

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

B.H., Appellant and DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Houston, TX, Employer)))))))))	Docket No. 09-292 Issued: September 1, 2009
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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 November 10, 2008 appellant filed a timely appeal from an October 24, 2008 decision of a hearing representative of the Office of Workers' Compensation Programs, finding that she received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment from July 7 to August 30, 2008 in the amount of \$3,912.06; 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

On October 20, 2007 appellant, then a 37-year-old immigration enforcement agent, injured her left knee while running an obstacle course in the performance of duty. The Office

accepted her claim for a tear of the medial meniscus of the left knee and she received compensation benefits. Appellant subsequently stopped work and was paid wage-loss compensation beginning April 28, 2008. She was placed on the periodic compensation rolls as of June 8, 2008.

In a letter dated June 10, 2008, the Office advised appellant that compensation benefits for total disability were only payable while she could not perform work because of her injury. Appellant was advised to inform the Office if she returned to work and to return any payment to the Office to minimize the possibility of an overpayment. She was also advised of the penalties for accepting compensation payments to which she was not entitled.

In a June 30, 2008 report, Dr. Robert H. Fain, a Board-certified orthopedic surgeon, advised that appellant could return to light duty. He provided restrictions which included that she could return to desk work. Dr. Fain advised that appellant could not walk long distances, jump, run, climb or lift over 45 pounds.

In a July 11, 2008 report, an Office field nurse assigned to appellant's claim indicated that she returned to work on July 7, 2008. A subsequent review by the Office confirmed that appellant had returned to full-time light duty on July 7, 2008. The Office determined that she received an overpayment from July 7 to August 30, 2008 in the amount of \$3,912.06.

A computer printout of the Office's compensation payment history shows that appellant received compensation in the amount of \$3,912.06 covering the period July 7 to August 30, 2008. The Office explained that, for a 28-day periodic roll cycle, she was entitled to receive \$1,991.59, or \$71.13 per day. It also determined that appellant was overpaid compensation for the 55-day period from July 7 to August 30, 2008. The Office multiplied the daily rate of \$71.13 by 55 days and determined that she received an overpayment in the amount of \$3,912.06.

On September 24, 2008 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$3,912.06 because she returned to full-time duty on July 7, 2008 but received wage-loss compensation for temporary total disability from July 7 to August 30, 2008. It found that she was at fault in creating the overpayment because she was paid her salary by the employing establishment and received compensation from the Office after she returned to work such that she knew or should have known that she was not entitled to further compensation. The Office advised appellant that she had 30 days in which to submit evidence or argument if she disagreed with the preliminary determination. Appellant did not respond to the Office's preliminary determination.

By decision dated October 24, 2008, the Office finalized the overpayment of compensation in the amount of \$3,912.06. It found that appellant returned to full-time duty on July 7, 2008; however, compensation payments for total disability continued through August 30, 2008. The Office found that she accepted payments she knew or should have known to be incorrect because she received compensation payments for wage loss despite having returned to full-time duty at full salary. As appellant was at fault in the creation of the overpayment, she was not entitled to waiver of the recovery. She was advised to either forward a

check for the entire amount of the overpayment or to contact the Office to make arrangements for repayment.

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.¹ The Office regulations, at 20 C.F.R. § 10.500(a), provide that benefits are available only while the effects of a work-related condition continue. 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.² A claimant is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.³

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to full-time duty on July 7, 2008. However, she received compensation for temporary total disability from July 7 to August 30, 2008. As appellant returned to work and had no entitlement to compensation for this period, the receipt of compensation for this time frame, caused an overpayment of compensation to appellant. The Board will affirm the Office's October 24, 2008 decision on the issue of fact of overpayment.

In calculating the overpayment, the Office determined that appellant received total compensation in the amount of \$3,912.06 from July 7 to August 30, 2008. It explained that she received \$1,991.59 for each 28-day period which represented \$71.13 in compensation per day. The Office multiplied this amount, \$71.13, by the 55 days for the above-noted period, to total \$3,912.06. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$3,912.06 for the period July 7 to August 30, 2008, when she returned to full-time work on July 7, 2008.

Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation or contesting the existence and amount of the overpayment. As noted above, any compensation paid for total wage loss subsequent to the date of return to work should be declared an overpayment.⁴ The Board will affirm the October 24, 2008 decision on the amount of the overpayment.

¹ 5 U.S.C. § 8116(a).

² 20 C.F.R. § 10.500(a).

³ *L.S.*, 59 ECAB ____ (Docket No. 07-1961, issued February 14, 2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 2

The Office may 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 with respect to 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; or (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).⁵

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted a payment which she knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, it must show that, at the time she accepted the compensation checks in question, she knew or should have known that the payment was incorrect.⁷

The Board finds that, at the time appellant received the compensation in question, she knew or should have known that the payments were incorrect. The record reflects that she returned to work on July 7, 2008. On June 10, 2008 the Office had informed appellant that she must return checks received after she returned to work in order to avoid an overpayment of compensation. Appellant was advised by the Office of the penalty provision for accepting compensation to which she was not entitled. She was notified of the period covered by each compensation check and should have been reasonably aware that she could not receive wage-loss compensation for a period after she had returned to work. On appeal, she acknowledged receipt of the two checks. Appellant noted that she inadvertently spent one check and hid the other one so well she could not find it. The Board finds that she knew or should have known that she was not entitled to receive compensation in the amount of \$3,912.06 from July 7 to August 30, 2008

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.430(a) provides that the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. 20 C.F.R. § 10.430(b) notes that, by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment. *See J.R.*, 60 ECAB __ (Docket No. 08-1107, issued June 15, 2009).

concurrently with her full salary. As she is at fault in the matter of the overpayment, it cannot be waived.⁸

On appeal, appellant contends that she thought the compensation payments in question were for an earlier period. However, as noted, each compensation check is accompanied by an indication of the period covered by check. This put her on notice of the period covered by each check.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$3,912.06 which occurred for the period July 7 to August 30, 2008. The Board further finds that she was at fault in the creation of the overpayment and thus not entitled to waiver of the recovery.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: September 1, 2009
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

⁸ 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 *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.