

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, JENKINS STATION,
Tulsa, OK, Employer**

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**Docket No. 07-1434
Issued: December 14, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 5, 2007 finding that he 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 this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,234.30 for the period February 5 to 19, 2005; and (2) whether the Office properly denied waiver of the overpayment on the grounds that appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On December 4, 2003 appellant, then a 63-year-old mail carrier, filed a traumatic injury alleging that he stepped in a hole while delivering mail injuring his left knee, wrist, ankle and low back. He did not stop work. The Office accepted appellant's claim for lumbar strain, left

lower leg strain and left wrist strain. Appellant underwent a left knee arthroscopy with partial medial meniscectomy, chondroplasty of the medial femoral condyle, patella and trochlea. He filed a claim for compensation on April 28, 2004 requesting compensation for leave without pay from April 17 to 28, 2004 which the Office paid. The Office entered appellant on the periodic rolls on May 25, 2004 at the gross rate of \$2,612.44 every 28 days. The Office instructed appellant to provide immediate notification if he returned to work and return to the Office any payment received after returning to work.

In a letter dated July 29, 2004, the Office made a preliminary determination that appellant had received an overpayment in the amount of \$653.11 as he was paid compensation for wage loss on dates which he was paid for annual leave usage. Appellant repaid the amount on August 5, 2004.

Appellant underwent a bilateral decompressive laminectomy L3-4 and L4-5 on September 14, 2004. In a report dated January 17, 2005 appellant's attending physician, Dr. R. Tyler Boone, a Board-certified orthopedic surgeon, released him to return to work four hours a day with restrictions.

Appellant returned to work on February 5, 2005. On March 4, 2005 he filed a claim for compensation requesting wage-loss compensation for four hours of leave without pay from February 5 to March 4, 2005. Dr. Boone released appellant to return to work eight hours a day with restrictions on March 14, 2005.

The Office found that appellant was paid on the periodic rolls through February 19, 2005 and that he returned to work four hours a day on January 17, 2005. During this period appellant received compensation in the amount of \$2,797.72. The Office determined that appellant was entitled to compensation for 80 hours lost during the period February 5 to March 4, 2005 in the amount of \$1,306.21. In a letter dated April 29, 2005, the Office made a preliminary finding that appellant had received an overpayment of compensation in the amount of \$1,398.86 as he returned to work with no loss of wage-earning capacity on January 17, 2005, but continued to receive disability benefits on the account of his work-related disability until February 19, 2005. The Office found appellant at fault in the creation of the overpayment.

The employing establishment responded to the Office's request for information on April 22, 2005. It indicated that appellant return to his modified position on February 5, 2005. The attached position description noted that appellant's work hours were from 9:30 a.m. to 6:00 p.m., but that he would work only four hours a day.

Appellant disagreed with the preliminary finding of overpayment and stated that he did not begin working until February 5, 2005. He stated that he worked four hours a day until March 4, 2005. Appellant stated that he began working six hours a day from March 5 to 18, 2005. He planned to begin working eight hours a day on March 19, 2005. Appellant requested a telephone conference regarding the overpayment on May 2, 2005.

By decision dated May 20, 2005, the Office found that appellant's earnings in the modified position beginning February 5, 2005 fairly and reasonably represented his wage-earning capacity.

The Office claims examiner completed a memorandum to file on May 23, 2005 indicating that the amount of the overpayment in the April 29, 2005 preliminary finding of overpayment was incorrect. The Office found that appellant had received an overpayment in the amount of \$717.96, that he was at fault in the creation of the overpayment and that the overpayment was not subject to waiver as he had not provided financial information.

By decision dated June 2, 2005, the Office finalized the overpayment amount of \$717.96 stating that appellant return to work with no loss of wage-earning capacity on January 17, 2005 but continued to receive compensation for total disability through February 19, 2005.

On March 5, 2007 the Office issued a correction to the overpayment letters issued on April 29 and June 2, 2005. The Office made a preliminary determination that appellant was overpaid in the amount of \$1,234.30 for the period February 5 to 19, 2005. The Office stated that appellant was at fault in the creation of the overpayment as he accepted a payment which he knew or reasonably should have known was incorrect. The Office stated that appellant's net compensation for 28 days was \$2,304.02 or \$82.29 per day. The Office found that appellant was overpaid for 15 days in the amount of \$1,234.30. The Office stated that the May 25, 2004 letter informing appellant that he was entered on the periodic rolls, informed him that he was responsible for informing the Office of any return to work and to return all payments received for periods after return to work. Appellant did not respond.

By decision dated April 5, 2007, the Office finalized the overpayment of \$1,234.30.

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act¹ 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 Unites 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."²

The Act further provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.³ 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 he is entitled.⁴

¹ 5 U.S.C. §§ 8101-8193, 8102(a).

² 5 U.S.C. § 8106(a).

³ 5 U.S.C. § 8116(a).

⁴ 5 U.S.C. § 8129(a).

Office procedures state: The reason that the overpayment occurred must be clearly stated in the preliminary decision and the [Office] should provide a clearly written explanation indicating how the overpayment was calculated.⁵

ANALYSIS

Appellant returned to work four hours a day on February 5, 2005. He continued to receive compensation for total disability through February 19, 2005. Therefore, appellant received an overpayment of compensation. However, the Board is unable to determine and record the amount of overpayment appellant received.

The Board finds that the Office did not follow its procedures when it released the March 5, 2007 letter notifying appellant of its preliminary findings and the final decision dated April 5, 2007. Specifically, the Office did not provide a clearly written explanation indicating how the overpayment was calculated.⁶ The March 5, 2007 letter informed appellant that he was overpaid \$1,234.30 because he continued to receive compensation for temporary total disability after he returned to work on February 5, 2005. While the record indicates that he returned to work for four hours a day on February 5, 2005, the March 5, 2007 letter does not appear to take into account appellant's partial disability when determining the amount of the overpayment.

The Office did not submit documentation regarding the amount of compensation that was paid during this period and how the overpayment was calculated. It did not include the requisite worksheets demonstrating the formula by which it arrived at the total of \$1,234.30; *i.e.*, how the Office derived the amount of overpayment from temporary total disability compensation for the respective period or how the Office calculated the total amount of appellant's overpayment. As appellant was entitled to payment for four hours of wage loss per day, the Office offered no findings to support an overpayment in the amount of \$1,234.30. The Office provided no documentation indicating the basis of the overpayment and failed to offer appellant a clear formula or explanation as to how it arrived at the sum of \$1,234.30.

The Office has provided a variety of calculations of the amount of the overpayment each defective. The Office initially based appellant's overpayment on April 29, 2005 on the period January 17 to February 19, 2005. The Office then determined that appellant had received an overpayment in the amount of \$717.96 on June 2, 2005. However, the Office did not provide

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004).

⁶ *Id.* at Chapter 6.200 (September 1994) states:

When an overpayment is discovered, the claims examiner will enter information concerning the correct period of entitlement and the actual period paid on Form CA-24, CA-25, whichever form is appropriate and arrange for certification of this entry. The mathematics involved in the calculation of the overpayment must be documented in writing in the case file. In performing these calculations, use should be made of the worksheet calculation capabilities of the Automated Compensation Payment System (ACPS), for compensation paid since 1981; and/or of the ACPS *Shadrick* (CA-816) calculation capability for compensation payments for any prior period of time.

any indication of how it reached this overpayment amount and indicated that the overpayment covered the period January 17 to February 19, 2005. In the March 5, 2007 preliminary finding of overpayment, the Office found that appellant had received an overpayment of \$1,234.30 for the period February 5 to 19, 2005. However, it appears that the Office merely multiplied appellant's compensation for total disability by the 15 days that he was partially disabled and determined that this constituted the amount of the overpayment. The Board notes that as appellant was partially disabled and working only four hours a day during the period February 5 to 19, 2005 he was entitled to compensation for partial disability for the four hours a day that he was not working.

Accordingly, the Board will set aside the Office's April 5, 2007 decision on the issue of amount of overpayment and remand the case for further development.⁷

CONCLUSION

The Board finds that the Office properly found an overpayment was created. However, it did not comply with its procedures and provide a detailed calculation of the amount of the overpayment. Therefore, the case will be remanded for further development consistent with this decision of the Board.

⁷ Due to the disposition of this issue it is not necessary for the Board to address the issue of fault.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside, in part and remanded for further development.

Issued: December 14, 2007
Washington, DC

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

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

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