



benefits on October 10, 2008, which the Office accepted for fractured medial malleolus of the right ankle. In its November 25, 2008 letter accepting the claim, the Office advised appellant:

“You are expected to return to work (including light-duty or part-time work, if available) as soon as you are able. 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.*” (Emphasis added.)

The Office paid appellant appropriate compensation for total disability. Appellant returned to full duty without restrictions with the employing establishment on February 13, 2009. The Office, however, continued to pay him temporary total disability compensation until March 14, 2009.

By letter dated March 18, 2009, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$2,149.28, covering February 13 to March 14, 2009. It found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to receive compensation payments after he returned to work. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review.

Appellant submitted one page of the overpayment questionnaire to the Office, on which he stated that he had received a check in the amount of \$1,987.45, covering the period February 13 to March 14, 2009. In addition, he requested a teleconference to discuss the overpayment; the Office scheduled the teleconference for May 22, 2009. During this conference, a claims examiner explained to appellant that since he had been found to be at fault for the overpayment he was not eligible for waiver of the overpayment.

In a decision dated June 19, 2009, the Office finalized the preliminary determination regarding the overpayment of \$2,149.28. It stated that appellant should have been aware he was not entitled to receive compensation checks after he returned to work on February 13, 2009.

### **LEGAL PRECEDENT -- ISSUE 1**

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.<sup>1</sup> Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.<sup>2</sup>

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<sup>1</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>2</sup> *Id.* at § 500(a) (2003).

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period February 13 through March 14, 2009. The record shows that appellant received an overpayment during the period in question because he received a check for temporary total disability compensation after returning to full-time work on February 13, 2009. The Board notes, however, that the Office incorrectly calculated the amount of overpayment. The Office calculated the amount of overpayment by taking the net amount of appellant's salary for the period January 18, 2009, \$3,974.90, from which it subtracted the net amount of what he should have received during this period, \$1,845.90, for a gross difference of \$2,357.96. It then subtracted life insurance deductions of \$228.55, for a net overpayment of \$2,149.28. Appellant, however, received a check in the amount of \$1,987.45, which he subsequently cashed. He was not entitled to any portion of this check. The Board therefore finds that appellant received an overpayment of compensation in the amount of \$1,987.45 during the period February 13 to March 14, 2009.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act<sup>3</sup> 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>4</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provide in relevant part:

"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 the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual 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."<sup>5</sup>

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<sup>3</sup> 5 U.S.C. § 8129(a)-(b).

<sup>4</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(a).

## ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment, which he knew or should have been expected to know he was not entitled.<sup>6</sup> Appellant was informed by the Office on November 25, 2008 that he was to immediately report to the Office when he returned to work and return any compensation received after a return to work or otherwise an overpayment of compensation would be created. He returned to full-time work on February 13, 2009 and accepted a compensation check for disability from February 13 until March 14, 2009. The Office's regulations provide that each compensation check includes a clear indication of the period for which payment is made.<sup>7</sup> Appellant knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to work.

For these reasons, the Board finds that the Office properly found that appellant was at fault in the creation of the overpayment in the amount of \$1,987.45. As appellant was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,987.45 cannot be considered for waiver. Thus, the June 19, 2009 Office decision is affirmed, as modified.<sup>8</sup>

## CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,987.45, as modified, for the period February 13 to March 14, 2009. The Board finds that the Office properly found appellant was at fault for the overpayment.

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<sup>6</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>7</sup> 20 C.F.R. § 10.430(a).

<sup>8</sup> The Board notes that appellant submitted additional evidence to the record following the June 23, 2009 Office decision. The Board's jurisdiction is limited to a review of evidence, which was before the Office at the time of its final review. 20 C.F.R. § 501(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 19, 2009 decision of the Office of Workers' Compensation Programs be affirmed, as modified.

Issued: March 10, 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