

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

D.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 08-208
Issued: May 1, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 30, 2007 appellant filed a timely appeal from a September 18, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who found her at fault in creating a \$1,312.13 overpayment for the period November 11 to December 23, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$1,312.13 for the period November 11 to December 23, 2005; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver.

FACTUAL HISTORY

On October 6, 2005 appellant, then a 49-year-old customer service sales associate, filed an occupational disease claim alleging that her left rotator cuff tear was employment related.¹ In a November 27, 2005 letter, she detailed the employment duties she believed caused or contributed to her condition. Appellant stopped work on November 11, 2005 and returned to work with restrictions on April 3, 2006.² The Office accepted her claim for a left rotator cuff tear on January 10, 2006.³

On December 29, 2005 appellant filed a (Form CA-7) claim for compensation, for leave without pay for the period November 11 to December 23, 2005. She did not check either the yes or no box on whether the leave was intermittent. On the back of the form the employing establishment stated an absence analysis form would be submitted once the Office adjudicated the claim and a compensable period was identified.

The Office paid appellant wage-loss compensation in the amount of \$3,741.29 for the period November 11 to December 23, 2005. The date of payment was January 10, 2006.

On January 25, 2006 appellant filed a Form CA-7 claim for compensation requesting leave buyback for the period November 11 to December 16, 2005. The Office approved appellant's request for leave buyback on February 15, 2006. The Office paid the employing establishment for leave buyback for the period November 11 to December 16, 2005 in the amount of \$1,505.26.

The Office received an absence analysis form for the period October 29, 2005 to January 20, 2006. During the period in question, November 11 to December 23, 2005, appellant used 16 hours of holiday leave, 61.68 hours of sick leave, 26.10 hours of annual leave and 144.22 hours of leave without pay.

In a February 14, 2006 memorandum to file, the Office calculated the amount of the overpayment for the period November 11 to December 23, 2005. It noted that appellant received gross compensation of \$3,741.28 when she was only entitled to \$2,175.68, resulting in an overpayment of \$1,565.60. The Office subtracted appellant's payments for health benefits (\$125.97), basic life insurance (\$22.50) and OLI (\$105.00), which resulted in a total overpayment amount of \$1,312.13.

By letter dated February 21, 2006, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$1,312.13 for the period

¹ This was assigned claim number 09-2064733. On June 16, 2006 the Office combined claim numbers 09-0379484, 09-0463760 and 09-2064733, with claim number 09-0463760 as the master file number. The record also contains evidence from two other claims filed by appellant. The Office accepted bilateral carpal tunnel syndrome for claim number 09-0463760.

² On November 11, 2005 appellant had left rotator cuff surgery.

³ Appellant filed a claim for a schedule award on May 9, 2006. As the Office has not issued a final schedule award decision it is not an issue before the Board on this appeal. See 20 C.F.R. § 501.2(c).

November 11 to December 23, 2005 because she received wage-loss benefits for the same period she received compensation for leave without pay. The Office found that appellant was at fault in creating the overpayment. The Office asked her to submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment and advised her of her right to request a prerecoupment hearing or a telephone conference.

On March 3, 2006 appellant requested a prerecoupment hearing before an Office hearing representative, which was held on August 24, 2006. Subsequent to the hearing, she submitted an overpayment recovery questionnaire dated September 1, 2006.

By decision dated September 18, 2007, the Office hearing representative found that appellant received an overpayment of compensation in the amount of \$1,312.13 that arose because she received both wage-loss compensation and used sick, annual and holiday leave from November 11 to December 23, 2005. The Office hearing representative found that appellant was only entitled to 144.22 hours of leave without pay from November 11 to December 23, 2005 but received compensation for 248 hours. The Office hearing representative provided the calculation of the overpayment, finding that she was due a gross amount of \$2,175.68, not including deductions for health and life insurance premiums, for the period November 11 to December 23, 2005. As appellant received a gross amount of \$3,741.28 during the period, the Office hearing representative determined that she was overpaid by \$1,312.13 by subtracting the gross amount she was entitled to and including the deductions for health and life insurance premiums. The Office hearing representative found that she was at fault in the matter of the overpayment for the reason that she knew or should have known that she was accepting an incorrect compensation payment.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation 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.”⁴

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.⁵ Section 8118(c) of the Act provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.⁶

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8116(a).

⁶ 5 U.S.C. § 8118(c).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,312.13. An employee cannot receive paid leave and compensation for wage-loss during the same period.⁷ That is what occurred in this case. The record contains copies of appellant's absence analysis for the period November 11 to December 23, 2005 and claim for compensation (Form CA-7) for the period November 11 to December 23, 2005. She used 16 hours of holiday leave, 61.68 hours of sick leave, 26.10 hours of annual leave and 144.22 hours of leave without pay. On the claim for compensation form, appellant indicated that she used LWOP for the period November 11 to December 23, 2005. She did not check yes or no to the question of whether it was intermittent. The employing establishment noted on the back of the form that it would provide an absence analysis once the Office adjudicated the claim and a compensable period was identified. Appellant received both wage-loss compensation for temporary total disability and was paid leave for the period November 11 to December 23, 2005. She was only entitled to 248 hours of leave without pay from November 11 to December 23, 2005. The amount of compensation paid for the hours she used leave during this period, \$1,312.13, is an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

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 receives 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; (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).⁸

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, it must show that, at the time she received the compensation checks in question,

⁷ See *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

⁸ 20 C.F.R. § 10.433(a).

she knew or should have known that the payment was incorrect.⁹ With respect to whether an individual is with fault, section 10.433(b) 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.”¹⁰

The record in this case supports that appellant received both pay for annual, sick or holiday leave and wage-loss compensation for temporary total disability from the Office for the period November 11 to December 23, 2005.

The Board finds that appellant was at fault in creating the overpayment. Appellant asserts that she did not understand the process regarding restoring leave used during the period in question and that she had been unaware that the Office had overpaid her. She alleged that she did claim leave used as she had submitted a copy of a CA-7 form claiming leave buyback which had been approved by the Office. The Board is not persuaded by appellant’s assertions. Appellant filed two CA-7 forms. The December 29, 2005 CA-7 form contained no indication that she had used any type of leave during the period November 11 to December 23, 2005. The Office paid appellant on January 10, 2006 for this leave. The January 25, 2006 CA-7 form requested leave buyback and was submitted subsequent to receipt of payment for wage-loss compensation for the period November 11 to December 23, 2005. The record establishes that appellant used intermittent leave during this period, but she did not indicate this on the December 29, 2005 CA-7 form. She did not request leave buyback on the December 29, 2005 CA-7 form and did not do so until she submitted a January 25, 2006 CA-7 form. When appellant subsequently requested leave buyback for the period November 11 to December 16, 2005, she was aware that she had received an incorrect payment, but made no effort to return any of the overpaid compensation. The record contains evidence of her use of holiday leave, sick leave and annual leave during the period November 11 to December 16, 2005. She knew or should have known that the Office’s payment of compensation for the same period constituted an overpayment. Even though the Office erred by paying compensation for the period when appellant had already received paid leave, this does not excuse appellant’s fault in accepting compensation payments she knew or should have known were incorrect.¹¹

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,312.13 and that she was not without fault in the creation thereof, thereby precluding waiver of the recovery of the overpayment.

⁹ See *Diana L. Booth*, 52 ECAB 370 (2001); *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ *Ricky Greenwood*, 57 ECAB ____ (Docket No. 05-1739, issued March 10, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2007 is affirmed.

Issued: May 1, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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