

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Raleigh, NC, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-990
Issued: November 5, 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 February 19, 2008 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs' dated December 28, 2007 regarding an overpayment and November 19, 2007, denying compensation for intermittent dates of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.¹

ISSUES

The issues are: (1) whether appellant established disability for work on August 6, 20, 21 and 22 and September 5 and 14, 2007; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,863.78, for the period July 31 through September 1, 2007; and (3) whether appellant was at fault in the creation of this overpayment and therefore not entitled to waiver.

¹ The record also contains Office decisions dated September 10, 2007 and January 17, 2008 pertaining to appellant's wage-earning capacity. As appellant did not appeal these decisions, the Board will not address them in this decision.

FACTUAL HISTORY

On March 20, 2006 appellant, then a 34-year-old flat sorter machine clerk, filed an occupational disease claim alleging right foot plantar fasciitis caused or aggravated by her federal employment. The Office accepted appellant's claim for aggravation plantar fibromatosis of the right foot. Appellant stopped work in March 2007. She received compensation every 28 days beginning April 2007. In a letter dated April 16, 2007, the Office outlined appellant's responsibilities, including notifying it when she returned to work and returning any payments if she worked for any portion of the period covered by the compensation payment. Appellant remained on the periodic rolls until September 1, 2007.

In a July 23, 2007 note, Dr. Sarah E. Dewitt, an orthopedic surgeon, advised that appellant could work up to six hours unrestricted duties and had no restrictions on sedentary duty. Appellant returned to full-time light-duty work on July 31, 2007. On August 6, 2007 Dr. Dewitt advised that appellant could work up to four hours restricted and four hours sitting.

On August 4, 2007 appellant received a direct deposit of compensation in the amount \$2,706.52 for the period July 8 through August 4, 2007. On September 1, 2007 she received a direct deposit in the amount \$2,706.52 for the period August 5 through September 1, 2007.

Appellant filed a Form CA-7 claiming compensation for wage loss during the period August 6 through 17, 2007 for 17.99 hours. On September 10, 2007 the Office deposited \$326.05 into appellant's account to cover the 17.99 hours of time lost claimed.

On September 19, 2007 the Office made a preliminary finding that appellant had been overpaid in the amount of \$2,863.78, as she returned to work full time July 31, 2007 but received wage-loss compensation for total disability through September 1, 2007. It made a preliminary finding that appellant was at fault in creating the overpayment because she knew or should have known that she was not entitled to compensation for total disability after she returned to work. The overpayment was calculated by taking \$5,413.04, the total amount she received for the period July 8 through September 1, 2007, minus \$2,549.26, the amount to which she was entitled from July 8 through 31, 2007, to total an overpayment of \$2,863.78. Appellant was provided with an overpayment recovery questionnaire and informed of the various actions she could take if she disputed the occurrence or amount of the overpayment and to support her belief that she was without fault in creating the overpayment such that the overpayment should be waived.

In a September 24, 2007 note, Dr. Dewitt advised that appellant could work up to six hours unrestricted and four hours sitting.²

On October 4, 2007 appellant requested a review of the written record on the issues of fault and waiver of the overpayment. She submitted a completed overpayment recovery questionnaire and copies of her monthly bills. Appellant stated that she returned to work on a part-time reduced schedule and had not received any compensation for her loss of hours at work.

² On October 1, 2007 appellant filed a Form CA-7 claim for compensation for wage loss during the period September 17 to 28, 2007 for 14.29 hours. On October 9, 2007 the Office paid appellant \$258.99 for the 14.29 hours claimed during the period September 17 to 28, 2007.

Appellant filed Form CA-7a's for intermittent time lost for the period August 6 through September 14, 2007, for a total of 87.5 hours. She claimed a total of 18 hours for the period August 6 to 17, 2007; a total of 38 hours for the period August 20 to 31, 2007; and a total of 31.50 hours for the period September 3 to 14, 2007.³

In a letter dated October 15, 2007, the Office advised that appellant's claim for the period August 6 to September 14, 2007 was processed for 51.49 hours.⁴ Although she claimed eight hours of leave without pay (LWOP) on the dates August 6, 20, 21 and 22 and September 5 and 14, 2007, it paid two hours of LWOP for each of those dates as there was insufficient medical evidence to support total disability on those dates. The Office advised appellant that additional medical evidence was required to establish total disability for those dates before the remaining six hours of wage loss could be paid. Appellant was accorded 30 days in which to submit such information.

In an October 16, 2007 letter, the Office advised appellant that the evidence on file to document the overpayment issue for the period July 8⁵ to September 1, 2007 had been resolved. It stated that the period of August 5 to 17, 2007 was calculated and included in the offset for the overpayment. The Office advised, however, that the 38 hours appellant claimed during the period August 20 to 31, 2007 could not be paid until the overpayment issue was resolved. It noted that additional medical evidence was needed to support the entire eight hours of disability claimed for August 20, 21 and 22, 2007. The Office paid 19.5 hours for the period September 3 to 14, 2007. It noted that only two hours of limited duty was paid for September 5 and 14, 2007 as there was insufficient medical evidence to support total disability for those days. The Office requested that appellant submit medical evidence establishing total disability for work on August 20, 21 and 22 and September 5 and 14, 2007. No medical evidence was provided.

By decision dated November 19, 2007, the Office denied appellant's claim for the remaining six hours of compensation claimed for August 6, 20, 21 and 22 and September 5 and 14, 2007.

In a November 25, 2007 letter, Dr. Dewitt advised that appellant could work eight hours a day so long as standing and walking were limited to four to six hours.

In a December 28, 2007 decision, the Office found that appellant received a \$2,863.78 overpayment for the period July 31 to September 1, 2007. It further found that she was at fault in the creation of the overpayment as she knew or should have known that she was not entitled to compensation for total wage loss after she returned to work, even on a part-time basis. Appellant was advised to repay the overpayment in full.⁶

³ Appellant also filed Form CA-7 claims for compensation for the periods following September 14, 2007.

⁴ As previously noted, the Office paid 17.99 hours for the period August 6 to 17, 2007 and 19.5 hours for the period September 3 to 14, 2007.

⁵ The correct date should be July 31, 2007.

⁶ The Office did not direct repayment from compensation.

On appeal, appellant questioned the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act⁷ has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁸ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁹

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹⁰ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹¹ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹²

ANALYSIS -- ISSUE 1

The Office accepted that appellant's right foot plantar fibromatosis was aggravated by her federal employment. After a period of total disability, appellant returned to work on July 31, 2007 on a modified schedule in a light-duty position. The medical evidence of file supports that she was able to work for up to six hours. The medical evidence supports two hours of disability each workday causally related to the accepted employment injury. As noted, disability means the inability to earn the wages the employee was receiving at the time of injury.

Appellant claimed 8 hours compensation for August 6, 20, 21 and 22 and September 4 and 14, 2007 or a total of 48 hours. As noted, the medical evidence supports only 2 hours of disability causally related to the employment injury for each workday or 12 hours total. Although appellant was advised by the Office to submit additional medical evidence to establish

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

¹⁰ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Id.*

¹² *Id.*

total disability for the dates claimed no medical evidence was submitted which addressed any employment-related disability beyond the accepted two hours of disability each workday. As the medical evidence only supports two hours of disability causally related to the employment injury for each date claimed, the Office properly paid her wage-loss compensation for two hours of disability on August 6, 20, 21 and 22 and September 4 and 14, 2007. It is appellant's burden of proof to submit the necessary evidence to establish an employment-related disability. The Board finds that she did not meet her burden of proof to establish that she was totally disabled for work on August 6, 20, 21 and 22 and September 4 and 14, 2007.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act¹³ provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.¹⁴ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.¹⁵

A final decision of the Office shall contain findings of fact and a statement of reasons.¹⁶ With respect to overpayment decisions, it must provide clear reasoning showing how the overpayment was calculated.¹⁷

ANALYSIS -- ISSUE 2

The Office accepted appellant's right foot plantar fibromatosis claim. After a period of total disability, she returned to part-time work on July 31, 2007 on a modified schedule in a light-duty position. From July 8 through September 1, 2007, the Office paid appellant wage-loss compensation for total disability in the amount of \$5,413.04. As appellant had returned to work, she was not entitled to compensation for total disability commencing July 31, 2007. Accordingly, she received an overpayment in compensation. Appellant does not dispute that she received an overpayment; however, she disputes the amount of the overpayment.

The Office calculated the \$2,863.78 overpayment by adding the wage-loss disability compensation she received from July 8 through September 1, 2007 in the amount of \$5,413.04. It deducted the amount of compensation to which appellant was not entitled from July 31 through September 1, 2007 in the amount of \$2,549.26. Based on this determination, the Office

¹³ 5 U.S.C. §§ 8101-8193, 8102(a).

¹⁴ 5 U.S.C. § 8116(a).

¹⁵ *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

¹⁶ 20 C.F.R. § 10.126.

¹⁷ *James Tackett*, 54 ECAB 611 (2003).

found that appellant received an overpayment of compensation in the amount of \$2,863.78 for the period July 31 through September 1, 2007.

The Board finds, however, that the Office did not properly determine the amount of the overpayment. In determining that appellant received an overpayment of compensation in the amount of \$2,863.78 for the period July 31 through September 1, 2007, the Office did not provide documentation to support that it had offset the partial wage loss to which appellant was entitled for two hours a day. Appellant claimed a total of 87.5 hours for the period August 6 through September 14, 2007; however, the Office indicated that it paid compensation for only 51.49 hours without any clear explanation. The Office is required to provide findings to establish how an overpayment was calculated.¹⁸ Appellant claimed 87.5 hours during this period, *i.e.*, 17.99 hours for the period August 6 to 17, 2007; 38 hours for the period August 20 to 31, 2007; and 31.50 hours for the period September 3 to 14, 2007.¹⁹ While the Office properly noted that appellant was entitled to two hours of compensation for the dates August 6, 20, 21 and 22, 2007 the record reflects that appellant was paid eight hours of compensation for the date of August 6, 2007, but there is no clear indication that the Office paid appellant two hours for the dates of August 20, 21 and 27, 2007. In its October 16, 2007 letter, it specifically advised that the 38 hours appellant claimed during the period August 20 to 31, 2007 could not be paid until the overpayment issue was resolved. The evidence of record does not allow the Board to make a fully informed adjustment of the amount of the overpayment. The case will be remanded to the Office for further development regarding the amount of the overpayment. The Office should fully explain its rationale and provide adequate documentation to support its finding. After such further development, the Office should issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act provides that 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 the Act or would be against equity and good conscience.²⁰ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.²¹

On the issue of fault, 20 C.F.R. § 10.433(a) provides 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 (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid

¹⁸ *Id.*

¹⁹ While the period after September 1, 2007 is not relevant to the overpayment issue at hand, documentation as to how the Office paid the entire compensation is.

²⁰ 5 U.S.C. § 8129(b).

²¹ *Gregg B. Manston*, 45 ECAB 344 (1994).

individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”²²

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“(b) 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 individual’s capacity to realize that he or she is being overpaid.”²³

ANALYSIS -- ISSUE 3

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

Appellant’s receipt of the August 4, 2007 direct deposit in the amount of \$2,706.52 covered a portion of the first overpayment from July 31 to August 4, 2007.²⁴ The Board has found a 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 were incorrect.²⁵ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by 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.²⁶ Appellant had no reason to suspect at the time the \$2,706.52 payment was deposited into her checking account that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.²⁷ Because the funds were deposited directly into her bank account, appellant was not in a position to immediately decline acceptance of the amount paid by the Office. The Board finds that she was not at fault in either creating or accepting the applicable portion of the overpayment of \$2,706.52 for the period July 31 to August 4, 2007.²⁸ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period and the case must be remanded for it to determine whether he is entitled to waiver for

²² See *Kenneth E. Rush*, 51 ECAB 116 (1999).

²³ 20 C.F.R. § 10.433(b).

²⁴ The deposit covered the period July 8 to August 4, 2007.

²⁵ See *Karen K. Dixon*, 56 ECAB 145 (2004).

²⁶ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

²⁷ See *Tammy Craven*, 57 ECAB 689 (2006).

²⁸ *Id.*

this period. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived for the relevant portion of the August 4, 2007 direct deposit.

After appellant's receipt of the first direct deposit, for which fault may not be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled. Therefore, for receipt of the September 1, 2007 direct deposit in the amount of \$2,706.52 for the period August 5 to September 1, 2007, the Board finds that appellant was with fault as she should have known that she accepted a payment for an incorrect amount.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled from work for the periods August 6, 20, 21 and 22 and September 4 and 14, 2007 and, thus, is not entitled to an additional six hours of compensation claimed for each day. The Office properly found that appellant received an overpayment of compensation but the case is not in posture for decision regarding the amount of the overpayment. The Board further finds that the Office properly found appellant at fault in creating the overpayment for the period August 5 through September 1, 2007 but that it improperly found her at fault in creating the overpayment that occurred from July 31 to August 4, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 19, 2007 is affirmed and that the December 28, 2007 decision is affirmed in part and set aside in part and remanded for further proceedings consistent with this decision.

Issued: November 5, 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