

work on June 26, 2006. The Office accepted the claim for spinal stenosis in the cervical region and intervertebral disc disorder with myelopathy, cervical region. Appellant's claim was expanded to include chronic pain syndrome. On December 13, 2007 he underwent disc replacement surgery.¹

The record reflects that appellant was receiving compensation through direct deposit. Appropriate compensation benefits were authorized and paid.

By letter dated May 20, 2008, the Office informed appellant that he would receive \$3,899.00 in gross compensation every 28 days. Appellant was also advised that his compensation would continue as long as the medical evidence supported his inability to work. Additionally, he was advised that he must "NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK." Appellant was advised that, if he worked for any portion of the period for which compensation was received, he must return the check to the Office, or an overpayment of compensation would result.

On December 15, 2008 the vocational rehabilitation counselor notified the Office that appellant had accepted full-time employment in the private sector.²

In a letter dated December 23, 2008, the Office advised appellant that, since he returned to work on December 15, 2008, notification was received too late to make adjustments to the compensation payment for the period November 23 to December 20, 2008. It advised appellant that, since he had returned to work full time, he was not entitled to compensation for the period December 15 to 20, 2008. Appellant was advised that, in order to avoid an overpayment, he must send a check in the amount of \$792.61 for the amount of compensation he was not entitled to receive for the period December 15 to 20, 2008.

On January 14, 2009 the Office made a preliminary finding that an overpayment of \$792.61 arose because appellant returned to work on December 15, 2008 but continued to receive full compensation benefits for total disability through December 20, 2008. It advised appellant that he returned to full-time modified duty on December 15, 2008, and should have been paid nothing after that date. The Office found that appellant was at fault in the creation, because he knowingly accepted a payment which he knew or should have known to be incorrect. It further informed appellant that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a precoupment hearing on the issues of fault and possible waiver.

In memoranda to the file dated January 12 and 14, 2009, the Office noted that appellant returned to full-time work with a private employer on December 15, 2008. It determined that appellant was on the periodic rolls from November 23 to December 20, 2008. However, appellant should not have been paid for the period December 15 to 20, 2008, thus an

¹ Appellant stopped work again on November 19, 2007. Thereafter, the Office accepted a recurrence of disability on March 29, 2008.

² The record indicates that appellant's earnings in his new job exceeded those he earned with the employing establishment when he stopped work.

overpayment was created. The Office indicated that for the period November 23 to December 20, 2008 appellant received \$3,698.85. It indicated that appellant should have received \$2,906.24 as payment for the period November 23 to December 14, 2008. The Office calculated that the difference between the amount paid for the entire period, and the amount to which appellant was entitled resulted in a total overpayment of \$792.61 (\$3,698.85 minus \$2,906.24). Its payment records reflected that, on December 20, 2008, appellant received a net \$3,698.85 direct deposit for the period November 23 to December 20, 2008. The Office deducted the following amounts from the gross amount of \$3,899.00: health benefits insurance (HBI) \$124.30; basic life insurance (BLI) \$20.10 and optional life insurance (OLI) \$21.40). A calculation of the payment that appellant should have received was also included. It reflected that appellant should have received a direct deposit in the net amount of \$2,906.24 for the period November 23 to December 14, 2008. The Office deducted the following amounts from the gross amount of \$3,063.50: HBI \$97.66; BLI \$15.79 and OLI \$16.81.

In a decision dated February 18, 2009, the Office finalized its preliminary finding that appellant received an overpayment of compensation in the amount of \$792.61 for the period December 15 to 20, 2008, based on the receipt of compensation for disability after he returned to work. It further found that he was at fault in the creation of the overpayment, as he accepted a payment he knew or should have known was incorrect. The Office advised appellant to repay this amount in full or to contact the Office to make repayment arrangements.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation 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.³ 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.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$792.61. The record reflects that appellant returned to work without wage loss effective December 15, 2008. The record reflects that he continued to receive payments for compensation for temporary total disability through December 20, 2008. When an employee returns to work and ceases to have any loss of wages, he is no longer entitled to receive compensation for wage loss.⁵ As appellant was not entitled to receive compensation after he returned to work, the Office properly found an overpayment of compensation was created.

³ 5 U.S.C. § 8102(a).

⁴ *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008). See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁵ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

The Office, as noted, indicated that appellant received net compensation for the period November 23 to December 20, 2008 in the amount of \$3,698.85. It indicated that he was entitled to receive compensation for the period November 23 to December 14, 2008, as he returned to work on December 15, 2008. The Office explained that appellant would be entitled to receive compensation of \$2,906.24 during this period. It subtracted the amount he should have received, \$2,906.24, from the amount he actually received, \$3,698.85, to determine that the amount of the overpayment is \$792.61.

Consequently, appellant received an overpayment of compensation from December 15 to 20, 2008 in the amount of \$792.61. 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ 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 regulations⁷ 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.⁸

The Board has found the claimant 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 were incorrect.⁹ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433.

⁸ *Id.* at § 10.433(b).

⁹ See *Karen K. Dixon*, 56 ECAB 145 (2004).

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.¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. The Board finds that appellant was without fault with regard to the Office's first direct deposit following his return to work.

On December 20, 2008 the Office made a direct deposit in the amount of \$3,698.85 into appellant's bank account for the period November 23 to December 20, 2008, when he was entitled to receive only \$2,906.24. Accordingly, the December 20, 2008 direct deposit resulted in an overpayment of \$792.61. On January 14, 2009 the Office issued a preliminary determination of the overpayment, finding that appellant was aware or should have been aware that he was not entitled to the entire payment because he had returned to full-time modified duty and accepted a payment which he knew or should have known was incorrect. The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹¹ The Board has noted that receiving an erroneous direct deposit payment immediately following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹²

The Board finds that appellant was without fault regarding the deposit of \$3,698.85 into his account on December 20, 2008. While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he 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 his account.¹³ The Board finds that the Office improperly determined that appellant was at fault in the creation of the overpayment. The Office has not presented sufficient evidence to establish that he accepted a payment which he knew or should have known to be incorrect. The Board will, therefore, reverse the Office's finding of fault regarding the overpayment. A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period. The case will thus be remanded to the Office to determine whether he is entitled to waiver for this period.

¹⁰ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹¹ *Tammy Craven*, 57 ECAB 689 (2006).

¹² *Supra* note 6.

¹³ *W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008); *see also id.*

On appeal, appellant asserts that he informed the Office of his return to work, that he should not be punished for a clerical error and that repayment will cause hardship. However, as the Board has found that he was not at fault in creating the overpayment, the Office will further consider matters relating to whether the overpayment must be repaid.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment during the period December 15 to 20, 2008 in the amount of \$792.61. The Board also finds that the Office improperly determined that he was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 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.

Issued: June 15, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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