

**United States Department of Labor
Employees' Compensation Appeals Board**

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
East Providence, RI, Employer**

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**Docket No. 07-2052
Issued: March 24, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated July 11, 2007, finalizing a \$1,072.15 overpayment of compensation and that he was at fault in creating the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUES

The issues are: (1) whether an overpayment of \$1,072.15 was created during the period January 11 to 21, 2006; and (2) whether the Office properly denied waiver of the recovery of the overpayment on the grounds that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

This case is before the Board for the second time. In the prior appeal the Board reversed an April 18, 2006 overpayment decision.¹ The Board found that the evidence of record was

¹ Docket No. 06-1229 (issued September 14, 2006).

insufficient to establish that compensation was paid for the period in question as the only relevant evidence was a January 19, 2006 compensation computer worksheet and a February 2, 2006 overpayment calculation worksheet. The facts and the circumstances of the case as set forth in the Board's prior decision and are hereby incorporated by reference.²

In a letter dated October 3, 2005, the Office outlined appellant's responsibilities upon receiving compensation. These included notifying the Office when he returned to work and returning payments to it if he had worked for any portion of the period covered by it.

Subsequent to the Board's decision, the Office included a payment report which indicated that appellant received a net payment of \$2,420.10 or gross amount of \$2,680.36 for the period December 25, 2005 to January 21, 2006. The check date was listed as January 21, 2006.

By letters dated September 28 and October 16, 2006, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred from January 11 to 21, 2006. The Office stated that he was paid for temporary total disability from December 25, 2005 to January 21, 2006, but had returned to work on January 11, 2006. With respect to fault, the Office made a preliminary determination that appellant was at fault because he should have known he was not entitled to receive compensation for total disability after he had returned to work. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On November 1, 2006 appellant requested a prerecoupment hearing and noted his disagreement with the finding of fault. He advised that he had previously submitted an overpayment recovery questionnaire. An oral hearing was held on April 26, 2007 at which appellant and his spouse testified.

In a May 17, 2007 letter, the employing establishment requested the hearing representative to include in his consideration that appellant "received \$20,159.23 in overtime pay during the period April 2006 to April 2007."

On May 22, 2007 appellant submitted a revised overpayment recovery questionnaire. He indicated that he had total assets of \$7,650.00, monthly income of \$4,926.00 and monthly expenses of \$4,359.66. Appellant contended that he was not at fault in the creation of the overpayment as the payments he received from the Office were inconsistent and he had informed the Office of his return to work.

By decision dated and finalized July 11, 2007, the Office hearing representative finalized the October 16, 2006 overpayment. The hearing representative found that appellant was at fault

² On December 3, 2004 appellant, a 52-year-old letter carrier, filed an occupational disease claim alleging that on September 9, 2004 he first realized his plantar fasciitis was employment related. The Office accepted the claim for aggravation of left plantar fasciitis and authorized surgery was performed on July 19, 2005.

in creating the \$1,072.15 overpayment as he knew or should have known he was not entitled to wage-loss compensation after he had returned to limited-duty work on January 11, 2006. Therefore, the hearing representative denied waiver of recovery. The hearing representative noted that the Office's October 3, 2005 letter was addressed to appellant at his address of record and there was no evidence that he did not receive it. The hearing representative found that appellant's "usual" monthly expenses exceeded his household monthly income by \$63.66. The hearing representative therefore found that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act. Repayment was directed by submitting monthly payments of \$150.00.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act provides that, while an employee is receiving compensation under the Act the employee may not receive salary, pay or remuneration of any type from the United State Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation except in limited specified instances.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that an overpayment was created and properly calculated the amount of the overpayment. The overpayment was paid for the period from January 11 to 21, 2006 in the amount of \$1,072.15. The Office properly noted that for this period appellant received a check in the gross amount of \$2,680.38. The Office determined that during that time period, December 20, 2005 to January 10, 2006, he should have only been paid \$1,608.23. Subtracting what appellant should have been paid for this period, \$1,608.23, from what he was paid, \$2,680.38, equals an overpayment of \$1,072.15 for period January 11 through 21, 2006. There is no contrary evidence regarding the fact of and the amount of the overpayment. The Board will affirm the Office's finding on the fact and the amount of the overpayment. Accordingly, appellant received an overpayment as he returned to work and continued to receive compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that an overpayment in compensation shall be recovered by the Office 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.⁵

³ 5 U.S.C. § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005) (Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129(b).

Section 10.433(a) of the Office's regulations provides:

"[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which 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."⁶

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that at the time he received the compensation in question, he knew or should have known that the payment was incorrect.⁷

Appellant properly notified the Office of his return to work on January 11, 2006. However, he accepted compensation benefits for total disability during a period that he had actual earnings. The evidence establishes that appellant knew or should have known this to be incorrect. In an October 3, 2005 letter, the Office clearly advised that he was to return any checks if he returned to work. Appellant did not do so.

Appellant contends that he never received the October 3, 2005 letter informing him how his compensation benefits would be paid while on the periodic rolls for temporary total disability. The letter informed him to return the payment to the Office if he worked for any portion of the period for which payment was made. Appellant did not assert that his address changed or that the address used by the Office was otherwise incorrect. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.⁸ Appellant submitted no evidence substantiating that he did not receive the Office's October 3, 2005 letter. The Board finds that there is no error on the part of the Office in mailing the October 3, 2006 letter to the address provided by appellant.⁹ Thus, the Board finds that appellant knew or should

⁶ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁷ *Neill D. Dewald*, 57 ECAB __ (Docket No. 06-117, issued February 21, 2006); *Diana L. Booth*, 52 ECAB 370 (2001).

⁸ *Joseph R. Giallanza*, 55 ECAB 186 (2003).

⁹ *Id.*

have known that he was not entitled to wage-loss compensation on and after January 11, 2006. Waiver of an overpayment is not permitted unless a claimant is without fault in creating the overpayment.¹⁰ Accordingly, the Office properly denied waiver of the overpayment as appellant was not without fault in its creation.

Lastly, with respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹¹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹²

CONCLUSION

The Board finds that the Office properly found a \$1,072.15 overpayment of compensation in appellant's case for the period January 11 to 21, 2006 as he received compensation after he no longer had any wage loss. The Board further finds that the Office properly found appellant at fault in creation of the overpayment and that he was therefore not entitled to waiver.

¹⁰ *Michael L. Leffingwell*, 53 ECAB 309, 314 (2002).

¹¹ *Joan Ross*, 57 ECAB ____ (Docket No. 06-887, issued July 24, 2006); *Cheryl Thomas*, 55 ECAB 610 (2004).

¹² *Danny E. Haley*, *supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2007 is affirmed.

Issued: March 24, 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