

syndrome and authorized right carpal tunnel release, which was performed on December 15, 2003. Appellant returned to work limited duty on June 21, 2004. She stopped work on August 3, 2007 and on August 6, 2007, underwent recurrent right carpal tunnel release surgery. Appellant filed Forms CA-7, claims for compensation, beginning August 3, 2007. On March 4, 2008 she was placed on the periodic rolls.

By letter dated August 14, 2003, the Office advised appellant of her diagnosed conditions and her eligibility for benefits. In an attached Form CA-1008, it advised her of certain information concerning the circumstances under which she could receive compensation. The Office advised:

“Once you return to work or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

In a letter dated March 4, 2008, the Office outlined appellant’s entitlement to compensation benefits and her responsibility to return to work in connection with the injury accepted by the Office. In an attached Form EN1049 it provided:

“OVERPAYMENTS. To minimize the possibility of an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.

“CERTIFICATION. I have read the information contained in the EN1049 and understand the conditions under which I may receive compensation and the items I must report to the Department of Labor, Office of Workers’ Compensation Programs, in connection with my claim. I agree to be bound by these conditions. I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for the resulting overpayments.”

The Office also listed a schedule of check dates and periods covered by each check cycle for 2008. On March 10, 2008 appellant signed and returned the certification form on the EN1049 form indicating that she understood the conditions under which she could receive compensation.

On August 6, 2008 the employing establishment offered appellant a job as a full-time limited-duty program analyst without any wage loss. On August 18, 2008 appellant accepted the position and returned to work the same day.

In a letter dated August 20, 2008, appellant informed the Office that she had returned to work and submitted her signed acceptance of the job offer. She requested that she be reimbursed for “loss wages” for the period August 7 to 16, 2008.

In a compensation termination report dated August 27, 2008, the Office noted that appellant returned to work, full time, eight hours per day, on August 18, 2008. It noted that prior to that time she was on the periodic rolls receiving compensation for her work-related injury. The Office noted that appellant's case history revealed that she continued to receive compensation through August 30, 2008 and that an overpayment of benefits was created.

In a January 16, 2009 letter, the Office informed appellant that it made a preliminary determination that she had received a \$2,377.24 overpayment of compensation from August 18 to 30, 2008, because she continued to receive compensation benefits for temporary total disability from August 18 to 30, 2008 after she had returned to work full time on August 18, 2008. It calculated that for the period August 3 to 30, 2008 appellant was paid compensation in the amount of \$4,744.88 but was entitled to compensation for the period August 3 to 17, 2008 in the amount of \$2,367.64 for an overpayment of \$2,377.24. The Office found that she was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect. It informed appellant that she had the right to submit evidence or argument if she disagreed with the Office's finding. The Office also informed her that she had a right to a precoupment hearing before an Office hearing representative. It instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

In a decision dated May 1, 2009, the Office found that appellant received a \$2,377.24 overpayment of compensation from August 18 to 30, 2008 for which she was at fault in creating. It advised that the overpayment occurred because she returned to work full time, eight hours per day, on August 18, 2008 and continued to receive compensation for total disability until August 30, 2008. The Office found that appellant was at fault in creating the overpayment because she reasonably should have been aware that she was not entitled to compensation benefits for total disability while working full time. It stated that she should forward a check for the entire amount of the overpayment and if she was unable to refund the amount she was instructed to contact the Office and make arrangements for recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

A claimant 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.¹

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to work full time, eight hours per day, at the employing establishment on August 18, 2008. She continued to receive wage-loss compensation for total disability through August 30, 2008. As noted above, appellant is not entitled to receive compensation for total disability after she has returned to work. Thus, an overpayment occurred.

¹ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

Since the evidence indicated that appellant returned to full-time work without wage loss on August 18, 2008, she would not be entitled to any compensation for wage loss after that date. The record shows that the Office calculated that, from August 3 to 30, 2008, she received \$4,744.88 in total disability compensation but should have received compensation for the period August 3 to 17, 2008 of \$2,367.64. It subtracted \$2,367.64 from \$4,744.88 and found that the difference between the amount of compensation appellant received and the amount she should have received was \$2,377.24, which is the amount of the overpayment. The Office explained how the overpayment occurred and provided this to her with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,377.24 for the period August 18 to 30, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act provides as follows:

“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 this subchapter or would be against equity and good conscience.”²

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.³

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁴

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provide in relevant part:

“(b) 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.”⁵

² 5 U.S.C. § 8129(b).

³ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁴ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁵ 20 C.F.R. § 10.433(b).

Section 10.430(a) of the Office's regulations advise 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.⁶

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time she accepted the compensation checks in question, she knew or should have known the payments were incorrect.⁷

As noted, the Office erroneously issued wage-loss compensation for total disability for the period August 3 to 30, 2008 while appellant was only entitled to wage-loss compensation for the period August 3 to 17, 2008. However, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment to which she knew or should have known that she was not entitled.⁸ On August 14, 2003 the Office advised appellant "If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation." Likewise, in a letter dated March 4, 2008, the Office advised appellant: "To minimize the possibility of an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working." The Office also listed a schedule of check dates and periods covered by each check cycle for 2008. Furthermore, it includes on each periodic check a clear indication of the period for which payment is being made. By doing this, the Office puts the recipient on notice that a payment was made and the amount of the payment.⁹ This is evidence that appellant should have been aware that, when she accepted the compensation for the period in question, that she was not entitled to receive wage-loss compensation for total disability for a period when she worked.

For these reasons, the Office properly found that appellant accepted wage-loss compensation from August 18 to 30, 2008, which she knew or should have known was incorrect. As appellant was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$2,377.24 may not be waived.¹⁰

⁶ *J.R.*, 60 ECAB ____ (Docket No. 08-1107, issued June 15, 2009). 20 C.F.R. § 10.430.

⁷ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ See *J.R.*, *supra* note 6.

¹⁰ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

On appeal, appellant asserts that she was not at fault in creating the overpayment as she advised the Office on August 8, 2008 of her return to work and believed that she would be paid up to August 18, 2008. However, as noted above, even though the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment to which she knew or should have known that she was not entitled.¹¹ While appellant notified the Office of her return to work, she did not return the compensation check as the Office had previously instructed. The evidence supports that she knew or should have known that she accepted an incorrect payment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from August 18 to 30, 2008 and that she was at fault in creating the overpayment.¹²

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 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

¹¹ See *Russell E. Wageneck*, *supra* note 8.

¹² After her appeal was filed, appellant submitted a letter regarding other compensation claims previously filed. However, the Board notes that in the present appeal, the Board only has jurisdiction over the overpayment decision. See 20 C.F.R. §§ 501.2(c), 501.3. Should appellant wish to pursue issues in her other compensation claims, she should contact the Office.