

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

S.B., Appellant)	
)	
and)	Docket No. 09-628
)	Issued: September 11, 2009
U.S. POSTAL SERVICE, MONMOUTH)	
PROCESSING & DISTRIBUTION CENTER,)	
Eatontown, NJ, Employer)	

Appearances:
Jeffrey Brents, for the appellant
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 January 5, 2009 appellant, through his representative, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 22, 2008 finding that he had received 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 appellant has received an overpayment in the amount of \$626.29 from August 23 to 29, 2008 as he received both compensation and annual leave; and (2) whether appellant was at fault in the creation of the overpayment, thereby denying waiver of the recovery.

FACTUAL HISTORY

On June 6, 2008 appellant filed a traumatic injury claim alleging that he developed a muscle pull in his groin while pulling a machine in the performance of duty. The Office accepted his claim for inguinal hernia without obstruction on the right.

Appellant filed a claim for compensation on September 9, 2008 and requested compensation for leave without pay from August 3 to 29, 2008. On the reverse of the form, the employing establishment indicated that appellant used annual leave from August 25 to 29, 2008. On September 9, 2008 the employing establishment completed a time analysis form and indicated that appellant's nonscheduled days off were August 23 and 24, 2008 and that he used eight hours of annual from August 25 through 29, 2008. On September 16, 2008 the Office granted appellant compensation in the amount of \$626.29 for the period August 23 through 29, 2008.

The employing establishment completed a time analysis form on September 29, 2008 for the period July 22 through August 22, 2008 which stated that appellant was entitled to compensation for leave without pay only, not leave buyback. Appellant received compensation in the amount of \$1,753.62 for this period.

Appellant returned to full duty effective November 15, 2008.

In a letter dated November 21, 2008, the Office informed appellant that it had made a preliminary determination that he was overpaid \$626.29 for the period August 23 to 29, 2008 as he received annual leave and wage-loss compensation for this period. It stated that appellant was at fault in the creation of the overpayment. Appellant responded by telephone and stated that he intended to buy back that leave.

The Office finalized the overpayment decision on December 22, 2008 finding that appellant received an overpayment in the amount of \$626.29 and that he was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to receive compensation for wage-loss for a period during which he utilized annual leave.

On appeal, appellant alleged that he had requested leave without pay for the periods in question rather than annual leave and that he did not complete a leave slip requesting annual leave.

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, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.¹ When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.²

ANALYSIS -- ISSUE 1

Appellant completed a claim for compensation requesting compensation for leave without pay from August 3 to 29, 2008. On the reverse of the form, the employing establishment indicated that appellant used annual leave from August 25 through 29, 2008 and was not

¹ 5 U.S.C. § 8116(a).

² See *Lawrence J. Dubuque*, 55 ECAB 667, 670-671 (2004).

scheduled to work from August 23 through 24, 2008. The Office issued appellant compensation on September 16, 2008 in the amount of \$626.29 for the period August 23 through 29, 2008.

The record establishes through payroll records that appellant requested compensation for a period during which he utilized annual leave or was not otherwise on duty for which the Office paid him \$629.29. Therefore, appellant has received an overpayment of compensation in the amount of \$629.29.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act³ 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.”

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 received 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).⁴

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.⁵

ANALYSIS -- ISSUE 2

Appellant indicated that he had utilized leave without pay for the period August 25 through 29, 2008. The employing establishment submitted a time analysis form which indicated that appellant utilized annual leave for this period. As appellant indicated in the telephone conversation with the Office that stated that he intended to buy back that leave, the record clearly establishes that appellant accepted a payment which he knew or should have known to be incorrect. Although he argued on appeal that he did not request annual leave for this period, he has not submitted a copy of the leave request to establish this fact and his payroll records dispute that contention.⁶ The Board notes that it does not have jurisdiction to review the Office’s finding

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.433(a).

⁵ *Id.* at § 10.433(b).

⁶ Following the Office’s December 22, 2008 decision, appellant submitted additional new evidence before the Board. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

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.⁷

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$629.29 and that he was at fault in the creation of the overpayment such that it is not subject to waiver of the recovery.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 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

⁷ *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).