

total disability beginning February 28, 2009. In a March 6, 2009 letter, the Office advised him that he had to immediately notify the Office and return all compensation checks when he returned to work.

On June 17, 2009 appellant returned to part-time modified work for the employing establishment. He was only entitled to compensation for partial disability after his return to work.¹ On July 23, 2009 appellant telephoned the Office and asked if the amount of compensation due to him would be offset by the compensation paid to him through July 4, 2009 given the fact that he had returned to work on June 17, 2009.

In a July 24, 2009 letter, the Office advised appellant that it had made a preliminary determination that he received a \$1,029.04 overpayment of compensation because he was paid compensation for temporary total disability through July 4, 2009 despite the fact that he had returned to part-time modified work on June 17, 2009. It also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect.² The Office provided calculations showing that appellant received a \$2,875.30 compensation check around the time he returned to work³ but was only entitled to receive \$1,846.26 due to the fact that he only had partial disability after his return to modified duty on June 17, 2009.⁴

On July 31, 2009 appellant called the Office and asked about how the Office would offset the claimed overpayment against the compensation he was due. On September 10, 2009 he participated in a telephone conference with an Office claims examiner regarding the preliminary overpayment determination. Under questioning, appellant indicated that he was not disputing that an overpayment had occurred or that he was found at fault in the creation of the overpayment. He stated that he wanted to point out the fact that he actually saved the government some money because he only went to the doctor on his off days, he paid for some medical supplies out of his own pocket and he did not draw overtime pay while he was off work. The claims examiner advised appellant that these matters were irrelevant to the overpayment matter. Appellant provided information about his financial situation.

In an October 6, 2009 decision, the Office determined that appellant received a \$1,029.04 overpayment of compensation for the period June 17 to July 4, 2009. It also found that he was at

¹ Appellant returned to work for four hours per day. He did not return to full-time modified duty until July 15, 2009.

² The Office indicated that appellant was advised in a March 6, 2009 letter that he had to immediately notify the Office and return all compensation checks when he returned to work.

³ The record reflects that appellant received a \$2,875.30 compensation check on July 4, 2009. The check indicated that it covered the period June 7 to July 4, 2009.

⁴ The Office provided calculations for the period June 7 to July 4, 2009 as the compensation check appellant received covered this period. It then adjusted the calculation to reflect the amount of total disability appellant was entitled to receive from June 7 to 16, 2009, *i.e.*, the period leading up to appellant's return to modified duty on June 17, 2009.

fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.⁵

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁶ 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.⁷ Section 8129(a) of the Act provides, in pertinent part:

“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.”⁸

Section 8116(a) of the Act provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁹

ANALYSIS -- ISSUE 1

On June 17, 2009 appellant returned to part-time modified work for the employing establishment, at which point he was only entitled to compensation for partial disability. The record reflects that on July 4, 2009 he accepted a check which compensated him for total disability for the period June 17 to July 4, 2009.¹⁰ The record contains calculations which show that appellant was not entitled to \$1,029.04 of the check because he only had partial disability from work for the period June 17 to July 4, 2009. Appellant did not present any credible evidence disputing the fact or amount of the overpayment.¹¹ For these reasons, the Board finds that appellant received a \$1,029.04 overpayment of compensation.

⁵ The Office directed appellant to repay the overpayment at a rate of \$50.00 per month.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Id.* at § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8116(a).

¹⁰ The record reflects that appellant accepted a \$2,875.30 compensation check on July 4, 2009 which indicated that it covered the period June 7 to July 4, 2009. Appellant did not return the check to the Office.

¹¹ In a September 10, 2009 telephone conference with the Office, appellant asserted that he actually saved the government some money because he only went to the doctor on his off days, he paid for some medical supplies out of his own pocket and he did not draw overtime pay while he was off work. On appeal to the Board, he made a similar argument regarding overtime pay. Appellant did not explain how these arguments were relevant to the present overpayment matter.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹² The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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.”¹³ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁴

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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....”¹⁵

Section 10.433(c) of the Office’s regulations provide:

“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.”¹⁶

Even though the Office may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed he had returned to work, this does not excuse his acceptance of such checks which he knew or should have been expected to know should have been returned to the Office.¹⁷

¹² 5 U.S.C. § 8129(a).

¹³ *Id.* at § 8129(b).

¹⁴ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.433(c).

¹⁷ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the \$1,029.04 overpayment under the third prong of 20 C.F.R. § 10.433(a) because he accepted a payment that he knew or reasonably should have known was incorrect. Appellant was placed on the periodic rolls for total disability beginning February 28, 2009 and, in a March 6, 2009 letter, the Office clearly advised him that he had to immediately notify the Office and return all compensation checks when he returned to work. The compensation check he accepted on July 4, 2009 indicated that it was for total disability for the period June 7 to July 4, 2009. Therefore, appellant was advised that he was not entitled to a portion of the check due to his return to work on June 17, 2009 with partial disability. On July 23, 2009 he telephoned the Office and asked if the amount of compensation due to him would be offset by the compensation paid to him through July 4, 2009 given the fact that he had returned to work on June 17, 2009. All of these circumstance show that appellant knew or should have known that he could not keep the check he accepted on July 4, 2009.¹⁸ For these reasons, the Office properly determined that appellant was at fault in the creation of the \$1,029.04 overpayment, thereby precluding waiver of the overpayment.¹⁹

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$1,029.04 overpayment of compensation. The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

¹⁸ On appeal to the Board, appellant asserted that an Office claims examiner told him “not to worry” about cashing the check he accepted on July 4, 2009. The case record does not contain evidence of such a conversation.

¹⁹ As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the method of recovery of the overpayment. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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