

FACTUAL HISTORY

On December 2, 1999 appellant, then a 43-year-old air traffic controller, filed a claim alleging that his preexisting Tourette's syndrome was aggravated by his federal employment. The Office accepted an aggravation of Tourette's syndrome. Appellant returned to work in a light-duty job from December 2, 1999 to June 4, 2001 when he was placed on leave without pay. From June 4, 2001 to January 20, 2002, he received wage-loss compensation on the periodic rolls. On January 21, 2002 appellant returned to work in the private sector as a warehouse employee. On April 10, 2002 the Office found that his actual earnings fairly and reasonably represented his wage-earning capacity and he received wage-loss benefits at a reduced rate on the periodic rolls. As of July 13, 2002, appellant's payments were made by direct deposit.

On August 7, 2007 the employing establishment offered appellant a full-time permanent light-duty job as a logistics management specialist. Appellant accepted the position and returned to work on October 1, 2007. The record reflects that on October 27, 2007 he received a compensation payment by direct deposit in the amount of \$5,021.02 for the period commencing September 30, 2007. On November 5, 2007 the Office requested that appellant return the payment in order that it could recalculate his entitlement to wage loss. On December 3, 2007 appellant acknowledged receipt of the compensation payment but contended that as he had not received any formal modification of his wage-earning capacity or notice of reduction in benefits he was entitled to keep the payment.

The record reveals that the Office determined that appellant returned to full-time work on October 1, 2007 and received compensation from September 30 to October 27, 2007. Therefore, appellant received an overpayment of 27 days. It divided the payment of \$5,021.02 by 28 days to find a daily pay rate of \$179.32, which when multiplied by 27 days resulted in a total overpayment of \$4,841.70. In a September 26, 2008 preliminary determination, the Office advised appellant of the overpayment of \$4,841.70 for wage-loss benefits paid after his return to full-time duty.¹ It noted that he was only entitled to one day, \$179.32, of the payment made. The Office found that appellant was at fault in the creation of the overpayment as he accepted a payment he knew or should have known to be incorrect. Appellant was advised of his right to submit evidence and argument if he disagreed with the overpayment finding.

On October 9, 2008 appellant requested a precoupment hearing that was held on February 13, 2009. He noted that he received compensation payments by direct deposit. Appellant stated that, upon his return to work on October 1, 2007, the employing establishment was to inform the Office of his return and ensure all his benefits would be terminated. He contended that his benefits should have continued because he never received proper notification that his prior wage-earning capacity decision would be modified.

In a June 29, 2009 decision, an Office hearing representative finalized the overpayment determination, finding that appellant received wage-loss benefits in the amount of \$4,841.70

¹ The record reflects that the Office developed the issue of appellant's wage-earning capacity based on his actual earnings as a logistic management specialist. As there was an error in pay rate, the Office was directed to recalculate any overpayment.

from October 1 to 27, 2007 to which he was not entitled. She found that appellant accepted a payment he knew or should have known to be incorrect. The hearing representative noted that during the prereduction hearing appellant indicated that he could repay the overpayment and did not want to complete an overpayment questionnaire.²

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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.³ When an overpayment has been made to an individual 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 the individual is entitled.⁴ 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 at salary but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The record established that appellant returned to work full time at the employing establishment on October 1, 2007 but received wage-loss benefits through October 27, 2007. The Office made a direct deposit compensation payment of \$5,021.02 covering the 28-day period from September 30 to October 27, 2007. As noted, an overpayment in compensation is created when a claimant returns to work and receives wage-loss compensation. Appellant received a total \$5,021.02 but was entitled to benefits for only one day, September 30, 2007 in the amount of \$179.32. The difference of \$4,841.70 represents an overpayment of compensation. The Board will affirm the Office's determination as to fact and amount of overpayment.

Appellant contended that he was denied administrative due process as the Office should have issued a formal decision before reducing his benefits and final termination of benefits before stopping his benefits. The Board notes, however, that the Office's procedures provide that a prereduction notice is not required when a claimant has returned to work.⁶

² The hearing representative indicated that appellant submitted a January 1, 2008 financial statement which revealed monthly income of \$10,500.00 and expenses of \$2,350.00 for a balance of \$8,150.00.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004). *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(c)(2) (March 1997).

LEGAL PRECEDENT -- ISSUE 2

Under Office regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ The fact that the overpayment was the result of error by the Office or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.⁸ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (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 (this provision applies only to the overpaid individual).⁹

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.¹⁰

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment as he accepted a payment he knew or should have known to be incorrect.¹¹

On October 27, 2007 the Office made a direct deposit of \$5,021.02 into appellant's bank account. As noted, this resulted in an overpayment of \$4,841.70. The Office found that appellant was at fault in the creation of the overpayment as he had returned to full-time work as of October 1, 2007 and knew he was not entitled to the entire wage-loss payment.

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.¹² The Board has found that receiving one or two erroneous direct deposit payments over a short time period immediately after an employee's return to work does not create the requisite knowledge to find

⁷ *Id.* at § 10.433(a).

⁸ *Id.* at § 10.435(a).

⁹ *Id.* at § 10.433(a).

¹⁰ *Id.* at § 10.433(b).

¹¹ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹² *Tammy Craven*, 57 ECAB 689 (2006).

that the recipient was at fault in the creation of the overpayment.¹³ The Board has held that an employee's failure to return an overpayment is immaterial to the issue of whether he or she is at fault in its creation.¹⁴

The Board finds that appellant was without fault in the creation of the overpayment in this case. On October 27, 2007 the direct deposit was made into his bank account. While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, the evidence does not show that he knew that he would receive an incorrect payment on that day. On November 5, 2007 the Office first notified him that he received an incorrect payment and asked for its return. In contrast to the situation in which an employee receives a physical check and is aware of the amount and period of the payment before depositing it into his account, appellant was not on notice of the payment until after it was deposited electronically into his account.¹⁵ For this reason, the case will be remanded to the Office to consider appellant's eligibility for waiver.

¹³ *Supra* note 6.

¹⁴ *Id.* (that appellant spent the money or had more than ample opportunity to return it before the preliminary finding of fault is immaterial to whether he was at fault in creating the overpayment).

¹⁵ *Id.*, see also *W.P.*, 59 ECAB ___ (Docket No. 08-202, issued May 8, 2008) (where the Board 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 or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge).

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,841.70. The Board further finds that appellant was not at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2009 decision of the Office of Workers' Compensation Programs be affirmed with respect to the fact and amount of overpayment. The decision is set aside as to fault and remanded for further development consistent with this decision.

Issued: June 3, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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