 2009. On December 18, 2007 appellant was notified that, in order to avoid an overpayment of compensation, she was to immediately notify the Office of her return to work and that she was required to return the check to the Office which included a period during which she worked. After her receipt of the first direct deposit following her return to work, she was on notice that the Office was making payments to her in error. Appellant knew or should have known that she was not entitled to the benefit of subsequent direct deposits. When she received the second deposit on July 4, 2009, in the amount of \$1,856.74 for the period June 7 to July 4, 2009, she had worked nearly eight weeks. In light of the Office's clear mandate to provide notification of a return to work and to return any check received which included a period during which appellant worked, a reasonable person would have been aware that an overpayment had occurred. Appellant had the benefit of reviewing bank statements reflecting her receipt of these compensation payments. Furthermore, logic would dictate that a claimant ought not to be entitled to compensation for a disabling injury when she is not disabled, but rather is receiving full wages for time worked. The Board finds

³⁰ The Board has found appellant 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 are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct deposit until such time as a reasonable person would have been aware that this 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.

³¹ See *Tammy Craven*, 57 ECAB 689 (2006).

that appellant knew or should have known that the direct deposits covering the period June 7 to August 11, 2009 were in error.³² Appellant had an obligation to return payments that she knew or should have known were incorrect.³³ Therefore, she was at fault in creating the overpayment for the period June 7 to August 11, 2009 and is not entitled to waiver.

The Board has no jurisdiction over recovery of the \$5,503.81 overpayment in this case, as appellant returned to work on May 11, 2009 and is no longer receiving monetary compensation.³⁴

CONCLUSION

The Board finds that appellant received an overpayment of \$1,242.72 from May 11 to October 25, 2008 due to the Office's underwithholding of health insurance premiums. The Board further finds that the Office properly denied waiver of the recovery of the \$1,242.72 overpayment. The Board also finds that appellant received an overpayment of \$5,503.81 from May 11 to August 11, 2009 because she continued to receive wage-loss compensation after she returned to work. The Board finds that the Office's finding of fault for the portion of the \$5,503.81 overpayment for the period May 10 to June 6, 2009 is reversed and the case is remanded to the Office to determine whether waiver of the recovery of the overpayment is warranted. The Board finds, however, that the Office properly found that appellant was at fault for the remaining portion of the \$5,503.81 overpayment for the period June 7 to August 11, 2009 and, therefore, ineligible for waiver of the recovery.

³² *Neill D. Dewald*, 57 ECAB 451 (2006).

³³ *Id.*

³⁴ *L.D.*, *supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for action consistent with this decision. The Office's August 14, 2009 decision is affirmed.

Issued: December 15, 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