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C.E., Appellant)	
)	
and)	Docket No. 09-947
)	Issued: November 5, 2009
U.S. POSTAL SERVICE, POST OFFICE,)	
Islandia, NY, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On February 26, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 19, 2008 merit decision finding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether the Office properly determined that appellant received a \$16,120.72 overpayment of compensation for the period March 20 to September 30, 2006; and (2) whether the Office properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

The Office accepted that on October 21, 2005 appellant, then a 50-year-old processing clerk, sustained a cervical sprain and cerebral concussion due to hitting his forehead on a mail sweeping machine. Appellant stopped work on that date. The February 14, 2006 letter accepting

his claim stated in part, "RETURN TO WORK ... If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation." (Emphasis in the original.) The Office paid appellant appropriate compensation for periods of disability. Appellant was placed on the periodic rolls effective February 19, 2006 and his payments were made by check.

On March 20, 2006 appellant returned to limited-duty work for the employing establishment on a full-time basis without wage loss. The Office continued to pay him wage-loss compensation on the periodic rolls. On August 17, 2006 the employing establishment advised the Office by telephone that appellant had returned to full-time work as of March 20, 2006. The Office terminated periodic compensation payments effective September 30, 2006.

In a August 22, 2007 letter, the Office advised appellant that it had made a preliminary determination that he received a \$16,120.72 overpayment of compensation for the period March 20 to September 30, 2006. It also made a preliminary determination that appellant was at fault in the creation of the overpayment because he knew or should have known that he could not accept compensation checks after he returned to full-time work for the employing establishment on March 20, 2006 without wage loss. The Office provided appellant with an opportunity to present evidence and argument to contest the overpayment and request waiver of the overpayment. It directed him to complete and return a financial information questionnaire even if he was not contesting the overpayment.¹

Appellant requested a prerecoupment hearing before an Office hearing representative regarding the proposed overpayment determination. At the April 21, 2008 hearing, he argued that he was not at fault in the creation of the overpayment because the Office had erred by paying compensation after he returned to work. Appellant testified that he lived from paycheck to paycheck and that he no longer had the compensation monies paid to him. He claimed that he used such funds for living expenses.

In a May 9, 2008 letter, Allison Hassett, an employing establishment official, stated that she personally told appellant that he was not entitled to any compensation checks issued after his return to work and that any monies received after that date would constitute an overpayment of compensation. She also noted that as of January 2006, appellant earned \$51,049.00 per year as a mail handler.²

In a June 19, 2008 decision, the Office hearing representative determined that appellant received a \$16,120.72 overpayment of compensation for the period March 20 to September 30, 2006. He found that appellant was at fault in the creation of the overpayment because he knew or should have known that he could not accept compensation checks after he returned to full-time work for the employing establishment on March 20, 2006. The Office

¹ The Office included a calculation sheet, which shows how it determined that appellant received \$16,120.72 in compensation for the period March 20 to September 30, 2006.

² Appellant did not complete the financial information questionnaire but on an undated note received by the Office on May 27, 2008 he stated that he had \$1,200.00 in monthly income and more than \$1,200.00 in monthly expenses.

hearing representative noted that the compensation checks appellant received after March 20, 2006 clearly displayed the periods covered by the checks. He directed that the overpayment would be recovered at the rate of \$350.00 per month.³

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁴ 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.⁵ Section 8129(a) of the Act provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter 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 an individual is entitled."⁶ Section 8116(a) of the Act provides that while an employee is receiving compensation or if he 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, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁷

ANALYSIS -- ISSUE 1

The Office accepted that on October 21, 2005, appellant sustained a work-related cervical sprain and cerebral concussion and paid him compensation beginning that date. On March 20, 2006 appellant returned to limited-duty work for the employing establishment on a full-time basis without wage loss. The Office continued to pay him compensation on the periodic rolls and did not terminate these periodic compensation payments until September 30, 2006. Appellant was not entitled to receive compensation after his return to full-time work without wage loss on March 20, 2006. The record contains documents showing that he received \$16,120.72 in compensation for the period March 20 to September 30, 2006. Therefore, the Board finds that appellant received an overpayment of compensation in the amount of \$16,120.72 for the period March 20 to September 30, 2006

LEGAL PRECEDENT -- ISSUE 2

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

³ As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

payments to which an individual is entitled.⁸ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 this subchapter or would be against equity and good conscience.”⁹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁰

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (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....”¹¹

Section 10.433(c) of the Office’s regulations provides:

“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.”¹²

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the overpayment because he knew or should have known that he accepted compensation payments for wage loss after he returned to full-time work for the employing establishment on March 20, 2006. The February 14, 2006 letter accepting appellant’s claim stated in part, “RETURN TO WORK ... If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.” (Emphasis in the original.) Therefore, appellant had been advised by the Office only about a month prior to his March 20, 2006 return to work that he could not accept compensation checks covering periods after his

⁸ 5 U.S.C. § 8129(a).

⁹ *Id.* at § 8129(b).

¹⁰ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(c).

return to work.¹³ Each of the checks he received after returning to work identified the period of compensation covered by the check and, therefore, he was apprised that the checks covered periods that he was working and ineligible to receive continuing compensation benefits. Appellant received these compensation checks for over six months after his March 20, 2006 return to work and the sheer length of time that he received these checks militates against a finding that he did not realize he was not entitled to receive them.¹⁴

Even though the Office may have been negligent in issuing appellant compensation checks after he returned to full-time work on March 20, 2006, this does not excuse his acceptance of payments, which he knew or should have known to be incorrect.¹⁵ For these reasons, it properly found that appellant was at fault in creating the \$16,120.72 overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$16,120.72 overpayment of compensation. The Board finds that the Office properly determined that appellant was at fault in creating the \$16,120.72 overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

¹³ Moreover, Ms. Hassett, an employing establishment official, stated that she personally told appellant that he was not entitled to any compensation checks issued after his return to work date and that any checks received after that date would constitute an overpayment of compensation.

¹⁴ On appeal, appellant's attorney, argued that appellant in his "unsophisticated" mindset believed that he could receive compensation checks after returning to full-time work without wage loss on March 20, 2006. However, he did not explain the reasons for this assertion or otherwise show that appellant was incapable of understanding that he had to return compensation checks after his return to work. Counsel suggested that appellant felt he could keep the checks because he was "still experiencing considerable pain and physical restrictions" after his return to work, but he did explain the basis for this belief. He also questioned the repayment schedule but this matter is not within the Board's jurisdiction.

¹⁵ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

ORDER

IT IS HEREBY ORDERED THAT Office of Workers' Compensation Programs' June 19, 2008 decision is affirmed.

Issued: November 5, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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