

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

K.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Leandro, CA, Employer**

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**Docket No. 08-2135
Issued: April 16, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 29, 2008 appellant filed a timely appeal from a June 3, 2008 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$7,183.80 for the period April 10 to July 7, 2007; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery.

FACTUAL HISTORY

This case is before the Board for the second time. In the prior appeal, the Board, on April 21, 2008, set aside an August 20, 2007 overpayment decision and remanded the case for further proceedings.¹ In the August 20, 2007 decision, the Office found that an overpayment was

¹ Docket No. 08-201 (issued April 21, 2008).

created in the amount of \$7,183.80 for the period April 10 to July 7, 2007 and denied appellant's request for waiver of the recovery of the overpayment. The Board found the evidence of record was devoid of any evidence that compensation was paid for the period in question. The facts and the circumstances of the case are set forth in the Board's prior decision and are hereby incorporated by reference.²

On remand the Office issued a final overpayment decision dated June 3, 2008 finding that appellant received an overpayment of compensation in the amount \$7,183.80 and that she was at fault in its creation. It calculated the amount of the compensation based upon the computer printout forms it attached showing payment of compensation to appellant during the period April 10 to July 7, 2007.

LEGAL PRECEDENT -- ISSUE 1

Under section 8129 of the Federal Employees' Compensation Act³ and the 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.⁴

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, the Office will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁵ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁶ Additionally, the Office is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.⁷ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.⁸ The recipient of the alleged overpayment may present evidence in response to the Office's preliminary notice either in writing or at a precoupment hearing.⁹ The evidence must be

² On September 26, 2006 appellant, then a 47-year-old letter carrier, filed an occupational disease claim alleging that her carpal tunnel syndrome was employment related. The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant had carpal tunnel surgery on January 8, 2006. In a February 6, 2007 memorandum to file, a claims examiner stated that appellant would be placed on the periodic rolls for temporary total compensation. However, the record does not contain a letter to appellant informing her of this decision. Appellant stopped work on January 8, 2006 and returned to modified work on April 10, 2007.

³ 5 U.S.C. §§ 8101-8193

⁴ *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁵ 20 C.F.R. § 10.431(a).

⁶ *Id.* at § 10.431(b).

⁷ *Id.* at § 10.431(c).

⁸ *Id.* at § 10.431(d).

⁹ *Id.* at § 10.432.

presented or the hearing requested within 30 days of the date of the written notice of overpayment.¹⁰ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹¹

The Office procedure manual provides as follows:

“Once an overpayment is identified and calculated, the OE [Office examiner] is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, the OE is responsible for issuing a final decision....”¹²

The procedure manual further provides:

“If the claimant is determined to be with fault, Form CA-2201 [preliminary finding notice] must be released (along with an OWCP-20) within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. Form CA-2201 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of (a) fact and amount of overpayment; (b) fault; and (c) waiver. Along with Form CA-2201, the OE should provide a clearly written statement explaining how the overpayment was calculated.”¹³

ANALYSIS -- ISSUE 1

In the prior appeal, the Board found the record did not establish that appellant received an overpayment and did not contain findings which would allow appellant to understand the precise defect of her claim or the evidence which would tend to overcome it. Thus, the Board found the evidence of record insufficient to establish that an overpayment in the amount of \$7,183.80 existed.

Following the Board’s remand, the Office inserted computer printouts into the record detailing the payments made to appellant for the period April 10 to July 7, 2007. It again issued an overpayment decision dated June 3, 2008 finding that an overpayment was created in the amount of \$7,183.80 for the period April 10 to July 7, 2008, that she was at fault in the creation of the overpayment and, thus, was not entitled to waiver.

The Board finds, however, that the Office failed to follow its procedures in issuing the June 3, 2008 decision. The Office regulations provide that, before seeking to recover an overpayment or adjust benefits, the Office will advise the individual in writing that the

¹⁰ *Id.*

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (May 2004).

¹³ *Id.* at Chapter 2.600.4(a)(1) (May 2004).

overpayment exists and the amount of the overpayment.¹⁴ As set out above, the written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.¹⁵ The Office must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹⁶ The Office's procedure manual further provides that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.¹⁷ Prior to issuing its June 3, 2008 decision, the Office did not issue a preliminary determination informing appellant as to how the overpayment was created or computed and why she was considered to be at fault prior to issuing the June 3, 2008 decision. This is in conflict with its own implementing regulations and its own procedure manual. The Office should have issued appellant a preliminary determination of overpayment covering this period and a preliminary finding of fault before issuing a final overpayment decision for the period April 10 to July 7, 2007, accompanied by the appropriate due process rights to a hearing or review of the evidence or a waiver of the foregoing. Consequently, as the Office did not provide appellant with due process, the Board finds that the Office improperly issued its June 3, 2008 decision.

CONCLUSION

The Board finds that the Office improperly issued its June 3, 2008 decision. On remand, the Office should issue a preliminary determination of overpayment for the period April 10 to July 7, 2007 according to its procedures.

¹⁴ 20 C.F.R. § 10.431(a).

¹⁵ *Id.* at § 10.431(b).

¹⁶ *Id.* at § 10.431(d).

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2008 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: April 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board