

FACTUAL HISTORY

The Office accepted that, on August 9, 2000, appellant, then a 46-year-old journeyman painter, sustained a meniscal tear of the left knee when he slipped while jumping from a boat. He received compensation for temporary total disability and underwent left knee arthroscopy on October 3, 2000 to repair the anterior cruciate ligament.

In letters dated October 24 and November 6, 2000, the Office advised appellant that “[f]ull compensation [was] payable only when [he was] unable to perform the duties of [his] regular job because of [his] accepted employment-related condition.” On June 27, 2001 appellant signed a Form EN1049. This form advised him that to “minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that [you were] working.” (Emphasis in the original). Appellant remained totally disabled for work through July 2002.

In an August 16, 2002 report, Jane Gerrish, a vocational rehabilitation counselor, noted that appellant was pursuing a housekeeping position at the Department of Veterans’ Affairs. The appointment was approved on August 25, 2002 with a pay rate of \$9.37 an hour.

The Office issued compensation payments in the form of direct deposit electronic funds transfers in the amount of \$1,475.76 on the following dates: on September 7, 2002 for the period August 11 to September 7, 2002; on October 5, 2002 for the period September 8 to October 5, 2002; on November 2, 2002 for the period October 6 to November 2, 2002; on November 30, 2002, for the period November 3 to 30, 2002. For the period September 2 to 7, 2002, the Office noted that appellant received \$333.84 in compensation but did not note a payment date.

In an October 10, 2002 report, Ms. Gerrish noted that appellant was earning \$9.00 an hour. Appellant submitted earnings and leave statements for the pay periods ending September 21, October 5 and November 2, 2002, indicating that he worked full time at a pay rate of \$8.72 an hour. He advised the Office by October 21, 2002 letter that he started work on August 28, 2002 and that the Office should “make the necessary adjustments” to his compensation. In a letter received by the Office on November 7, 2002, appellant again asked that the Office adjust his compensation as he was “concerned that [he would] be charged for overpayment in the future.” In a November 21, 2002 letter, the employing establishment advised the Office that appellant was employed, earning \$8.72 per hour.

In a November 17, 2002 report, Ms. Gerrish stated that appellant was concerned “that he continue[d] to receive the same benefit check” despite her September 17, 2002 message to the Office advising that he returned to full-time work as of August 26, 2002 at \$9.37 per hour as a housekeeping aide.” She again called the Office “to remind of this return to work.” In a December 20, 2002 report, Ms. Gerrish stated that appellant “[c]ontinued to have some questions about the amount of benefit he is receiving,” noting that she left additional messages with the Office. She also noted that appellant’s “present job has been of concern from the beginning, due to the amount of walking and standing involved.”

In a January 8, 2003 Form CA-7 claim for compensation, appellant stated that he had returned to work on August 25, 2002 and stopped work on December 30, 2002. The Office accepted an August 27, 2002 recurrence of disability with total work stoppage beginning December 30, 2002. Appellant noted that he experienced buckling and popping of the left knee on August 27, 2002, his first day of work.¹ His temporary appointment expired effective January 11, 2003.

On January 9, 2003 the Office calculated that appellant had a 44-percent loss of wage-earning capacity and was entitled to receive \$696.00 a week in wage-loss compensation. On February 11, 2003 the Office noted that appellant returned to work full time as of September 2, 2002 but received compensation for total disability through November 30, 2002. The Office calculated that appellant received \$5,007.84 in gross compensation for that period but was due only \$2,915.50, resulting in an overpayment of \$2,092.34.

By notice dated February 24, 2003, the Office advised appellant of its preliminary finding that a \$2,092.34 overpayment of compensation had occurred in his case as he returned to work on September 2, 2002 but received compensation for temporary total disability through November 30, 2002 with no deductions for actual earnings. The Office also made the preliminary finding that appellant was at fault as he knew or should have known he was not entitled to receive “full compensation” after he returned to work. The Office enclosed an overpayment recovery questionnaire (Form OWCP-20) and a form for appellant to request a prerecoupment hearing or waiver of the overpayment.

Appellant responded by February 27, 2003 letter, asserting that he was not at fault in creation of the overpayment as he notified Ms. Gerrish of his prospective employment at least 30 days before he returned to work. He signed the overpayment recovery questionnaire (Form OWCP-20) on March 16, 2003. Appellant checked a box indicating that the compensation payments were not in his possession and that he had not transferred cash or property since he found out about the overpayment. He noted that he advised Ms. Gerrish “numerous” times that his compensation check “hadn’t changed (amount).”² Appellant requested that the Office decide his case on the written record.³

In an undated letter received by the Office on March 20, 2003, appellant stated that he was informed that “it might take a while for the system to adjust” his pay rate.

¹ Appellant did not assert that he lost time from work in the housekeeping aide position prior to December 30, 2002. In a December 23, 2002 report, Dr. John J. Walsh, an attending orthopedic surgeon, found appellant unable to continue working in the housekeeping aide position due to left knee problems related to the accepted injury. The Office noted in a January 7, 2003 worksheet that the housekeeping aide position was not within appellant’s medical restrictions although he performed the duties for approximately five months.

² In an undated letter received July 30, 2003, appellant enclosed a copy of a portion of a March 3, 2003 certified mail receipt addressed to a Mike Harvill, which appellant asserted proved that he had mailed Mr. Harvill a letter advising him that he had returned to work.

³ In a July 21, 2003 affidavit of earnings and employment (Form EN-1032), appellant noted that, from August 27 to December 30, 2002, he was employed as a housekeeping aide for the Department of Veterans’ Affairs at an hourly pay rate of \$8.72. He did not list his total earnings.

By decision dated April 29, 2004, the Office found that an overpayment of \$2,092.34 was created in appellant's case as he returned to full-time work on September 2, 2002 but received compensation for total disability through November 30, 2002. The Office further found that appellant was at fault in creation of the overpayment as after he returned to work, he "should have known" that he was not entitled to receive compensation for total disability. The Office directed recovery of the overpaid amount through submission of a lump-sum check in the amount of \$2,092.34.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his or her monthly pay, which is known as basic compensation for total disability.⁵ If a claimant receives compensation for total disability after returning to work with a loss of wage-earning capacity, this results in an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

Appellant's employment injuries left him incapable of earning the wages he received at the time of injury.⁷ He received compensation under the Act, including during the period from September 2 to November 30, 2002, on the basis that his disability was total. During this period, the record indicates that appellant was working full time but with a loss of wage-earning capacity. Thus, appellant received an overpayment of compensation as he received compensation for total disability after returning to work with a loss of wage-earning capacity.⁸

The Office calculated that, from September 2 to November 30, 2002, appellant received \$5,007.84 in gross compensation but was due only \$2,915.50, resulting in an overpayment of \$2,092.34. However, the Board finds that there are significant discrepancies of record regarding both the period and amount of overpayment.

The record is unclear as to the appropriate period of overpayment as there is conflicting evidence as to the date appellant began work. Appellant's appointment was approved on August 25, 2002. Appellant noted in a January 28, 2003 Form CA-7 that he started work on August 25, 2002. On December 20, 2002 Ms. Gerrish noted that he returned to work as of August 26, 2002. Appellant's claim for recurrence of disability indicates that he began work on August 27, 2002. In accepting the recurrence of disability, the Office relied on the August 27,

⁴ 5 U.S.C. § 8102(a).

⁵ 5 U.S.C. § 8105(a). *See also Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

⁶ *Tammi L. Wright*, 51 ECAB 463 (2000).

⁷ *See* 20 C.F.R. § 10.5(f) ("disability" defined).

⁸ *Tammi L. Wright*, *supra* note 6.

2002 date. In appellant's October 21, 2002 letter, he noted that he started work on August 28, 2002. In its April 29, 2004 decision, the Office found that appellant returned to work and the period of overpayment began on September 2, 2002. The Office did not explain why it used the September 2, 2002 date. As the date appellant began work cannot be ascertained dispositively from the record, the beginning of the period of overpayment cannot presently be determined.

There evidence of record also contains conflicting information regarding appellant's pay rate in the housekeeping aide position. Upon appointment, appellant's salary was to be \$9.37 an hour. On October 10, 2002 Ms. Gerrish noted that appellant was earning \$9.00 an hour. However, on November 21, 2002, the employing establishment advised that appellant was earning \$8.72 per hour. Earnings and leave statements for the pay periods ending September 21, October 5 and November 2, 2002 show a pay rate of \$8.72 an hour. However, as the earnings statements do not cover the entire period from late August to November 30, 2002, it cannot be assumed that the \$8.72 pay rate remained constant throughout appellant's employment. Thus, as appellant's pay rate and his total earnings as a housekeeping aide cannot be ascertained from the record, the amount of the overpayment of compensation remains in question.

Thus, the case must be remanded to the Office for further development regarding the appropriate period and amount of the overpayment. Following such development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.⁹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment 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 this subchapter or would be against equity and good conscience."¹⁰ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹¹

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.433 of Title 20 of the Code of Federal Regulations states, in pertinent part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

⁹ 5 U.S.C. § 8129(a).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002) (the Board held that no waiver of compensation is possible if the claimant is at fault in the creation of the overpayment of compensation).

(2) Failed to furnish 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.”¹²

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 individuals’ capacity to realize that he or she is being overpaid.¹³ In applying the tests to determine fault, the Office applies a “reasonable person” test.¹⁴

ANALYSIS -- ISSUE 2

In this case, in its April 29, 2004 position, the Office applied the third standard under section 10.433, finding appellant at fault in creation of the overpayment as he knew or should have known he was not entitled to receive compensation for total disability while working.

Appellant received October 24 and November 6, 2000 letters from the Office explaining the circumstances under which he could accept compensation for total disability. On June 27, 2001 appellant signed a Form EN1049, indicating that he read its advisement that compensation payments for periods in which he worked must be returned to the Office, “even if [he had] already advised the [Office] that [he was] working.” Although appellant returned to work in approximately late August 2002, he continued to receive compensation for total disability through November 30, 2002. Thus, the Board finds that appellant accepted payments that he knew or should have known to be incorrect as he had returned to work.¹⁵

Appellant’s correspondence to the Office also indicates that he knew or should have known that he should not have been paid compensation for total disability while working. In an October 21, 2002 letter, appellant advised the Office that he had started work on August 28, 2002 and that therefore the Office should “make the necessary adjustments in [his] compensation” pay rate. In a November 7, 2002, appellant again asked that the Office adjust his compensation as he was “a little concerned that [he would] be charged for overpayment in the future.” These letters demonstrate that appellant realized that the compensation payments for total disability he received after returning to work could result in an overpayment of compensation. Additionally, he expressed concern about the amount of his compensation payments to Ms. Gerrish, noting that his compensation payments had not decreased following his return to work. This also indicates that appellant was aware that he was being overpaid compensation.

¹² 20 C.F.R. § 10.433(a) (2003).

¹³ *Rosemary A. Kayes*, 54 ECAB ____ (Docket No. 02-1397, issued January 23, 2003).

¹⁴ *William E. McCarty*, 54 ECAB ____ (Docket No. 03-308, issued April 14, 2003).

¹⁵ *Stephen V. Carknard*, 53 ECAB ____ (Docket No. 00-1440, issued February 25, 2002).

Appellant's letters to the Office and calls to his vocational rehabilitation counselor indicate he is a careful, meticulous individual, who was well able to interpret financial information and should have been able to recall the advisement he signed on June 27, 2001 of the necessity to return to the Office any compensation payments for total disability received after his return to work. Thus, the Office's finding of fault was correct under the facts of this case, as the evidence indicates that appellant knew or should have known that he was not entitled to receive compensation for total disability while working.¹⁶

The Board notes that appellant's compensation for the period September 2 to November 30, 2002 was paid by electronic funds transfers deposited directly into his bank account. As set forth above, appellant made written inquiries to the Office on October 21 and November 7, 2002 as to why his compensation payments were not decreased following his return to work. This demonstrates that appellant reviewed his financial documents after he returned to work and realized that he had received compensation payments of an amount greater than that to which he was entitled. Thus, the Office found correctly that appellant was at fault in creation of the overpayment as he knew or should have known he accepted incorrect compensation payments.¹⁷

As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board has no jurisdiction to review the recovery of the overpayment.¹⁸

CONCLUSION

The Board finds that the Office properly found that appellant was not entitled to receive wage-loss compensation for total disability for the period September 2 to November 30, 2002 while working. The Board further finds that the case is not in posture for a decision regarding the date on which the period of overpayment commenced as well as the amount of the overpayment. The Board further finds that appellant was at fault in creation of the overpayment and that therefore it was not subject to waiver.

¹⁶ The Board notes that, in this case, both appellant and Ms. Gerrish advised the Office on several occasions in October and November 2002 that it was issuing compensation payments at an incorrectly high rate as appellant had returned to work. The Board notes, however, that the Office's negligence in issuing compensation did not excuse appellant's acceptance of payments he knew or should have known to be incorrect. See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹⁷ See *William J. Loughrey* (Docket No. 01-1861, issued July 12, 2002) (the claimant received wage-loss compensation payments by electronic funds transfer direct deposits for approximately 16 months after returning to work. After the payments were not decreased for the first two months after he returned to work, the claimant inquired of the Office. As the Office did not reply, the claimant assumed that the compensation payments were proper. The Board found that the claimant was at fault in creation of the overpayment as he accepted payments which he knew or should have known were incorrect, as evinced by his inquiries to the Office as to why his compensation payments were not adjusted although he had returned to work).

¹⁸ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2004 is affirmed in part regarding fact of overpayment and fault. The April 29, 2004 decision is set aside in part regarding the amount of overpayment and is remanded for further development consistent with this opinion.

Issued: November 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
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