

an opportunity to respond to the Office's preliminary determination of the creation of an overpayment because he did not receive the July 24, 2007 notice.

FACTUAL HISTORY

On October 26, 2006 appellant, then a 27-year-old transportation security screener, injured his lower back when he tripped over a carpet while carrying a bag to the luggage belt. He stopped work the day of his injury. The Office accepted appellant's claim for lumbosacral nerve impingement, spinal stenosis and lumbosacral strain. On February 27, 2007 he underwent a microsurgical laminotomy and disc excision at L5-S1.

On February 28, 2007 appellant was placed on the periodic rolls and began receiving compensation in the amount of \$1,883.28 every four weeks. After deductions for health benefit premiums, his payment was \$1,660.00. Appellant authorized the Office to directly deposit payment into his bank account. In the letter notifying him of this compensation, which was sent to the address of record in Passaic, New Jersey, the Office stated:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment may result.” (Emphasis in the original.)

On April 10, 2007 appellant stated that he no longer wanted health insurance premiums deducted from his wage-loss compensation. During the period April 15 to May 12, 2007, the Office stopped deducting these charges and appellant began receiving net payments of \$1,872.78.

On May 22, 2007 Dr. Steven Dorskey, a Board-certified orthopedic surgeon, released appellant to work in a light-duty position. On May 24, 2007 appellant accepted and began working in a position as a modified transportation security officer.

On June 21, 2007 the Office learned from a medical report that appellant had returned to work. The Office terminated appellant's wage-loss compensation effective May 24, 2007 and determined that he had received disability compensation for 17 days during which he worked.

By notice dated July 24, 2007, the Office informed appellant of its preliminary determination that he had been overpaid in the amount of \$1,137.05 and that he was at fault in the creation of the overpayment. The Office found that, beginning February 18, 2007, appellant received payments from the periodic rolls, which were electronically deposited into his bank account. It noted that appellant was paid for the full period May 13 to June 9, 2007, although he returned to work on May 24, 2007. The Office found that appellant did not notify the Office that he had returned to work and did not return the compensation received for the period May 25 to June 9, 2007. Because appellant was aware or should have been reasonably aware, that he was not entitled to compensation benefits after returning to work, the Office found that he was at fault in the creation of the overpayment. It found that he was aware or should have been aware

that he was not entitled to the entire payment because he had been informed that he should report his return to work to avoid overpayment and the date and amount of the payment appeared on a statement from his financial institution. The Office provided an overpayment action request form explaining the steps appellant could take if he disagreed with the preliminary finding and overpayment recovery questionnaire. The notice was mailed to the address of record in Passaic, New Jersey. Appellant did not respond to the preliminary determination.

By decision dated September 17, 2007, the Office found that appellant had received an overpayment of \$1,137.05 and that he was at fault in its creation. The Office noted that appellant received disability compensation totaling \$1,872.78 for the period May 13 to June 9, 2007, but should have received only \$753.73 because he returned to work on May 24, 2007. The Office found that there was no evidence in the record to support that appellant was not at fault in the creation of the overpayment, that collecting the overpayment would defeat the purpose of the Federal Employees' Compensation Act or that collecting the overpayment would be against equity and good conscience. The Office stated that appellant should return the overpayment by writing a check for the full amount.

LEGAL PRECEDENT -- ISSUE 1

The 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.¹ The Office regulations state that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.²

ANALYSIS -- ISSUE 1

The Office placed appellant on the periodic rolls on February 28, 2007 and began issuing him wage-loss compensation payments in the net amount of \$1,660.00 every 28 days. On May 12, 2007 appellant's net payment was increased to \$1,872.78 per period when the Office stopped deducting health benefit premiums from his compensation. Appellant returned to work on May 24, 2007. On June 9, 2007 he received disability compensation in the amount of \$1,872.78 for the period May 13 to June 9, 2007.

The Board finds that appellant was disabled from work from May 13 through 23, 2007, which entitled him to 11 days of wage-loss compensation. However, he was not entitled to compensation for the remaining 17 days, from May 24 to June 9, 2007, in the compensation period. The Office properly calculated that appellant was entitled to only \$753.73 of the \$1,872.78 he received on June 9, 2007 and that he was therefore overpaid by \$1,137.05.

The Board finds that appellant was overpaid in the amount of \$1,137.05

¹ 5 U.S.C. §§ 8101-8193, 8102(a).

² 20 C.F.R. § 10.500(a).

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.³ 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.⁴ 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).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

If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁷

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.⁸ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.⁹ Recovery of an overpayment is also

³ *Id.* at § 10.433(a).

⁴ *Id.* at § 10.435(a).

⁵ *Id.* at § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.434.

⁸ *Id.* at § 10.436.

⁹ *Id.* at § 10.437(a).

considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁰

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹¹

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 record establishes that, on June 9, 2007, the Office made a direct deposit of \$1,872.78 into appellant's bank account. As discussed above, this disbursement included an overpayment of \$1,137.05. On June 21, 2007 the Office discovered the overpayment and terminated appellant's wage-loss compensation effective May 24, 2007, the date of his return to work. On July 24, 2007 the Office issued a preliminary determination of the overpayment. It found that appellant was aware or should have been aware that he was not entitled to the entire payment because he had been informed that overpayment might occur if he did not report his return to work and because the date and amount of the payment appeared on a statement from the financial institution following the electronic transfer of funds.

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 Previous cases have held that receiving one or two erroneous direct deposit payments over a short time immediately following the employees' return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹³ However, the Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.¹⁴ The Board has noted that an employee's failure to return an overpayment is immaterial to the issue of whether he or she was at fault in its creation.¹⁵

¹⁰ *Id.* at § 10.437(b).

¹¹ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

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

¹³ *Id.* at note 6.

¹⁴ *Id.* at note 7.

¹⁵ *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.")

The Board finds that appellant was without fault for the deposit of \$1,137.05 into his account on June 9, 2007. 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 his account, appellant was not on notice of the amount of the payment until after it was deposited electronically into his account.¹⁶

The Board finds that the Office improperly determined that appellant was at fault in the creation of the overpayment.

On appeal, appellant contends that he did not respond to the Office's preliminary findings because he never received the notice. The Board has previously found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course.¹⁷ This is known as the "mailbox rule." On review of the record, the Board notes that the July 24, 2007 letter was properly addressed to appellant's address of record in Passaic, New Jersey. The record contains no evidence to rebut the presumption that appellant received the July 24, 2007 notice. The Board therefore finds that appellant's contention that he did not receive notice of the proposed findings is not supported by the record.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,137.05. The Board further finds that appellant was not at fault in the creation of the overpayment.¹⁸

¹⁶ *Id.*

¹⁷ *Kenneth E. Harris*, 54 ECAB 502 (2003).

¹⁸ In view of the Board's disposition of issue number two, it would be premature to adjudicate issue number three regarding recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 17, 2007 is affirmed with respect to fact of and amount of the overpayment and reversed with respect to the finding of fault. The case is remanded for a determination of waiver.

Issued: May 8, 2008
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