

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

J.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Jose, CA, Employer**

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Docket No. 07-2076

Issued: October 10, 2008

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 6, 2007 appellant filed a timely appeal of the July 19, 2007 decision the Office of Workers' Compensation Programs, which found that appellant had received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly found that there was an overpayment in the amount of \$35,452.74 for the period June 1, 1998 to October 12, 1999; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On February 23, 1992 appellant, then a 31-year-old letter carrier, injured her lumbar spine, left shoulder and foot when she fell down stairs at work. The Office accepted the claim for multiple contusions, left L4-5 disc herniation, left shoulder strain, left fifth metatarsal fracture and left osteomyelitis and authorized a lumbar laminectomy and discectomy which was

performed on October 22, 1992. Appellant stopped work on February 18, 1992 and received compensation benefits.

On December 9, 1994 the employing establishment offered appellant a position as a part time, four hours per day, limited-duty position as a modified city carrier. It indicated that the position was in conformance with appellant's treating physician's recommendation. In a January 10, 1995 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits. The Office warned appellant that a refusal to accept an offer of suitable employment without justification would result in a termination of compensation.

On January 12, 1995 appellant, through her representative, disputed the Office's finding. She also submitted a report from Dr. Raul Guisado, a Board-certified neurologist, dated January 26, 1995 who reviewed the job description of the offered position dated December 9, 1994 and determined that position was within appellant's limitations and opined that she could return to work in the position described in the Office's letter.

On March 2, 1995 the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. Appellant requested reconsideration and on October 11, 1995 the Office vacated the March 2, 1995 decision, finding that the Office failed to notify appellant that her reasons for refusing the light-duty job were not justified, that the position remained available and that she had 15 days within which to accept the position or her compensation would be terminated under 5 U.S.C. § 8106(c).

On October 12, 1995 the Office advised appellant that the modified mail processing clerk position was suitable work, that it considered the reasons given by her for refusing the position and found them to be unacceptable. It afforded appellant 15 additional days to accept the job offer or her compensation for wage loss or schedule award would be terminated.

In a November 13, 1995 decision, the Office terminated appellant's monetary compensation effective the same day because she refused an offer of suitable work. The decision noted that the claim remained open for medical treatment.

On December 6, 1995 appellant requested a review of the written record. In a decision dated April 24, 1996, a hearing representative affirmed the November 13, 1995 Office decision finding that appellant was not entitled to further monetary compensation.

On October 4, 1998 appellant requested a schedule award. On March 5, 2000 an Office medical adviser determined that she sustained 9 percent impairment to the left upper extremity and 15 percent impairment to the left lower extremity. The date of maximum medical improvement was found to be June 1, 1998.

On March 31, 2000 the Office issued appellant a check as payment for her schedule award. A March 28, 2000 daily computation log for a schedule award noted that she received a check in the amount of \$35,452.74 for the period June 1, 1998 to October 12, 1999.

On January 11, 2006 appellant filed a Form CA-7, claim for wage loss beginning April 15, 2003. She also sought a disability retirement.

In correspondence dated February 1, 2006, the Office advised appellant that a claim for disability retirement would be adjudicated by the Office of Personnel Management. It further noted that appellant was not eligible for compensation for wage loss due to her employment injury because her compensation was terminated on November 13, 1995 for refusing suitable work, under 5 U.S.C. § 8106(c)(2), which bars payment for wage loss and schedule award compensation.

In a decision dated March 1, 2006, the Office denied appellant's claim for wage-loss compensation beginning April 15, 2003. It found that she was not entitled to compensation for wage loss because she refused an offer of suitable work and her compensation was terminated on November 13, 1995 pursuant to 5 U.S.C. § 8106(c)(2).

On March 20, 2006 appellant requested an oral hearing and later requested the Office proceed with a review of the written record.

In a January 5, 2007 decision, the hearing representative affirmed the March 1, 2006 Office decision. The hearing representative noted that, while the Office paid appellant a schedule award from June 1, 1998 to October 12, 1999, 5 U.S.C. § 8106(c) serves as a bar to receipt of further compensation or a schedule award for the period after termination of compensation based on a refusal of suitable work. The hearing representative noted that the payment of the schedule award was in error and should be declared an overpayment. The Office sent the decision to the address provided in appellant's August 24, 2006 correspondence.¹

On March 2, 2007 the Office reissued the January 5, 2007 decision and sent the decision to appellant's most recent address in Costa Rica.

In a June 12, 2007 preliminary overpayment determination, the Office found that appellant was overpaid benefits in the amount of \$35,452.74 for the period June 1, 1998 to October 12, 1999 under a schedule award erroneously paid after appellant's benefits were terminated on November 13, 1995 pursuant to 5 U.S.C. § 8106(c), for refusal of suitable work. It determined that appellant was not at fault in creating the overpayment. The Office advised appellant that she had 30 days to submit evidence or arguments regarding the overpayment and her eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit. No additional evidence was received by the Office regarding the overpayment.

On July 11, 2007 appellant advised the Office that, as of that date, she was relocating to Texas and provided a change of address for future correspondence.

On July 19, 2007 the Office finalized the overpayment determination, finding that appellant received a \$35,452.74 overpayment of compensation for the period June 1, 1998 to

¹ Appellant has not appealed the January 5, 2007 decision. Therefore, this matter is not before the Board on the current appeal.

October 12, 1999, for which she was without fault. It noted how the overpayment occurred and further found that appellant was not eligible for waiver as recovery of the overpayment would not defeat the purpose of the Act and it would not be against equity and good conscience. The Office requested that appellant pay the full amount of \$35,452.74 or if she was unable to refund the entire amount to contact the Office to make arrangements for recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Act 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 duty.² When an overpayment has been made to an individual because of an error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.³

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.⁴ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered.⁵

ANALYSIS -- ISSUE 1

The Office terminated appellant's compensation effective November 13, 1995 because she refused an offer of suitable work.

Under 5 U.S.C. § 8106(c)(2), an employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to monetary compensation, including a schedule award for the period after the termination of compensation.⁶ After terminating appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), the Office, on March 31, 2000, erroneously granted a schedule award in the total amount of \$35,452.74 for 9 percent impairment of the left upper extremity and 15 percent impairment of the left lower extremity. Payment commenced as of the date of maximum medical improvement June 1, 1998 to October 12, 1999. The Board finds that this resulted in a \$35,452.74 overpayment of compensation. In this case, section 8106(c) serves as a bar to appellant's receipt of schedule award compensation after November 13, 1995. The evidence developed by the Office established June 1, 1998 as the date of maximum medical improvement. As this was subsequent to the termination under section 8106(c), appellant was not entitled to

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *M.L.*, 57 ECAB ____ (Docket No. 06-136, issued September 25, 2006).

⁶ *See* 5 U.S.C. § 8106(c)(2); *Stephen R. Lubin*, 43 ECAB 564 (1992).

compensation paid under the schedule award.⁷ Appellant was not entitled to a schedule award for the period after the termination of compensation. She did not allege or submit evidence to show that she did not receive a \$35,452.74 overpayment for this period and the Office properly found that she received such an overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁸ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] 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."⁹ When the Office finds a claimant to be without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections of the Office's regulations.¹⁰

Section 10.438 of the regulations provides that "[t]he individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience." Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

ANALYSIS -- ISSUE 2

On June 12, 2007 the Office requested that appellant provide necessary financial information by completing an overpayment recovery questionnaire, OWCP-20, if she desired waiver of the overpayment in question. Appellant did not submit a completed OWCP-20 form or otherwise submit financial information supporting her income and expenses. As a result, the Office did not have the necessary financial information to determine whether recovery of the

⁷ Compare *Ronald P. Morgan*, 53 ECAB 358 (2002) (an employee remains eligible to schedule award benefits provided the date of maximum medical improvement is prior to termination under section 8106(c) with *Lizzie M. Greer*, 49 ECAB 681 (1998) (an employee is not entitled to compensation under a schedule award where maximum medical improvement is not reached until after termination under section 8106(c)).

⁸ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁹ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

¹⁰ *R.W. (A.T.)*, 59 ECAB ____ (Docket No. 07-1845, issued December 7, 2007); see 20 C.F.R. §§ 10.436, 10.437.

¹¹ 20 C.F.R. § 10.438.

overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.¹²

Consequently, as appellant did not submit the financial information required by section 10.438 of the Office's regulations, which was necessary to determine eligibility for waiver, the Office properly denied waiver of recovery of the overpayment.¹³ Inasmuch as appellant has not shown that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office properly denied waiver of recovery of the overpayment of compensation in the amount of \$35,452.74.¹⁴

On appeal, appellant alleges that she never received the preliminary overpayment notice dated June 12, 2007. The record supports that the Office's June 12, 2007 preliminary overpayment notice and accompanying overpayment questionnaire was sent to appellant at the address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹⁵

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of \$35,452.74 in compensation from June 1, 1998 to October 12, 1999. The Board also finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

¹² *See id.*

¹³ *See R.W. (A.T.), supra* note 10.

¹⁴ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).

¹⁵ *A.C. Clyburn*, 47 ECAB 153 (1995).

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board