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MONIQUE MOISE, Appellant)	
)	
and)	Docket No. 04-691
)	Issued: August 1, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Miami, FL, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

On January 20, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated December 23, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$22,089.70 for the period July 30, 2001 through May 18, 2002; (2) whether the Office abused its discretion in denying waiver of the overpayment; and (3) whether the Board has jurisdiction over the amount appellant is required to pay and the method employed for the purpose of recovery of the overpayment.

Appellant, a 25-year-old letter carrier, injured her back and right shoulder on August 18, 2000 while lifting a tub loaded with magazines. She filed a claim for benefits on the date of injury, which the Office accepted for right shoulder strain and lumbosacral strain. Appellant was placed on the periodic rolls.

On July 30, 2001 appellant returned to full-time work, in a modified, light-duty position, with the employing establishment. On November 29, 2002 the Office granted appellant a schedule award for a 17 percent impairment of the right arm for the period May 19, 2002 to May 25, 2003, for a total of 53.04 weeks of compensation.

By letter dated February 7, 2003, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$22,089.70, covering July 31, 2001 to May 18, 2002.¹ The Office found that appellant was at fault in creating the overpayment because she 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 to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review.

On February 19 and 25, 2003 appellant completed and returned the Form OWCP-20 outlining her income and assets as well as her household expenses and debts, including credit card and checking accounts. In addition, appellant requested a prerecoupment hearing and a waiver of recovery of overpayment. Appellant claimed that recovery of the overpayment would constitute a severe financial hardship that would deprive her of the ability to meet ordinary and necessary living expenses.

The recoupment hearing was held on October 21, 2003; appellant was represented by her authorized representative, Joanne Wright. At the hearing, Ms. Wright stated that appellant was not at fault in creation of the overpayment because on July 30, 2001, the day appellant returned to work, the employing establishment sent a facsimile to the Office indicating that appellant had returned to work and requesting that she be taken off the periodic rolls. In addition, when asked if she was aware that she was not entitled to receive compensation checks after returning to work, appellant replied that she assumed she was getting paid for her schedule award.

In a decision dated December 23, 2003, the hearing representative finalized the preliminary determination regarding the overpayment of \$22,089.70. The hearing representative also found that appellant was at fault in creating the overpayment of compensation in the amount of \$22,089.70 for the period July 30, 2001 through May 18, 2002. The hearing representative rejected appellant's contention that she was unaware that she was not entitled to receive compensation checks after she returned to work on July 30, 2001. The hearing representative rejected appellant's argument that she thought she was receiving checks for her schedule award, noting that she did not receive the schedule award until November 29, 2002, nearly 16 months after she returned to work. Based on the above evidence of record, the hearing representative concluded that appellant was not without fault in the creation of the overpayment and that therefore recovery of the overpayment could not be waived.

The hearing representative also found that, based on the information appellant submitted with her Form OWCP-1032, she was able to afford monthly repayments of \$200.00 to recover the amount of the overpayment.

¹ The Office also found that appellant received an overpayment in the amount of \$2,303.24 for the period March 23 through July 30, 2001, by preliminary determination dated January 17, 2003. This overpayment determination was finalized on March 4, 2003. Appellant has not appealed this overpayment decision by the Office.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act provides that an employee who receives continuing compensation, or has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, may not receive salary, pay or remuneration of any type from the United States.² Section 8129 of the Act³ 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.

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$22,089.70 for the period July 30, 2001 through May 18, 2002. The record shows that appellant received an overpayment during the period in question because she continued to receive monthly checks for temporary total disability compensation after returning to full-time work on July 30, 2001. The Office calculated the \$22,089.70 overpayment by totaling the amount from eight compensation checks appellant received during the period July 30, 2001 through March 23, 2002, at the monthly rate of \$2,103.60; two checks for \$2,131.00 received on April 20 and May 18, 2002; plus a prorated amount of \$976.39, covering 13 days worked from July 30 through August 11, 2001 -- in addition to a supplemental payment of \$22.51 on March 26, 2002. Based on this determination, the Board finds that 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 Act⁴ 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.⁵

² 20 C.F.R. § 10.400(b).

³ 5 U.S.C. § 8129(a)-(b).

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

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."⁶

ANALYSIS -- ISSUE 2

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

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have been expected to know she was not entitled.⁷ Appellant returned to full-time employment on July 30, 2001 and was, therefore, no longer entitled to wage-loss compensation. Upon her receipt of the August 11, 2001 check in the amount of \$2,103.60, which contained the first overpayment of \$976.39, covering 13 days worked from July 30 through August 11, 2001 appellant has testified that she believed she was entitled to this check. Appellant was clearly entitled to a check for compensation because she did not work during the month of July prior to July 30, 2001. The check does not appear in the record and therefore the Board cannot verify if it informed appellant of the period of time for which compensation was paid. Appellant has testified that she assumed she was entitled to another check and did not know whether this payment included a schedule award for which she was awaiting payment. The Board finds that appellant was not at fault for acceptance of the first overpayment check dated August 11, 2001, which included an overpayment of \$976.39.

However by the receipt of the following month's check for \$2,103.60, on September 8, 2001, issued by the Office for payment of total disability compensation, appellant had a duty to return the check issued for total disability. Appellant could not have believed that she was entitled to wage-loss compensation for August and September since she had returned to work in July. Since appellant had not received any indication that her schedule award claim had been accepted she could not have expected payment for a schedule award. After her receipt of the first check, for which fault may not be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent checks exceeded the amount to which she was

⁶ 20 C.F.R. § 10.433(a).

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

entitled.⁸ Therefore, upon receipt of the September 8, 2001 check, at the latest, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, appellant accepted and did not question the subsequent checks in the amount of \$2,103.60 until March 23, 2002, in addition to two checks for \$2,131.00 received on April 20 and May 18, 2002. Appellant accepted and did not question receipt of compensation totaling \$21,113.31 until May 18, 2002, when the payments were discontinued.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office from September 8, 2001 through May 18, 2002, which contained an overpayment in the amount of \$21,113.31, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$21,113.31 may not be waived. Appellant is not at fault however in the acceptance of the August 11, 2001 compensation check which created an overpayment of \$976.39. Appellant is entitled to a waiver determination regarding this amount.

LEGAL PRECEDENT -- ISSUE 3

With regard to the method determined by the Office to recover the amount of the overpayment, section 10.441(b) of Office regulations provides:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.... If the individual fails to make such refund, [the Office] may recover the same through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral to the debt to a collection agency or to the Department of Justice.”⁹

ANALYSIS -- ISSUE 3

The Board lacks the jurisdiction to determine the method of payment for the purpose of the recovery of a finalized overpayment. Section 10.441(b), cited above, gives the Office

⁸ The 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. In the instant case, by the time appellant accepted the September 8, 2001 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for appellant to become aware of the fact that the checks contained an overpayment.

⁹ 20 C.F.R. § 10.441(b) (1999).

discretion to determine the method of recovery of the overpayment where an overpayment has been made to an individual who is not entitled to further payments. Further, the Board's own case law stipulates that it does not have jurisdiction over the amount appellant is required to pay for the purpose of recovery of the overpayment when there is no further entitlement to compensation, and appellant is not in receipt of continuing compensation benefits.¹⁰ In the present case, the Board lacks jurisdiction over the method of repayment because appellant returned to work on July 30, 2001 and is therefore not entitled to disability compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$22,089.70 for the period July 30, 2001 through May 18, 2002. The Board finds that appellant was not at fault in acceptance of the initial check on August 11, 2001 which included an overpayment of \$976.39. On remand the Office shall determine whether this overpayment amount should be waived. The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment in the amount of \$21,113.31. The Board lacks jurisdiction over the amount appellant is required to pay and the method employed for the purpose of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2003 decision of the Office of Workers' Compensation Programs be affirmed as modified.

Issued: August 1, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

¹⁰ *Robert N. Vachon*, 36 ECAB 502 (1985); *Marshall L. West*, 36 ECAB 490 (1985).