

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

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**D.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Keyport, NJ, Employer**

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**Docket No. 09-780  
Issued: December 10, 2009**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*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 January 27, 2008 appellant, through counsel, filed a timely appeal of the May 12, 2008 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation benefits, for which she was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$30,264.28 for the period October 13, 2004 through June 7, 2008; and (2) whether she was at fault in creating the overpayment and, therefore, not entitled to waiver of recovery of the overpayment. On appeal, appellant's counsel contends that the finding of fault is inappropriate as appellant did not know she received a double payment.

**FACTUAL HISTORY**

On November 17, 2000 appellant, then a 34-year-old clerk, filed an occupational disease claim alleging that on October 23, 2000 she first realized that her right scapular costal syndrome,

cervical strain and chronic repetitive stress syndrome were employment related. The Office accepted the claim for cervical radiculopathy. On November 10, 2004 it accepted an August 26, 2004 recurrence claim.<sup>1</sup>

Appellant filed a claim for a schedule award. By decision dated August 18, 2006, the Office granted her a schedule award for a 38 percent bilateral impairment of her upper extremities. The period of the award was from October 24, 2005 through January 31, 2008 and was based on a weekly pay rate of \$593.95. The total number of weeks was 118.56.

In a letter dated August 25, 2006, appellant's counsel requested reconsideration of the August 18, 2006 schedule award decision. Appellant indicated that she was not challenging the impairment rating, but contended that the Office incorrectly calculated her weekly pay rate.

In a letter dated August 30, 2006, appellant requested a lump-sum payment of her August 18, 2006 schedule award noting that she needed this money to refinance. In a September 12, 2006 letter, the Office offered her a lump-sum payment for her remaining schedule award in the amount of \$31,493.15 as of September 30, 2006. It advised:

“Any lump-sum payment will represent full and final compensation payment for the period of the award even if you suffer a recurrence of total disability. If you elect to receive your schedule award in this form, please sign the attached agreement and return it to this Office as soon as possible.”

On September 14, 2006 appellant signed the lump-sum agreement provided by the Office accepting the sum of \$31,493.15 in full payment of the remainder of her schedule award from October 1, 2006 through January 31, 2008. She indicated by her signature that she understood that this lump-sum payment was full and final settlement and that she was entitled to no further monetary benefits for the duration of her schedule award.

In a letter dated October 24, 2006, the Office informed appellant that a written request for an emergency payment was made and that payment should be in her account by October 25, 2006. It informed her that it was not deleting the payment scheduled for October 27, 2006. Appellant was advised to send a check for the duplicate payment as she was only entitled to \$31,493.15.

By decision dated November 17, 2006, the Office found that an incorrect pay rate had been used to calculate the August 18, 2006 schedule award. It determined that the correct pay rate should be \$605.89 and modified the August 18, 2006 schedule award to reflect the correct pay rate of \$605.89.<sup>2</sup>

In a January 10, 2007 letter, the Office noted that it had issued to her an emergency payment of \$31,493.15 *via* electronic funds transfer (EFT) on October 25, 2006 and a regular

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<sup>1</sup> On February 14, 2008 the Office combined file numbers xxxxxx368 and xxxxxx238 with xxxxxx238 as the master file number.

<sup>2</sup> The Office noted that while a pay rate of \$753.20 had been used to calculate her compensation for her recurrence claim, a review of the record did not support this pay rate.

payment in the same amount *via* EFT was made on October 27, 2006. It requested that appellant return the duplicate payment and send a check in the amount of \$31,493.15.

A computer printout dated March 12, 2007 revealed that appellant had been paid \$85,220.07 for the schedule award granted on August 18, 2006.

In a letter dated March 12, 2007, the Office issued a preliminary determination of overpayment and informed appellant that she had received an overpayment of \$31,493.15 because of a duplicate lump-sum schedule award payment. It found that she was at fault in the creation of the overpayment as she knew or should have known that she was not entitled to two lump-sum payments for the same schedule award.

By decision dated May 9, 2007, the Office finalized the preliminary overpayment determination.

In a letter dated June 19, 2007, appellant's counsel requested reconsideration of the pay rate determination for her schedule award. He contended that correct pay rate was \$753.20 and submitted payroll information for the years 2002 through 2004, to support her contention.

On October 17, 2007 the Office denied appellant's request for reconsideration. It noted that, although the pay rate of \$593.95 was incorrect, the correct pay rate was actually \$605.89 and not \$753.20 as appellant's counsel contended on reconsideration.

On March 25, 2008 the Office recalculated appellant's lump-sum schedule award based on her correct pay rate of \$605.89. It found there was an overpayment of \$30,264.28.

By decision dated April 10, 2008, the Office vacated the prior May 9, 2007 overpayment decision as the overpayment had been calculated on an incorrect pay rate.

By letter dated April 10, 2008, the Office issued a preliminary determination of overpayment and informed appellant that she had received an overpayment in the amount of \$30,264.28 as she had received a duplicate lump-sum schedule award payment. It noted that she had been paid a total of \$85,220.07 based upon an incorrect pay rate of \$593.95. The Office noted that she was entitled to \$54,955.79 based upon a correct pay rate of \$605.89. The difference between what appellant was paid, \$85,220.07 and what she was owed, \$54,955.79, resulted in an overpayment of \$30,264.28. The Office found that she was at fault in the creation of the overpayment as she knew or should have known that she was not entitled to two lump-sum payments for the same schedule award. Appellant did not respond.

By decision dated May 12, 2008, the Office finalized the preliminary overpayment determination.<sup>3</sup> It instructed appellant to forward a check for \$30,264.28 to repay the overpayment.<sup>4</sup>

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

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>5</sup> When a claimant receives a duplicative compensation payment for a period that she has already received compensation, an overpayment of compensation is created.<sup>6</sup>

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

On appeal, appellant does not contest the pay rate on which the schedule award was calculated. She requested a lump-sum payment of her August 18, 2006 schedule award. Appellant signed a lump-sum agreement on September 14, 2006, which clearly stated that she was entitled to \$31,493.15 as full payment for the remainder of her schedule award from October 1, 2006 through January 31, 2008. She indicated by her signature that she understood that this lump-sum payment was full and final settlement and that she was entitled to no further monetary benefits for the duration of her schedule award. On October 24, 2006 the Office informed appellant that a written request for an emergency payment was made and that payment should be in her account by October 25, 2006. It informed her that it was not deleting the payment scheduled for October 27, 2006. Appellant was advised to send a check for the duplicate payment as she was only entitled to \$31,493.15. In a January 10, 2007 letter, the Office reiterated that she had received payments of \$31,493.15 *via* EFT on October 25 and 27, 2006. It requested that appellant return the duplicate payment and send a check in the amount of \$31,493.15 to avoid an overpayment.

The Office issued appellant two deposits for the amount of \$31,493.15 on October 25 and 27, 2006. It notified her by letter dated October 24, 2006, that she had received a duplicate payment on October 27, 2006 which she was to return. The Office subsequently recalculated appellant's schedule award as it had been based on an incorrect pay rate. Based upon the new pay rate, it determined that appellant should have been paid \$54,955.79 based upon a pay rate of

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<sup>3</sup> On September 5, 2008 appellant requested reconsideration of the May 12, 2008 overpayment determination. She also submitted a completed overpayment recovery questionnaire form with her request.

<sup>4</sup> On August 22, 2007 appellant filed a recurrence claim alleging a recurrence of disability beginning July 30, 2007, which the Office accepted. By letter dated February 13, 2008, the Office noted that she claimed wage-loss compensation for the period December 6, 2005 to December 15, 2006. It informed appellant that as she had been granted a schedule award and she was not entitled to compensation for the overlapping dates.

<sup>5</sup> 5 U.S.C. § 8116(a).

<sup>6</sup> See *E.V.*, 59 ECAB \_\_\_\_ (Docket No. 07-1733, issued December 11, 2007); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

\$605.89. The Board finds that the record establishes that appellant was paid a total of \$85,220.07. Appellant has clearly received a duplicate payment contrary to her lump-sum agreement and has received an overpayment in the amount of \$30,264.28.

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

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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>7</sup>

Section 10.433(a) of the Office's regulations provide that the Office:

“[M]ay 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 in 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).”<sup>8</sup>

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.<sup>9</sup>

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

On appeal, appellant's counsel contends that the Office erred in finding appellant at fault in the creation of the overpayment as it was automatically deposited into her account. She also contends that she was entitled to the money deposited in her account as she had sustained a recurrence of disability which overlapped the period of the schedule award.

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<sup>7</sup> 5 U.S.C. § 8129; *see P.M.*, 60 ECAB \_\_\_ (Docket No. 07-2169, issued March 3, 2009); *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>8</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>9</sup> *Tammy Craven*, 57 ECAB 689 (2006).

Appellant signed a lump-sum agreement on February 12, 2005 which specified the amount of compensation and the period covered by this compensation. She received two direct deposits to her account on October 25 and 27, 2006. Appellant was advised in letters dated October 24, 2006 and January 10, 2007 that she had received a duplicate payment. Thus her contention that she was not aware that she had received a duplicate claim is unpersuasive.

Appellant also contends that the fault finding is wrong as she believed that she was entitled to the money deposited in her account because she had sustained a recurrence of disability, which overlapped the period of her schedule award. This argument is not persuasive. The September 12, 2006 letter explicitly informed appellant that, because she was receiving a lump-sum payment, she would not be entitled to further compensation during the period of the schedule award.<sup>10</sup> This letter put her on notice that she would not receive any additional compensation during the period of her schedule award. Based on the facts and circumstance of this case, the Board finds that the Office properly found that appellant accepted a payment which she knew or should have know was incorrect.

The Board further notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in a lump sum. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>11</sup>

### **CONCLUSION**

The Board finds that appellant has received an overpayment of compensation in the amount of \$30,264.28. The Board further finds that she was at fault in the creation of this overpayment and that the overpayment is not subject to waiver.<sup>12</sup>

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<sup>10</sup> See *Edward W. Spohr*, 57 ECAB 287 (2005) (noting that the terms of a lump-sum agreement for payment of a schedule award clearly spelled out the limitation on the claimant's right to receive further compensation benefits).

<sup>11</sup> *R.M.*, 60 ECAB \_\_\_\_ (Docket No. 07-1066, issued February 6, 2009).

<sup>12</sup> With respect to recovery of the overpayment, the Board's jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act. See *J.K.*, 60 ECAB \_\_\_\_ (Docket No. 08-1761, issued January 8, 2009); *Terry A. Keister*, 56 ECAB 559 (2005); *Albert Pineiro*, 51 ECAB 310 (2000). As the Office instructed appellant to submit a check for the entire amount to repay the overpayment, the Board lacks jurisdiction to review the recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 12, 2008 is affirmed.

Issued: December 10, 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