

Appellant was advised that she was not entitled to receive compensation benefits after she returned to work, and that any such income received would constitute an overpayment. On February 28, 2004 she returned to work full duty.

By decision dated March 1, 2004, the Office terminated appellant's compensation benefits on the grounds that she was no longer disabled. However, appellant continued to receive compensation from the Office through September 2, 2006 for injuries related to the March 1, 2003 injury.¹

An automated computer payment system (ACPS) form, bearing a "run date" of April 23, 2007, reflected that appellant received compensation pursuant to her March 1, 2003 injury (File No. 022035971) for the period February 28, 2004 through September 2, 2006 in the net amount of \$61,418.48. The record also contains copies of cancelled checks and notices of payment from the Office for compensation benefits paid to appellant during the period in question.

In a preliminary overpayment decision dated April 23, 2007, the Office found that appellant had incorrectly received compensation in the amount of \$61,418.48 for the period March 1, 2004 through September 2, 2006. It also made a preliminary determination of fault in the creation of the overpayment, finding that appellant retained payments that she knew or should have known were erroneous. The Office advised appellant of actions available to her if she believed that she should receive a waiver instead of repaying the overpayment, including requesting a prerecoupment hearing. It further advised appellant to submit a detailed explanation of her reasons for seeking a waiver; a completed Form OWCP-20; and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

On May 7, 2007 appellant requested a prerecoupment hearing on the issues of fault and waiver. At the October 23, 2007 hearing, her representative acknowledged that appellant had received payments to which she was not entitled, but contended that the Office, rather than appellant, was at fault in the creation of the overpayment. He also argued that the overpayment amount should be reduced by \$7,000.00, to which appellant was entitled under a separate traumatic injury claim.

Appellant submitted an overpayment recovery questionnaire reflecting monthly income of \$2,375.00 and monthly expenses of \$2,478.00. She also submitted copies of bills and other financial documents.

By decision dated November 30, 2007, the Office found that an overpayment existed in the amount of \$61,418.48, and that appellant was at fault in the creation of the overpayment. It further determined that appellant should repay the amount by submitting monthly payments in the amount of \$600.00.²

¹ An intra-office memo dated November 6, 2006 indicates that appellant also began receiving compensation benefits on May 12, 2006 for a January 11, 2006 traumatic injury claim (File No. 022511502), which was accepted for left knee derangement.

² The Board notes that the Office issued a decision dated May 24, 2007 finalizing the preliminary determination of overpayment. In his November 30, 2007 decision, the Office hearing representative vacated the May 24, 2007 decision on the grounds that it had been issued prematurely.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act³ 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.⁴ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor, by decreasing later payments to which the individual is entitled.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$61,418.48 for the period March 1, 2004 through September 2, 2006.

Appellant returned to full-time employment on February 28, 2004 and was, thus, no longer entitled to receive compensation benefits after that date. On March 1, 2004 the Office terminated appellant's compensation benefits on the grounds that she was no longer disabled. However, appellant continued to receive compensation until September 2, 2006. The record reflects that she received compensation for the period March 1, 2004 through September 2, 2006 in the amount of \$61,418.48. Since appellant was not entitled to receive compensation from the Office after her return to full-time employment, the Office properly determined that appellant received an overpayment of compensation in the amount of \$61,418.48.

Appellant's representative argues that the overpayment amount should be reduced by \$7,000.00, the amount to which she was entitled under a separate claim. However, the record clearly reflects that appellant received the amount of \$61,418.48 pursuant to her original March 1, 2003 claim. The issue of appellant's entitlement to compensation benefits under her January 11, 2006 claim is not before the Board.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its implementing regulations, 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.⁶ Section 10.433 of the implementing regulations provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁷ 20 C.F.R. § 10.433(a).

he or she receives from the Office are proper.⁸ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.⁹ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁰

ANALYSIS -- ISSUE 2

By accepting payments after she returned to full employment and her entitlement to benefits was terminated, effective March 1, 2004, appellant accepted payments that she knew or should have known were incorrect. Therefore, she was at fault in the creation of the overpayment.¹¹

At the time appellant was placed on the periodic rolls she was advised that acceptance of compensation benefits after a return to work would create an overpayment of compensation. Appellant returned to full-duty work on February 28, 2004 but continued to accept compensation benefits. Furthermore, on March 1, 2004 the Office terminated appellant's compensation benefits effective that date. The record reflects that a copy of the Office's decision was properly mailed to appellant at her address of record in the ordinary course of business. Accordingly, appellant was on notice that her benefits had been terminated and that she was not entitled to receive any compensation payments subsequent to March 1, 2004. However, as noted, she accepted compensation payments for the period March 1, 2004 through September 2, 2006, in the amount of \$61,418.48. The Board notes that appellant was an active participant in the creation of the overpayment. In order to accept the payments, she was required to endorse and deposit a total of 30 checks from the Office. As appellant was aware that her entitlement to benefits had been terminated, she accepted payments that she knew or should have known to be incorrect. Accordingly, the Board finds that she was at fault in the creation of the overpayment. The fact that the Office may have erred in issuing the payments does not mitigate this finding.¹²

As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.

LEGAL PRECEDENT -- ISSUE 3

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.¹³ However, where no further compensation benefits

⁸ *Id.*

⁹ 20 C.F.R. § 10.433(a)(3).

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹² See 20 C.F.R. § 10.435(a); *D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007). *William E. McCarty*, 54 ECAB 525 (2003).

¹³ 5 U.S.C. § 8129(a).

are due an individual, the Board does not have jurisdiction, and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.¹⁴

ANALYSIS -- ISSUE 3

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁵ Appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter. Therefore, this Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$61,418.48 for the period March 1, 2004 through September 2, 2006. The Board also finds that appellant was at fault in creating the overpayment and thus is not entitled to waiver. The Board further finds that, as appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, it lacks jurisdiction to review recovery of the overpayment.

¹⁴ 20 C.F.R. § 10.441(a). *See also Bob R. Gilley*, 51 ECAB 377 (2000).

¹⁵ *See Terry A. Keister*, 56 ECAB 559 (2005).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment, and determination of fault.

Issued: July 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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