

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

T.R., Appellant

and

**DEPARTMENT OF THE INTERIOR, FISH &
WILDLIFE SERVICE, Albuquerque, NM,
Employer**

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**Docket No. 08-2405
Issued: June 12, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 3, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 29, 2008 regarding an overpayment of compensation. 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 the Office properly determined an overpayment of \$1,237.36 was created from February 26 to March 17, 2007; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated May 19, 2008, the Board found that the Office had not properly explained the amount of an overpayment to

appellant, and the case was remanded for further development.¹ The Board did not address the waiver issue. The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

In a letter dated June 12, 2008, the Office advised appellant of a preliminary determination that the amount of the overpayment was \$1,237.36. According to it, this was the amount of compensation for temporary total disability from February 26 to March 17, 2007. The Office found appellant was at fault in creating the overpayment as she accepted a payment she knew or should have known was incorrect.

By decision dated August 29, 2008, the Office finalized its preliminary determination. It found an overpayment of \$1,237.36 was created and waiver was denied on the grounds that appellant was at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.² 20 C.F.R. § 10.500 provides that "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."

ANALYSIS -- ISSUE 1

As the Board indicated in the prior appeal, the record indicates that appellant returned to work at two hours per day on February 26, 2007. A compensation payment of \$1,644.46 was issued on March 17, 2007 for the 28-day period February 18 to March 17, 2007. This represented appellant's compensation for temporary total disability and was the same gross compensation as appellant had received since November 16, 2006. It is an overpayment of compensation, as appellant had returned to part-time work during the period covered.

On March 19, 2007 the Office issued a payment of \$778.11 for the period February 26 to March 17, 2007. The \$778.11 payment represented the correct amount of compensation owed for the period, based on an offset for actual earnings using the *Shadrick* formula.³ Therefore the amount of the overpayment is that portion of the \$1,644.46 that is attributable to the period February 26 to March 17, 2007.

The Office calculation of \$1,237.36 was based on a worksheet finding that for the period February 26 to March 17, 2007 appellant would have been paid gross compensation of \$1,494.26, with health benefit and life insurance premiums reducing the net compensation to \$1,237.36. But the issue is not what appellant would have or should have been paid for the

¹ Docket No. 07-2228 (issued May 19, 2008).

² 5 U.S.C. § 8116(a).

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

period, but what she actually was paid. And what she was paid was \$1,644.46 for a 28-period. The only reasonable method to calculate the amount attributable to the 20-day period February 26 to March 17, 2007 is to divide the payment into 28 for a daily amount, and multiply this by 20. Using this method, the daily payment of \$58.73 is multiplied by 20 for an overpayment of \$1,174.60.⁴ The Board finds that based on the evidence of record the overpayment amount is \$1,174.60.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁵ provides: "Adjustment or recovery by the United States may not be made when 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."⁶ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.⁷

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: "(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 was incorrect."

ANALYSIS -- ISSUE 2

On March 17, 2007 the Office issued a payment representing temporary total disability for the period February 18 to March 17, 2007. Appellant had returned to work at two hours per day on February 26, 2007. The November 16, 2006 letter to her had clearly advised her that, if she had worked during any portion of the period covered by a compensation payment, she must return the payment to the Office. When appellant received the March 17, 2007 payment,⁸ covering the period February 18 to March 17, 2007, she should have known it was incorrect because she had been working part time since February 26, 2007. The Board finds that she accepted a payment she should have known was incorrect. Accordingly, appellant is at fault in creating the overpayment pursuant to 20 C.F.R. § 10.433(a)(3). Since she was at fault in creating the overpayment, the Office properly denied waiver.

⁴ The Office had initially used this method, although they added a cost-of-living increase effective March 1, 2007 of \$28.56. Again, it is not what appellant should have received, it is the amount she actually received. There is no evidence the March 17, 2007 payment included a cost-of-living increase.

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *Id.* at § 8129(b).

⁷ *Norman F. Bligh*, 41 ECAB 230 (1989); 20 C.F.R. § 10.433(a).

⁸ It appears that the payment was sent to appellant; there is no evidence of direct deposit payments.

CONCLUSION

The Board finds the amount of the overpayment is \$1,174.60. Appellant was not without fault in creating the overpayment, and therefore she is not entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 29, 2008 is modified to reflect the amount of the overpayment as \$1,174.60 and affirmed as modified.

Issued: June 12, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board