

2008 and was paid compensation benefits until he returned to light duty on July 26, 2008. The Office authorized additional surgery on the left knee. On June 4, 2009 appellant underwent arthroscopy, arthroscopic release and arthroscopic resection of plica and chondroplasty of the left knee. He filed various (Forms CA-7) for disability payment and the Office paid compensation benefits until August 2, 2009 when he was placed on the periodic compensation rolls. Appellant returned to work on September 21, 2009, yet the record reflects periodic roll payments to him from August 2 to October 24, 2009. He continued to file CA-7 forms requesting compensation payments through September 20, 2009. On the September 21, 2009 form claiming compensation for the period September 13 to 20, 2009, the employing establishment noted that he returned to a light-duty assignment on September 21, 2009.

In a letter dated August 4, 2009, the Office advised appellant that compensation benefits for total disability were only payable while he could not perform work because of his injury. Appellant was advised to avoid an overpayment by notifying the Office immediately when he returned to work. The Office informed him that each compensation payment showed the period for which payment is made and that, if he worked for any portion of this period, he was to return the payment to the office even if he had already advised the Office that he was working.

A review by the Office confirmed that appellant had returned to full-time duty work on September 21, 2009 and issued a preliminary determination of overpayment by letter dated December 1, 2009 finding that he had received an overpayment for the period September 21 to October 24, 2009, in the amount of \$5,115.25. It found that he was at fault in creating the overpayment because he knew or should have known that he received an incorrect payment when he was paid his salary by the employing establishment but received compensation from the Office after he returned to work. The Office advised appellant that he had 30 days in which to submit evidence or argument if he disagreed with the preliminary determination.

In the preliminary finding of overpayment, the Office explained that a computer printout of the Office's compensation payment history showed that appellant received compensation in the amount of \$8,425.12 covering the periods August 30 to September 26, 2009 and September 27 to October 24, 2009. It explained that for a 28-day periodic rolls cycle, appellant was entitled to receive a gross payment of \$4,382.70, less deductions for health insurance, \$170.14, for a net payment of \$4,212.56. The Office noted that he received two payments of 28 calendar days for the periods August 20 to September 26 and September 27 to October 24, 2009 in the amount of \$4,212.56 for a total of \$8,425.12. It noted that appellant should have received compensation for the period August 30 to September 20, 2009, which was 22 calendar days for a gross payment of \$3,443.55, less deductions for health benefits, for a net payment of \$3,309.87. The Office found the difference between the amount paid (\$8,425.12) and the amount owed (\$3,309.87) resulted in an overpayment in the amount of \$5,115.25 as he had returned to work on September 21, 2009.

On December 30, 2009 the Office received an undated overpayment recovery questionnaire. Appellant did not complete the financial portion but submitted a without fault statement. He stated that he "knew" that his employer was notified of his return to work date, and it notified the Office. Appellant advised that the overpayment was not his fault as he notified the Office. He alleged that the fact that the overpayment was paid in error should not be sufficient to attribute him with "fault" as he timely advised the Office of his return to work.

By decision dated February 19, 2010, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$5,115.25. It determined that he was at fault as he accepted payments he knew or should have known to be incorrect because he received wage-loss compensation payments after returning to full-time work. Appellant was advised to either forward a check for the entire amount of the overpayment or to contact the Office to make arrangements for repayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.¹ The Office regulations, at 20 C.F.R. § 10.500(a), provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or she from earning the wages earned before the work-related injury.² 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.³

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to work without wage loss on September 21, 2009, but received compensation for temporary total disability until October 24, 2009. As appellant returned to work and had no entitlement to compensation for this period, the receipt of compensation from September 21 to October 24, 2009 caused an overpayment of compensation to him. He does not dispute the amount of overpayment. Any compensation paid for total wage loss subsequent to the date of return to work should be declared an overpayment.⁴ The Board will affirm the Office's February 19, 2010 decision on the issue of fact of overpayment.

In calculating the overpayment, the Office properly determined that appellant received total compensation in the amount of \$8,425.12 from August 30 to October 24, 2009. It explained that he received two compensation payments in the amount of \$4,212.56 for each 28-day period which represented \$8,425.12 in compensation. The Office determined that for the period August 30 to September 20, 2009, appellant was entitled to a net payment of \$3,309.87. It found the difference between the amount paid and the amount owed resulted in an overpayment in the amount of \$5,115.25 as he had returned to full-time work on September 21, 2009.

¹ 5 U.S.C. § 8116(a).

² 20 C.F.R. § 10.500(a).

³ *L.S.*, 59 ECAB 350 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which 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; 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 (this provision applies only to the overpaid individual).⁵

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.⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that he accepted a payment which he knew or should have known to be incorrect. In order for it to establish that he was at fault in creating the overpayment, the Office must show that at the time he accepted the compensation checks in question, he knew or should have known that the payment was incorrect.⁷

The Board finds that, at the time appellant received the compensation in question, he knew or should have known that the payments were incorrect. The record reflects that appellant returned to work on September 21, 2009. By letter dated, August 4, 2009 the Office informed him that he must return checks received after he returned to work in order to avoid an overpayment of compensation. As appellant was advised by the Office of steps to take to avoid an overpayment and as each payment contains notification of the period covered by each compensation check, he should have been reasonably aware that he could not receive wage-loss compensation for a period in which he had also returned to work.⁸ When he completed the portion of the overpayment questionnaire pertaining to fault, he indicated that he "knew" that his employer was notified of his return to work date and he knew that it had notified the Office.

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.430(a) provides 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. *Id.* at § 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. *See J.R.*, 60 ECAB __ (Docket No. 08-1107, issued June 15, 2009).

⁸ *See id.*

This is supported by the September 21, 2009 Form CA-7 in which appellant claimed compensation only from September 13 to 20, 2009 and on which the employer noted that he returned to work on September 21, 2009. By claiming compensation only for the days that he did not work, appellant shows he was aware that he was not entitled to compensation after he returned to work. The fact that appellant properly did not request compensation after returning to work is not enough though to defeat a finding of fault. He is also obligated not to accept any payment he receives after returning to work. Here, appellant received payments, clearly marked for periods following his return to work. On appeal, he does not contest the amount of the overpayment but disputes the Office's finding that he was at fault in creating the overpayment. Appellant asserts that the Office was at fault for not processing the September 21, 2009 Form CA-7. The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from fault.⁹

The Board finds that appellant knew or should have known that he was not entitled to receive the additional compensation in the amount of \$5,115.25 for the period September 21 to October 24, 2009. As appellant was at fault in the matter of the overpayment, the overpayment of compensation cannot be waived.¹⁰

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$5,115.25 overpayment of compensation for the period September 21 to October 24, 2009. The Board further finds that he was at fault in the creation of the overpayment and thus not entitled to waiver.

⁹ *Supra* note 5.

¹⁰ With respect to recovery of the overpayment, the Board's jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act. *See Terry A. Keister*, 56 ECAB 559 (2005); *Albert Pineiro*, 51 ECAB 310 (2000). As the Office's decision did not direct recovery from continuing compensation, the Board lacks jurisdiction to review the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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