

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

C.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 08-638
Issued: October 14, 2008**

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 December 27, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 2, 2007 merit decision in which a hearing representative found appellant at fault in the creation of an overpayment and not entitled to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.¹

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$52,324.50 for the period May 16, 2005 through November 25, 2006; and (2) whether the Office properly found that appellant was at fault in creating the overpayment, thus precluding waiver of the recovery of the overpayment.

¹ The record also contains an April 17, 2007 wage-earning capacity decision and a June 15, 2007 overpayment decision in the amount of \$431.12 for the receipt of duplicate checks for the refund of health benefits. Appellant has not contested these decisions on appeal; thus, the Board will not address these decisions.

FACTUAL HISTORY

On April 20, 2004 appellant, then a 52-year-old supervisor customer service, filed an occupational disease claim for bilateral carpal tunnel syndrome. The Office accepted the claim for bilateral carpal tunnel syndrome and authorized surgical release. In its May 20, 2004 letter accepting the claim, the Office advised appellant:

“Once you return to work, or obtain new employment, notify this Office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

Appellant stopped work on February 8, 2005 and underwent a left carpal tunnel release. On March 29, 2005 she underwent a right carpal tunnel release. The Office paid appellant appropriate compensation for total disability. Appellant returned to limited-duty work on May 16, 2005.

In a letter dated July 13, 2005, appellant advised the Office that she had returned to work on May 16, 2005 as supervisor of maintenance operations support. She also advised that she received a compensation check on June 13, 2005 and indicated that she mailed the check back to the Office. Appellant advised that she would hold the next payment of \$3,107.58 until she received confirmation from the Office that it had discontinued payments and that it had received her returned June compensation check.

On February 22, 2007 the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$58,483.62 for the period May 16, 2005 through November 25, 2006.² It noted that appellant had returned to work on May 16, 2005 but continued to receive compensation for wage loss through November 25, 2006. The Office found that appellant was at fault in creating the overpayment because she failed to return the checks to which she was not entitled. It informed appellant that, if she disagreed with the decision, she could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearing and Review.³

In a February 22, 2007 letter, appellant advised the Office that she was returning checks dated October 28 and November 25, 2006 in the amount of \$3,079.56 each. The checks were for the period October 1 through 28, 2006 and October 29 through November 25, 2006, respectively. The Office cancelled the checks on March 13, 2007.

² The Office originally calculated the overpayment in the amount of \$61,591.20 but gave appellant credit for her returned compensation check of \$3,107.58 for a total amount of \$58,483.62.

³ In a February 21, 2007 letter, the employing establishment noted that appellant had received paid leave from October 17 through November 17, 2006 while she was also receiving wage-loss compensation from the Office. It advised appellant that all paid leave for that period would be changed to leave without pay.

Appellant requested a prerecoupment hearing. This was later changed to a review of the written record. In an undated statement, appellant argued that she was without fault in creating the overpayment as she had notified the Office of her return to work but continued to receive wage-loss compensation benefits. Although she had requested confirmation that her compensation checks had been stopped in July 2005, she never received a response from the Office. Appellant contended that, as the compensation checks continued to come and the Office was aware she was working, she was entitled to the money. She also advised that she was not financially able to repay such a large sum of money. In an August 6, 2007 statement, appellant stated that she was divorced and had resigned from the employing establishment due to medical reasons. She noted that she had been approved for social security benefits and would begin receiving \$1,767.00 a month commencing November 2007. Appellant stated that she had no present income and that her family was helping financially. In a statement entitled "Part III Without Fault Statement," she summarized the events of the overpayment. Appellant stated that, if she had received a response to her inquiries about the compensation checks, the overpayment would not have happened. She submitted copies of bank statements and transactions from her online banking. Appellant also submitted an overpayment recovery questionnaire, copies of EN1032 forms signed September 13, 2005 and September 28, 2006, noting that she worked, and a July 29, 2007 notice of disability award from the Social Security Administration, which noted that she was entitled to \$1,767.00 a month beginning October 2007.

By decision dated October 2, 2007, an Office hearing representative found that an overpayment in the amount of \$52,324.50 had occurred during the period May 16, 2005 through November 25, 2006.⁴ The hearing representative found that appellant was at fault in creating the overpayment as she knew or should have known that the compensation checks should not have continued once she returned to work and began receiving her salary. The hearing representative further found that appellant did not submit all the information requested to ascertain her current financial status; therefore, she was unable to render a decision on an equitable repayment schedule. The hearing representative found the overpayment due and payable.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation under the Act the employee may not receive salary, pay or remuneration of any type from the United States. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation except in limited specified instances.⁵

⁴ The hearing representative noted the original overpayment was in the amount of \$61,591.20. Appellant had returned checks in the amount of \$3,107.58, \$3,079.56 and \$3,079.56 for a total of \$9,266.70. Thus, the original overpayment of \$61,591.20 was offset by \$9,266.70 for a total of \$52,324.50.

⁵ 5 U.S.C. § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$52,324.50 for the period May 16, 2005 through November 25, 2006. The record shows that appellant received an overpayment during the period in question because she received wage-loss checks for temporary total disability compensation after returning to full-time work on May 15, 2005. The Office calculated the \$52,324.50 overpayment by totaling the amount of temporary total disability compensation appellant received for the period in the total amount of \$61,591.20. It subtracted the three checks appellant returned in the amounts of \$3,107.58, \$3,079.56 and \$3,079.56, a total of \$9,266.70, to total \$52,324.50. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁶ provides that an overpayment must be recovered 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. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment.⁷

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

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 the individual knew or should have known to be incorrect; or

“(2) Failed to provide information which the individual 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.”⁸

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. When the Office finds a claimant at fault in creating the overpayment on the grounds that he accepted a payment which the individual knew or should have been expected to

⁶ 5 U.S.C. § 8129(a)-(b).

⁷ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁸ 20 C.F.R. § 10.433(a).

know was incorrect, it must establish that, at the time the claimant received the compensation payment, the claimant knew or should have known the payment was incorrect.⁹

Appellant returned to full-time employment on May 15, 2005 and was, therefore, no longer entitled to temporary total wage-loss compensation. The evidence establishes that appellant knew she was accepting payments to which she was not entitled. In her July 13, 2005 letter, appellant advised that she notified the Office that she had returned to work. She also returned a June 13, 2005 check. In returning the check, appellant demonstrated that she was aware that the compensation checks received after she returned to work were incorrect. Appellant contended that she was entitled to subsequent checks as she continued to receive compensation payments from the Office. Her contention is without merit. Appellant knew to report her return to work to the Office and returned one check to which she was not entitled. This is evidence that she knew that she was not entitled to temporary total wage-loss compensation and salary from the employing establishment at the same time. Appellant is at fault in creating the overpayment. The fact that the Office may have been negligent in issuing the payments after appellant returned to work does not mitigate this finding.¹⁰ As appellant is with fault in the creation of the overpayment from May 16, 2005 through November 25, 2006, she is not eligible for waiver of the recovery of the overpayment. The Office is required by law to recover this overpayment.¹¹ Thus, the October 2, 2007 Office decision is affirmed.

CONCLUSION

The Board finds that an overpayment of compensation of \$52,324.50 was created during the period May 16, 2005 through November 25, 2006 because appellant received compensation for that period following her return to work. The Board further finds that, under the circumstances of this case, appellant is at fault in the creation of the overpayment and is not entitled to waiver of recovery of the overpayment.

⁹ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁰ See 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹¹ The repayment of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); see also *Joan Ross*, 57 ECAB 694 (2006); *Bob R. Gilley*, 51 ECAB 377 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2008
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