

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

F.N., Appellant

and

**U.S. POSTAL SERVICE, MISSOURI CITY
CARRIER ANNEX, Missouri City, TX, Employer**

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**Docket No. 06-2136
Issued: February 13, 2007**

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 September 22, 2006 appellant filed a timely appeal from a June 19, 2006 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment in the amount of \$906.28 for which she was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$906.28; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver.

FACTUAL HISTORY

On October 22, 2005 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim alleging that on that date she experienced pain in her right arm and shoulder while delivering mail to a mail box. She stopped work on the date of injury.

By letter dated January 26, 2006, the Office accepted appellant's claim for right shoulder sprain/strain. The Office also accepted appellant's claim for right rotator cuff tear. The Office advised appellant that she was expected to return to work including light-duty or part-time work if available, as soon as she was able. Once appellant returned to work or obtained new employment, she was to notify the Office immediately. The Office noted that full compensation benefits were only payable while appellant could not perform the duties of her regular job because of her accepted employment-related injury. Appellant was told to immediately return any compensation checks which included payment for a period she had worked, to prevent an overpayment of compensation.

By letter dated February 28, 2006, the Office notified appellant that her first payment of compensation would cover the period December 7, 2005 through February 18, 2006 and that she would receive a net amount of \$2,589.66. Beginning February 19, 2006, appellant would receive a gross amount of \$6,844.10. The Office advised appellant that compensation benefits for total disability were only payable while she could not perform work because of her injury. Appellant was to inform the Office if she returned to work and return any payment to the Office in order to minimize the possibility of an overpayment. Each payment would show the period for which the payment was made. If she worked for any portion of a compensable period, she must return the payment to the Office, even if she had already advised the Office that she was working.

On March 13, 2006 Dr. Stephen D. Thompson, an attending Board-certified orthopedic surgeon, released appellant to return to full-time limited-duty work with restrictions effective March 21, 2006. She returned to work on April 6, 2006.¹

By letter dated May 1, 2006, the employing establishment advised appellant that since she had returned to work, the Office had been notified of this action. It requested that her compensation payments be terminated and noted any compensation payments to which she was not entitled could result in an overpayment.

In a May 19, 2006 overpayment worksheet, the Office determined that appellant received compensation in the amount of \$911.42 during the period April 6 through 15, 2006. It found that a basic life insurance premium in the amount of \$5.14 was not deducted from April 6 through 15, 2006. The Office subtracted the life insurance premium and found that appellant had received a total overpayment of \$906.28.

On May 19, 2006 the Office issued a preliminary determination that an overpayment in the amount of \$906.28 had occurred because appellant continued to receive compensation for temporary total disability through April 15, 2006 after returning to full-time limited-duty work on April 6, 2006. The Office found that she was at fault in the creation of the overpayment as she knew or should have known that the payment she received was incorrect after she returned to full-time modified work. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an

¹ On May 8, 2006 Dr. Thompson released appellant to return to her regular work duties with no restrictions.

accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. Appellant did not respond within the allotted time period.

By decision dated June 19, 2006, the Office finalized the preliminary overpayment determination. It found that appellant was not without fault in the creation of the overpayment in the amount of \$906.28 that occurred from April 6 through 15, 2006. She was aware that, after she returned to work, she was no longer entitled to receive compensation for temporary total disability. The Office directed appellant to repay the overpayment as she was no longer receiving compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Office regulations, at 20 C.F.R. § 10.500(a), provide as follows:

“Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to full-time limited-duty work on April 6, 2006. She received her regular salary with no wage loss. However, appellant received compensation for temporary total disability from April 6 through 15, 2006. The Office issued a check which covered the period in question in the gross amount of \$911.42. In calculating the overpayment, the Office deducted from the April 6 through 15, 2006 compensation check, a payment for basic life insurance in the amount of \$5.14. This resulted in an overpayment of \$906.28. As appellant had returned to work from April 6 through 15, 2006 and had no entitlement to compensation for that period, the Office properly calculated the \$906.28 overpayment. Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation or contesting the existence and amount of the overpayment. The Office properly determined that she received an overpayment of compensation in the amount of \$906.28.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees’ Compensation Act² provides that an overpayment of compensation shall be recovered by the Office unless “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.”³ Thus, the Office

² 5 U.S.C. § 8129(b).

³ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

may not waive the overpayment of compensation unless appellant was without fault.⁴ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁵

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

"(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect."⁶

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

"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."⁷

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that she was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.⁸

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The evidence of record is insufficient to establish that appellant knew or should have been expected to know that she accepted an incorrect payment. As noted, the overpayment of compensation occurred during the period April 6 through 15, 2006 when appellant accepted a compensation check for wage loss after she returned to work on April 6, 2006. Although the Office's January 26 and February 28, 2006 letters indicated that appellant should return Office payments intended for periods she worked after returning to the employing establishment, the generalized statements contained in the letters do not show, without additional evidence, that appellant reasonably should have known that she received

⁴ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁵ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.433(b).

⁸ See *Diana L. Booth*, *supra* note 5.

improper payments. The record does not contain a photocopy of the compensation check in question. Thus, there is no evidence to show whether the period of wage loss from April 6 through 15, 2006 was imprinted on the check. This would have put appellant on notice that the compensation check was payment for a period of wage loss to which she was not entitled as well as establish fault. Further, there is no evidence of record indicating that any information or letter accompanied the check with the above information. For these reasons, the Board finds that appellant was not at fault in creation of the overpayment.

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act⁹ if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹⁰ The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$906.28 overpayment. 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.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$906.28 during the period April 6 through 15, 2006. The Board, however, finds that she was not at fault in the creation of the overpayment

⁹ 5 U.S.C. § 8129(b).

¹⁰ 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 20 C.F.R. §§ 10.434, 10.436, 10.437.

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2006 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the overpayment. The decision is reversed with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 13, 2007
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