

filed a claim for benefits on May 16, 2000. The Office accepted low back sprain, left ankle sprain and lumbar disc displacement. In its July 6, 2000 letter accepting the claim, the Office advised appellant:

“When you return to work, or obtain new employment, notify this office right away. 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 October 11, 2004. However, the Office continued to pay her compensation for total disability until November 25, 2006.

By letter dated April 24, 2007, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$52,565.64, for the period October 11, 2004 to November 25, 2006. It found that appellant was at fault in creating the overpayment because she knew or should have known that she was not entitled to receive compensation payments after she returned to work. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument or request a precoupment hearing with the Branch of Hearings and Review. Appellant did not respond to this letter within 30 days.

On May 30, 2007 appellant requested an oral hearing.

In a decision dated June 4, 2007, the Office finalized the preliminary determination regarding the \$52,565.64 overpayment. It found that she knew or should have known that she was not entitled to receive compensation checks after she returned to work on October 11, 2004.

By decision dated June 22, 2007, the Office denied appellant’s request for a precoupment hearing. It noted that appellant’s request was postmarked May 30, 2007, which was more than 30 days after the issuance of the Office’s April 24, 2007 preliminary notice of overpayment. Therefore, appellant waived that right.

LEGAL PRECEDENT -- ISSUE 1

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

¹ 20 C.F.R. § 10.401(a) (2003).

² 20 C.F.R. § 500(a) (2003).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$52,565.64 for the period October 11, 2004 to November 25, 2006. The record shows that appellant received an overpayment during the period in question because she continued to receive payments of wage-loss compensation for total disability after returning to full-time work on October 11, 2004. The Office calculated the \$52,565.64 overpayment by totaling the amount of temporary total disability compensation appellant received in 29 checks from October 11, 2004 to November 25, 2006, which amounted to \$52,565.64. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act³ 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.⁴

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provides 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.⁵”

ANALYSIS -- ISSUE 2

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

³ 5 U.S.C. § 8129(a)-(b).

⁴ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁵ 20 C.F.R. § 10.433(a).

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payments which she knew or should have known to be incorrect.⁶ Appellant was informed by the Office on July 6, 2000 that she was to immediately report her return to work and to return any compensation received after her return to work to avoid an overpayment of compensation from being created. She returned to full-time work on October 11, 2004 but did not report her return to work to the Office. Appellant received her full salary as of that date and knew or should have known that her continued receipt of compensation for total disability was incorrect.

Appellant's receipt of the October 30, 2004 direct deposit in the amount of \$1,302.14, contained the first overpayment covering 20 days from October 11 to 30, 2004. 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 her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.⁷ After appellant's receipt of the first direct deposit, for which fault may not be imputed to her, she knew the payment of wage-loss compensation contained in subsequent direct deposit checks were incorrect as she had no entitlement to such compensation. Therefore, for receipt of the October 30, 2004 direct deposit, the Board finds that appellant was without fault. While appellant accepted the overpayment by gaining control of the funds deposited into her checking account pursuant to her authorization, she did not know that she 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 her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account.

For these reasons, the Board finds the Office properly found appellant at fault for the overpayment created after October 30, 2004. However, the Office improperly found that appellant was at fault in the creation of the overpayment in the amount of \$1,302.14, the portion of the overpayment directly deposited into her account on October 30, 2004. As appellant was without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$51,263.50 may not be considered for waiver. Thus, the June 4, 2007 Office decision will be affirmed, as modified.

⁶ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁷ That Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office, or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.

LEGAL PRECEDENT -- ISSUE 3

The Office's regulations at 20 C.F.R. § 10.432 address "How can an individual present evidence to [the Office] in response to a preliminary notice of an overpayment?" This regulation states:

"The individual may present this evidence to [the Office] in writing or at a prerecoupment hearing. The evidence must be present or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right."

ANALYSIS -- ISSUE 3

In the present case, because appellant's May 30, 2007 request for a hearing was postmarked more than 30 days after the Office's April 24, 2007 preliminary notice of overpayment, she was not entitled to a hearing as a matter of right. She waived her right to a prerecoupment hearing. The Board therefore affirms the Office's June 22, 2007 decision denying appellant an oral hearing by an Office hearing representative.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$52,261.77 for the period October 11, 2004 to November 25, 2006. The Board finds that the Office properly found appellant was at fault for the overpayment paid after October 30, 2004, but will set aside as to fault for the portion of the overpayment paid from October 11 to 30, 2004. The case is remanded for a determination of whether she is eligible for waiver on the portion of the overpayment for which she is found to be without fault. The Board further finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2007 decision of the Office of Workers' Compensation Programs be affirmed, as modified. The June 22, 2007 decision of the Office hearing representative is affirmed.

Issued: July 23, 2008
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