

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

A.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
City of Industry, CA, Employer**

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**Docket No. 07-1380
Issued: October 15, 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 April 25, 2007 appellant filed a timely appeal from a March 27, 2007 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation for which she was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.¹

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$2,445.89 overpayment because she received two compensation checks covering the same period; (2) whether the Office properly found that she was not without fault in creating the overpayment; and (3) whether the Office properly directed recovery of the overpayment in a lump sum.

¹ In a decision dated February 8, 2007, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. On March 6, 2007 she requested a review of the written record. As appellant did not appeal the February 8, 2007 termination decision, it is not before the Board at this time.

FACTUAL HISTORY

On August 19, 2004 appellant, then a 42-year-old clerk, filed a recurrence of disability claim on November 24, 2003 due to an April 3, 2001 employment injury. She attributed her condition to casing mail six hours per day. The Office adjudicated the claim as an occupational disease and accepted that appellant sustained bilateral shoulder impingement syndrome due to factors of her federal employment. Appellant stopped work and filed claims for compensation on account of total disability beginning November 24, 2003. The Office paid her compensation for temporary total disability beginning November 30, 2003.

On March 29, 2005 two different claims examiners both issued appellant compensation checks in the amount of \$2,445.89 covering the period February 20 through March 19, 2005. The checks were sent directly to her financial institution in the form of direct deposit. On April 7, 2005 the Office notified appellant of its preliminary finding that she received an overpayment of \$2,445.89 because she received two payments covering the same period of February 20 through March 19, 2005. The Office informed her of its initial determination that she was at fault in the creation of the overpayment because she “was notified by telephone several days before the payments were issued...” The Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of the letter if she disagreed that the overpayment occurred, if she disagreed with the amount of overpayment, if she believed that the overpayment occurred through no fault of her own and if she believed that recovery of the overpayment should be waived. The Office requested that she complete an attached overpayment recovery questionnaire and submit supporting documentation. On April 26, 2005 appellant telephoned the Office and indicated that she was remitting a check for the amount of the overpayment.

In a decision dated March 27, 2007, the Office finalized its finding that she received an overpayment of \$2,445.89 because she received two checks covering the same period. The Office further found that she was at fault in creating the overpayment and that she should repay the overpayment by sending a check for the full amount.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees’ Compensation Act² defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ The Office’s regulations state in pertinent part: “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.”⁴

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8116(a).

⁴ 20 C.F.R. § 10.500.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral shoulder impingement and paid her compensation beginning November 24, 2003 based on her submission of claims for compensation on account of disability (Forms CA-7). On March 29, 2005 two separate claims examiners issued her compensation checks in the amount of \$2,445.89 covering the same period, February 20 through March 19, 2005. As appellant was only entitled to receive one check for this period, she received an overpayment of compensation in the amount of \$2,445.89.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulation⁶ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. 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.”

The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.⁷ The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from the Office or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.⁸ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.⁹ The Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.¹⁰

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433.

⁷ *Tammy Craven*, 57 ECAB ___ (Docket No. 05-249, issued July 24, 2006).

⁸ *Id.*

⁹ *Id.* at n.6.

¹⁰ *Id.* at n.7.

ANALYSIS -- ISSUE 2

The record establishes that appellant received an extra payment from the Office issued March 29, 2005 covering the period February 20 through March 19, 2005 in the form of a direct deposit to her bank account.

The Board finds that appellant was without fault in the creation of the overpayment. The Office determined that she was at fault because it notified her by telephone several days before the two compensation checks covering the same period were deposited in her account of its mistake. The record, however, contains no evidence that the Office informed appellant that she would receive two checks covering the same period. As noted, an employee who receives payments from the Office in the form of direct deposits may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹¹ While appellant accepted the \$2,445.89 overpayment by gaining control over the funds deposited in her account pursuant to her authorization, the record does not establish that she knew that she would receive an incorrect payment on that date. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into her account, when direct deposit is used, a claimant is not on notice of the amount of payment until after it has been deposited. The Office has not established that appellant knew or should have known that she received an incorrect payment. Consequently, the Board finds that the Office improperly determined that appellant was at fault in the creation of the overpayment and therefore that it was not subject to waiver.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$2,445.89 overpayment because she received two compensation checks covering the same period. The Board finds, however, that she was not at fault in creating the overpayment and thus is eligible for consideration of waiver of the overpayment.¹²

¹¹ See *supra* note 7.

¹² In view of the Board's disposition of the issue of fault, the issue of whether the Office properly required repayment is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 27, 2007 is affirmed in part and set aside in part. The case is remanded for the Office to determine whether appellant is entitled to waiver of the overpayment.¹³

Issued: October 15, 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

¹³ Appellant submitted new evidence with her appeal. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office together with a request for reconsideration under 5 U.S.C. § 8128.