

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

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**R.B., Appellant**

**and**

**SMITHSONIAN INSTITUTION, NATIONAL  
ZOOLOGICAL PARK, Washington, DC,  
Employer**

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**Docket No. 08-1384  
Issued: October 21, 2008**

*Appearances:*

*Steven D. Scavuzzo, Esq., for the appellant*

*No appearance, for the Director*

Oral Argument September 18, 2008

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On April 8, 2008 appellant, through her attorney, filed a timely appeal from a December 4, 2007 merit decision of the Office of Workers' Compensation Programs finding she received an overpayment of compensation and that she was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$124,416.57 for the period August 10, 2002 through November 25, 2006; and (2) whether she was at fault in creating the overpayment.

**FACTUAL HISTORY**

On October 7, 1992 appellant, then a 37-year-old police officer, filed a claim alleging that she sustained an injury to her back and neck in an October 5, 1992 motor vehicle accident.

She stopped work on October 7, 1992. The Office accepted the claim for a compression fracture at T6 and paid her compensation beginning November 21, 1992.

By decision dated July 24, 2002, the Office terminated appellant's compensation and entitlement to medical treatment effective August 10, 2002 on the grounds that she had no further injury-related disability or condition. It informed her that she must return any compensation received after August 10, 2002.

The Office continued to pay appellant compensation for total disability after August 10, 2002. On June 4, 2004 the Office of Personnel Management (OPM) informed the Office that she had elected workers' compensation benefits in lieu of retirement benefits. It indicated that it would recover dual benefit payments made through June 1, 2004. In letters dated November 1, 2005 and 2006, the Office requested that appellant provide information regarding any wages that she earned from April 1, 2004 to March 31, 2005.

On November 22, 2006 the Office noted that it had failed to delete appellant from the periodic rolls after it terminated her benefits. It calculated that it paid appellant \$126,416.57 after the termination of her compensation.

On November 27, 2006 the Office informed appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$126,416.57 for the period August 10, 2002 through November 25, 2006 because she continued to receive compensation after the termination of her benefits. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. It also notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On December 19, 2006 appellant submitted a completed overpayment recovery questionnaire and requested waiver of the overpayment. In an accompanying letter, she related that her attending physician had submitted November 11 and 25, 2002 medical reports supporting continued employment-related disability. Appellant heard nothing further from the Office until it requested earnings information on November 1, 2006. She believed that she was entitled to disability compensation due to her October 6, 1992 work injury. Appellant enclosed medical reports from Dr. Rida N. Azer, a Board-certified orthopedic surgeon, dated November 11 and 25, 2002.<sup>1</sup> She maintained that she would experience financial hardship attempting to repay the debt.

On June 21, 2007 the Office requested that appellant complete another overpayment recovery questionnaire. It noted that she provided workers' compensation benefits as her monthly income even though it had terminated her entitlement to compensation on August 10, 2002. On July 16, 2007 appellant completed another overpayment recovery questionnaire and submitted supporting financial documentation.

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<sup>1</sup> In a report dated November 11, 2002, Dr. Azer diagnosed carpal tunnel syndrome and a cervical and lumbar disc syndrome. He opined that appellant was unable to work. On November 25, 2002 Dr. Azer found that she could not perform her usual employment. The Office first received Dr. Azer's reports on December 28, 2006.

By letter dated July 17, 2007, appellant's attorney related that she believed that Dr. Azer had submitted reports dated November 11 and 25, 2002 to the Office. Counsel stated:

“[Appellant] continued to receive her monthly workers' compensation benefit check uninterrupted after the August 2002 termination date passed, and she assumed that the reason she did was that the reports submitted by Dr. Azer on her behalf had convinced your office that she remained disabled as a result of her work[-]related injury.”

The attorney noted that in May 2004 OPM told appellant that she must make an election between disability retirement benefits and workers' compensation payments. She elected to continue to receive benefits from the Office. Appellant returned \$21,458.97 she received from OPM as a dual payment. Counsel argued that, if she had to pay the alleged overpayment of \$126,416.57 to the Office, she should be credited for the \$21,458.97 paid to OPM and for the amount per month that she should have received from OPM beginning May 31, 2004 to the present.

By decision dated December 4, 2007, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$126,416.57 for the period August 10, 2002 through November 25, 2006 because she continued to receive compensation after the Office terminated her benefits. It further finalized its finding that she was at fault in the creation of the overpayment. The Office considered the financial information submitted and determined that appellant should forward a check for \$1,000.00 each month to repay the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

The Act<sup>2</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> Section 8129(a) of the Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office, by decreasing later payments to which the individual is entitled.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained a compression fracture at T6 due to an October 6, 1992 motor vehicle accident. It paid her compensation for disability beginning November 21, 1992. By decision dated July 24, 2002, the Office terminated her entitlement to compensation benefits effective August 10, 2002. It, however, continued to pay appellant wage-loss compensation in the amount of \$124,416.57 from August 10, 2002 through November 25, 2006. Appellant thus received a \$124,416.57 overpayment of compensation.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 5 U.S.C. § 8129.

Appellant, through her attorney, contends that the overpayment of \$124,416.57 should be reduced by the \$21,458.97 that she provided to OPM to repay a dual payment and by the amount of OPM benefits that she lost by electing benefits from the Office. She can, however, request that OPM provide her an opportunity to make a knowing election of OPM benefits as she is not entitled to workers' compensation benefits.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of the Act and its implementing regulations, 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.<sup>5</sup> Section 10.433 of the implementing regulations provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>6</sup> The regulation further provides that 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.<sup>7</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>8</sup> Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

By accepting payments after her entitlement to benefits was terminated effective August 10, 2002, appellant accepted payments that she knew or should have known were incorrect. In its July 24, 2002 termination decision, the Office notified her that she must return any compensation received after August 10, 2002. As noted, however, the Office paid appellant compensation payments from August 10, 2002 through November 25, 2006 in the amount of \$124,416.57. Appellant was aware that the Office had terminated her entitlement to benefits and the Office explicitly informed her that she must return any compensation received after August 10, 2002. Thus, she accepted payments that she knew or should have known to be incorrect. Accordingly, the Board finds that appellant was at fault in the creation of the overpayment. The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.<sup>10</sup>

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<sup>5</sup> 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>6</sup> *Id.* at § 10.433(a).

<sup>7</sup> *Id.*

<sup>8</sup> 20 C.F.R. § 10.433(a)(3); *Tammy Craven*, 57 ECAB 589 (2006).

<sup>9</sup> 20 C.F.R. § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>10</sup> See 20 C.F.R. § 10.435(a); *D.R.*, 59 ECAB \_\_\_\_ (Docket No. 07-823, issued November 1, 2007); *William E. McCarty*, 54 ECAB 525 (2003).

Appellant's attorney contended that she believed that the Office had reconsidered its termination of her benefits based on the submission of November 2002 reports from Dr. Azer. Counsel also argued that she believed that she was entitled to benefits from the Office as OPM sent her a letter requesting that she make an election of benefits between the Office and OPM letters and as the Office requested information about her earnings and income. In determining fault, the Office applies a "reasonable person" test.<sup>11</sup> The Board finds that, under the circumstances of the case, it was not reasonable for appellant to believe that she was entitled to continued compensation payments after August 10, 2002 given the plain language of the Office's termination decision and explicit instruction that any compensation received after August 10, 2002 must be returned.

As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover the overpayment.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$124,416.57 for the period August 10, 2002 through November 25, 2006. The Board further finds that she was at fault in creating the overpayment.

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<sup>11</sup> *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>12</sup> With respect to 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 Bob R. Gilley*, 51 ECAB 377 (2000). As appellant is not in receipt of continuing compensation payments under the Act, the issue of recovery is not before the Board.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 4, 2007 is affirmed.

Issued: October 21, 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