

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

J.W., Appellant)	
)	
and)	Docket No. 10-1271
)	Issued: February 3, 2011
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Artesia, NM, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2010 appellant filed a timely appeal from a January 14, 2010 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and that she was at fault in its creation. 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 received an overpayment of \$2,929.82 because she received compensation for total disability from April 1 through May 9, 2009 after she returned to work; and (2) whether she was at fault in creating the overpayment.

FACTUAL HISTORY

On April 24, 2008 appellant, then a 30-year-old border patrol agent trainee, filed a claim for an injury to her left side, back and rib cage when she was kicked by another student. The Office accepted her claim for a contusion of the left chest wall, a thoracic strain and lumbar strain. It paid appellant compensation for total disability by electronic funds transfer (EFT) beginning May 25, 2008 and placed her on the periodic rolls beginning July 6, 2008. On

April 11, 2009 the Office paid compensation by EFT for the period March 15 through April 11, 2009. On May 9, 2009 it paid appellant compensation by EFT from April 12 through May 9, 2009.

On April 13, 2009 appellant informed the Office that she was working as an investigator with the Office of Personnel Management (OPM). She stated, "I get paid per investigation. There is no set salary I will receive and it will vary each week depending on how many investigations I am able to complete. This first paycheck I received was on April 10, 2009 in the amount of \$662.50. This will vary each week and there is no set amount."

On April 15, 2009 appellant informed the Office by telephone that she was working as a contractor for the Federal Government. She telephoned the Office again on April 30, 2009 to report that she received income of \$260.00 on April 17, 2009, \$333.00 on April 24, 2009 and \$1,525.00 on May 1, 2009. In a May 11, 2009 (Form EN1032), appellant related that she earned \$4,472.63 with no benefits working as a background investigator from April 1 to May 8, 2009.

In a May 26, 2009 fiscal payment worksheet, the Office multiplied appellant's daily compensation of \$75.12 by 39, the number of days that she received pay for work performed, to find an overpayment of \$2,929.82.

On June 3, 2009 the Office advised appellant of its preliminary determination that she received an overpayment of \$2,929.82 because she returned to work on March 15, 2009 but received wage-loss compensation through May 9, 2009. It informed her of its preliminary finding that she was at fault in creating the overpayment as she knew or should have known that "there was no entitlement to wage-loss benefits after returning to full-time work." The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a preresoupment hearing.

On June 16, 2009 appellant requested a preresoupment hearing. She noted that, after she received a paycheck on April 10, 2009, she advised the Office that she was earning income. In an accompanying overpayment recovery questionnaire, appellant argued that she did not believe that she was paid erroneously. She notified the Office by writing and by telephone when she received her first paycheck.

By letter dated June 16, 2009, appellant related that she began unpaid training as an investigator with a contractor for OPM on March 15, 2009. She began work on April 12, 2009 and subsequently informed the Office of her return to work. Appellant inquired if the Office could stop paying her pending resolution of the issues created by her return to work. She received various amounts of pay depending on her investigations. Appellant disagreed that the overpayment was her fault and stated, "I especially do not agree that I owe \$2,929.82 because I was not even getting paid for my training of my new job in March." Her hours varied each week and she had to rest between work hours due to her injury.

A telephonic hearing was held on October 7, 2009. Appellant related that she started training on March 15, 2009 and began receiving payments on April 10, 2009 for work beginning April 1, 2009. She challenged the period of the overpayment.

By decision dated January 14, 2010, an Office hearing representative found that appellant received an overpayment of \$2,929.82 because she received compensation for wage-loss benefits and total disability from April 1 to May 9, 2009.¹ She noted that the Office calculated the overpayment for 39 days from April 1 to May 9, 2009. The hearing representative determined that appellant was not without fault in creating the overpayment and could pay \$50.00 a month to recover the overpayment.

On appeal, appellant argues that she is not at fault for the overpayment. She also notes that she is unable to perform her regular employment due to her injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act² provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

A claimant is not entitled to receive total disability compensation 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.⁵

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a contusion of the left chest wall, thoracic strain and lumbar strain and paid her compensation for total disability beginning May 25, 2008. On April 1, 2009 appellant began working for a private contractor as a background investigator. She related that she was in unpaid training for the position from March 15 to 31, 2009. Appellant received her first paycheck on April 10, 2009 for work performed as of April 1, 2009. The Office paid her compensation for total disability through May 9, 2009. When an employee has earnings from employment, she is not entitled to receive total disability benefits and actual earnings for the same time period.⁶ Consequently, she received an overpayment of compensation.

¹ On November 30, 2009 the Office began paying appellant based on an informal loss of wage-earning capacity determination.

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102.

⁴ *Id.* at § 8129(a).

⁵ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁶ *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

The Office calculated the overpayment by multiplying appellant's daily wages by 39, the number of days that she received compensation for disability from April 1 to May 9, 2009. While it initially indicated that the period of the overpayment was March 15 to May 9, 2009, it properly calculated the overpayment using only the period in which she received income. As discussed, when an employee has earnings from employment, she is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁷ Under these circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula.⁸ If a reduction of benefits based upon actual earnings is not accompanied by a determination that the actual earnings "fairly and reasonably" represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination.⁹ The Office did not apply the *Shadrick* formula to compute appellant's entitlement to earnings for the period in question but instead determined that the entire amount was an overpayment. The case, consequently, will be remanded for the Office to recalculate the amount of compensation that arose because she received compensation for total disability when she had earnings from employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹⁰ provides that "[a]djustment 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 this subchapter or would be against equity and good conscience." Section 10.433 of the Office's implementing regulations¹¹ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

"(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."

The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹² The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from the Office or simply with the passage of time and a

⁷ *Id.*

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

⁹ *See D.C.*, 61 ECAB __ (Docket No. 09-1460, issued April 19, 2010).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.433.

¹² *W.P.*, 59 ECAB 514 (2008); *Tammy Craven*, 57 ECAB 689 (2006).

greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹³ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁴ The Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.¹⁵

ANALYSIS -- ISSUE 2

On April 1, 2009 appellant began earning wages in nonfederal employment. She advised the Office on April 13, 2009 of her return to work. From April 1 through May 9, 2009, appellant received compensation for total disability from the Office after she returned to nonfederal employment. In finding her at fault for the creation of the overpayment for this period, the Office determined that she accepted payments through direct deposit that she knew or should have known to be incorrect.

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.¹⁶ It is generally not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁷

Appellant received compensation by direct deposit for total disability from the time she resumed work on April 1 to May 9, 2009. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFT is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence that appellant was aware of the period included in the direct deposits covering April 1 to May 9, 2009.¹⁸ Appellant had no reason to know at the time the Office deposited the overpayment into her checking account that the Office had issued an incorrect payment given that there was only one full incorrect payment made by the Office.¹⁹ As the funds were deposited directly into her bank account, she was not in a position to immediately decline acceptance of the amount paid by the Office. The Board finds that appellant is without fault in

¹³ *Tammy Craven, id.*

¹⁴ *Id.* at n. 6.

¹⁵ *Id.* at n. 7.

¹⁶ *Karen K. Dixon, 56 ECAB 145 (2004).*

¹⁷ *See K.H., Docket No. 06-191 (issued October 30, 2006).*

¹⁸ *See Karen K. Dixon, supra* note 15.

¹⁹ *Tammy Craven, supra* note 11.

creating the overpayment. A finding that appellant is without fault does not mean, however, that the claimant may keep the money, but rather that the Office must consider her eligibility for waiver for this period. On remand, the Office should consider whether she is entitled to waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation but that the case is not in posture for decision on the amount of overpayment. It further finds that she is not at fault in creating the overpayment. On remand, the Office should determine whether waiver of recovery of the overpayment is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 14, 2010 is affirmed in part, set aside in part and reversed in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 3, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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