

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

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**R.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Denver, CO, Employer**

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**Docket No. 09-605  
Issued: October 9, 2009**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On January 2, 2009 appellant, filed a timely appeal of the December 30, 2008 merit decision of the Office of Workers' Compensation Programs finding that she 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 this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in the amount of \$2,340.24; (2) whether she was at fault in the creation of the overpayment such that it is not subject to waiver; and (3) whether the Office properly determined to recover the overpayment by withholding \$500.00 every 28 days from her continuing compensation benefits.

**FACTUAL HISTORY**

This case has previously been before the Board. The Office accepted that appellant developed right carpal tunnel syndrome and resultant carpal tunnel release due to her employment on September 9, 1986. On July 15, 1988 appellant filed an occupational disease

claim alleging that she developed pain in the upper extremities, neck and shoulders due to her employment. In a decision dated January 30, 1991, the Board remanded appellant's claim for additional development of the medical evidence.<sup>1</sup> The Office accepted appellant's claim for aggravation of thoracic outlet syndrome on the right side on August 29, 1991. On April 22, 1994 it granted appellant a schedule award for 20 percent permanent impairment of her right upper extremity. The Office granted appellant a schedule award for 75 percent impairment of her right upper extremity on May 13, 1996.

Appellant filed a claim for recurrence of disability on June 24, 1998. The Office denied this claim on October 1, 1998. The Branch of Hearings and Review affirmed this decision on July 1, 1999. The Office denied appellant's requests for reconsideration on October 27, 1999 and July 26, 2000. The Board set aside the July 26, 2000 decision on July 16, 2002.<sup>2</sup> The facts of the case as set out in the Board's prior decisions are incorporated herein by reference.

The Office accepted the additional condition of aggravation of bilateral thoracic outlet syndrome on November 19, 2002. By decision dated December 5, 2003, it granted appellant a schedule award for 70 percent impairment of her left arm.

On November 20, 2007 appellant accepted a modified job offer working 16 hours a week. On January 4, 2008 she filed a claim for compensation requesting wage-loss compensation from December 23, 2007 through January 4, 2008. Appellant's leave summary indicated that she began working four hours a day on December 23, 2007.

On February 14, 2008 appellant noted that she returned to work on December 23, 2007 and received payment for the period December 23, 2007 through January 19, 2008 in the amount of \$2,340.24 as well as a payment of \$603.45. She stated that she would refund the payment of \$2,340.24. In a letter dated February 29, 2008, the Office noted that appellant had received an overpayment of \$2,717.00 and requested that she return this amount.

By letter dated March 11, 2008, the Office informed appellant of a preliminary determination that she had received an overpayment in the amount of \$2,340.24 from December 23, 2007 to January 19, 2008 as she returned to part-time work and received wage loss for total disability. It found that appellant was at fault in the creation of the overpayment.

Appellant requested a prerecoupment hearing on March 31, 2008 and submitted an overpayment recovery questionnaire. She had earnings of \$1,100.00 and her husband earned \$5,500.00 per month for total monthly earnings of \$6,600.00. Appellant listed her expenses as: rent or mortgage, \$1,300.00; food, \$650.00; clothing, \$3,000.00 and utilities, \$485.00, totaling \$5,345.00 per month. She listed her funds as \$870.00.

Appellant acknowledged the overpayment of \$2,340.00 and stated that she informed the Office of the overpayment on the date that it was deposited in her bank account. She stated that life and health insurance benefits had not been paid since December 2007. Appellant also stated

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<sup>1</sup> Docket No. 90-1870 (issued January 30, 1991).

<sup>2</sup> Docket No. 01-869 (issued July 16, 2002).

that the Office failed to provide her with the additional compensation payments that she was owed and used the overpayment to pay her debts. She stated that she did not believe that she created the overpayment and requested to repay the overpayment on a schedule.

Appellant testified at the precoupment oral hearing on September 10, 2008. Upon deposit of the January 18, 2008 payment from the Office, she spoke to the human resources department at the employing establishment and was instructed to wait for directions from the Office. Appellant spoke to the Office and was instructed to return the payment of \$2,340.24. She stated that she had not made any incorrect statements or failed to provide information. The hearing representative requested supporting financial documents. Appellant stated that she was working 20 hours a week and receiving compensation benefits.

Appellant submitted her transportation expenses, which averaged \$168.00 per month, credit card and other monthly expenses. Her mortgage was \$1,140.22; her medical expenses averaged \$175.78; her utilities were \$186.43; groceries expenses totaled \$377.40; massages averaged \$243.34 per month and her credit card debt totaled \$4,452.12 with minimum monthly payments of \$132.78 for monthly expenses of \$2,387.73.

By decision dated December 9, 2008, the hearing representative found that appellant had received an overpayment of compensation in the amount of \$2,340.24. Appellant was at fault in the creation of the overpayment as she knew the check she received should be returned to the Office. The hearing representative found that appellant failed to include her compensation benefits in her monthly income and that she and her husband had a combined household income of \$7,700.00 per month. He found total monthly expenses of \$3,500.00 and concluded that appellant had \$4,000.00 per month in excess. The hearing representative determined that appellant should repay the overpayment through deductions of \$500.00 every 28 days from her continuing compensation benefits.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of the Federal Employees' Compensation Act<sup>3</sup> 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. Section 8106(a) provides in pertinent part as follows:

"If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."<sup>4</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>4</sup> *Id.* at § 8106(a).

The Act further provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.<sup>5</sup> Section 8129(a) of the Act provides that when an overpayment has been made to an employee because of an error of fact or law, adjustment shall be made by decreasing later payments to which she is entitled.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes that appellant received compensation for total disability while working part time. She received an overpayment of compensation. In the February 14, 2008 conversation with the Office, appellant agreed that the amount of the overpayment was \$2,340.24. The Board finds that the record establishes that appellant received an overpayment in the amount of \$2,340.24.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>7</sup> provides: 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.”

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 received 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; 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 (this provision applies only to the overpaid individual).<sup>8</sup>

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.<sup>9</sup>

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<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8129(b).

<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> *Id.* § 10.433(b).

### **ANALYSIS -- ISSUE 2**

Appellant testified that she immediately realized that she was overpaid and initially offered to refund the amount of the overpayment to the Office on February 14, 2008. The record establishes that she accepted a payment which she knew was incorrect. As appellant was at fault in the creation of the overpayment it is not subject to waiver.

### **LEGAL PRECEDENT -- ISSUE 3**

The method by which the Office may recover overpayments is defined by regulation. The applicable regulations, 20 C.F.R. § 10.441(a) provides as follows:

“When an overpayment has been made to an individual who is 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 attention is called to the same. If no refund is made [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”

### **ANALYSIS -- ISSUE 3**

Appellant completed an overpayment recovery questionnaire and listed her monthly income as \$6,600.00. She provided documentation of monthly expenses of \$2,387.73. Appellant's monthly income exceeds her monthly expenses by \$4,212.37. The hearing representative properly noted that she had not included her compensation benefits of \$1,162.00 per month in calculating her compensation benefits and concluded that she could repay the overpayment through deductions of \$500.00 from her continuing compensation benefits. The Board finds that the hearing representative properly considered appellant's rate of compensation and her financial circumstances in determining the overpayment recovery schedule.

### **CONCLUSION**

The Board finds that appellant has received an overpayment of compensation in the amount of \$2,340.24 for which she was at fault and that the Office properly determined to recover this overpayment by reducing her compensation benefits in the amount of \$500.00 every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 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