

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

FAWN M. MYERS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Augusta, SC, Employer**

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**Docket No. 04-34
Issued: February 20, 2004**

Appearances:

*Fawn M. Myers, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On October 2, 2003 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated September 12, 2003, finding that an overpayment of \$21,721.15 had occurred, denying waiver of the overpayment and establishing a repayment plan for the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the overpayment issue.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$21,721.15 occurred; (2) whether appellant was at fault in creating the overpayment and, therefore, ineligible for waiver of the overpayment; and (3) whether the Office properly held that the overpayment should be repaid by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On October 20, 1992 appellant, then a 28-year-old letter carrier, filed a Form CA-1 (notice of traumatic injury¹ and claim for continuation of pay/compensation), alleging that on October 16, 1992 she sustained injury when she inhaled chemicals while in the performance of duty. The Office accepted the claim for chemical inhalation. Appellant resigned from federal employment on March 31, 1993² and, in 1995, the Office retroactively approved compensation for wage-loss commencing March 31, 1993.

By decision dated June 20, 2002, the Office issued a schedule award, pursuant to 5 U.S.C. § 8107, for an 18 percent permanent impairment to each lung. The period of the award was 56.16 weeks of compensation, from June 16, 2002 until July 14, 2003.

The record indicates that, prior to the issuance of the schedule award, appellant had requested that she receive a lump-sum payment for any schedule award issued. By letter dated June 3, 2002, the Office advised appellant that lump-sum payments are made at the discretion of the Office. Appellant was advised that compensation payments are intended as income replacement and she should submit evidence that the schedule payments are not to be used as a substitute for wages. Appellant received a copy of a June 20, 2002 letter from the Office to the Office of Personnel Management, noting that effective June 16, 2002 appellant was receiving a schedule award "instead of compensation for wage loss."

In a letter dated June 28, 2002, the Office advised appellant that a lump sum in her case would be \$21,721.15 and that such a lump sum would represent full and final compensation payment for the period of the award. On July 3, 2002 appellant signed an agreement to receive a lump-sum payment of \$21,721.15 for the period July 14, 2002 until July 14, 2003; the agreement stated that no further monetary compensation benefits would be extended to appellant for the duration of the schedule award. A daily computation log of compensation payments indicates that a payment dated July 13, 2002 was issued to appellant for \$1,703.06, covering the period June 16 to July 13, 2002. On July 17, 2002 the Office issued a direct deposit payment of \$21,721.15 into a designated bank account. The computation log reports that the period covered was October 16, 1992 to July 12, 2002. On August 7, 2002 the Office sent appellant a payment of \$21,721.15; the computation log stated that the period covered was October 16, 1962 [sic] to August 6, 2002.

In a letter dated September 20, 2002, the Office advised appellant that it had made a preliminary determination that an overpayment of \$21,721.15 had been created as a result of an erroneous duplicate payment in that amount. The Office also made a preliminary finding that appellant was at fault in creating the overpayment, as she accepted a payment she knew or should have known was incorrect.

¹ Traumatic injury is defined in the Office's regulations as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee).

² According to the employing establishment, appellant was under investigation for alleged misconduct at the time of her resignation.

On October 2, 2002 appellant completed an overpayment recovery questionnaire (Form OWCP-20). Appellant reported approximately \$940.00 in monthly expenses and noted that she received \$954.00 per month in Social Security benefits.

On June 25, 2003 a hearing was held before an Office hearing representative. At the hearing appellant indicated that she requested a lump-sum schedule award in order to build onto her house; stating “[b]ut they told me that that means for the period of my scheduled award I would not receive my monthly compensation checks.... I understood that.” Appellant further stated that when she received the first payment she thought it represented “what I was going to get any way if I had just got my check monthly for a year,” and that the second payment was for the permanent impairment to her lungs.

By decision dated September 12, 2003, the hearing representative finalized the preliminary determination that an overpayment of \$21,721.15 was created by the issuance of the August 7, 2002 payment. The hearing representative also finalized the finding that appellant was at fault and, therefore, waiver of the overpayment was denied. With respect to repayment, the hearing representative reviewed the financial information, noting that appellant had approximately \$1,800.00 in monthly compensation, \$954.00 in Social Security, with \$940.00 in monthly expenses. Based on this information, the hearing representative determined that appellant could repay the overpayment by deducting \$500.00 per month from continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8116(a) provides:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period, during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

“However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government, does

not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”

ANALYSIS -- ISSUE 1

The Office awarded appellant 56.16 weeks of compensation, from June 16, 2002 to July 14, 2003, representing an 18 percent permanent impairment to each lung. Pursuant to an agreement with appellant, the Office issued a payment of \$21,721.15 as a lump-sum payment for the period July 14, 2002 to July 14, 2003. As noted above, once a lump-sum payment has been made, appellant is not entitled to any additional compensation for the period covered. However, on August 7, 2002 the Office issued a duplicate payment of \$21,721.15 intending to cover the same period. Accordingly, the Board finds an overpayment was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees’ Compensation 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.”⁴ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁵

On the issue of fault 20 C.F.R. § 10.433 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

The Office determined that appellant accepted the August 7, 2002 payment when she knew or should have known was incorrect. The Board concurs in this determination. The June 3 and June 20, 2002 correspondence sent to appellant clearly indicated that the compensation pursuant to the schedule award would represent the only compensation she would receive for the period of the award from June 16, 2002 until July 14, 2003. Appellant sought a lump-sum payment and the agreement she signed on July 3, 2002 advised her that she would be paid \$21,721.15 for the period July 14, 2002 until July 14, 2003 and that this represented the only compensation she would receive for that period. Appellant herself acknowledged at the hearing before the Office hearing representative that she understood she could not receive both schedule award compensation payments and compensation for wage loss at the same time.

The Office deposited a payment of \$21,721.15 directly into her account on July 17, 2002. According to appellant, she believed that this payment was for her monthly wage-loss

³ 5 U.S.C. §§ 8101 *et. seq.*

⁴ 5 U.S.C. § 8129(b).

⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

compensation that she would have received over the next year. This is inconsistent with her other statements as to receipt of compensation for wage-loss and schedule award compensation payments and inconsistent with the circumstances of this case. When appellant received the direct deposit of \$21,721.15, she should have known it represented the lump-sum payment of her schedule award. The payment was for the specific amount she had been notified she would receive pursuant to the lump-sum agreement signed on July 3, 2002. Appellant had no reasonable expectation of receiving any additional compensation until the schedule award expired on July 14, 2003. The August 7, 2002 payment was for the same amount as the lump-sum schedule award. Under these circumstances, the Board finds that appellant should have known that the August 7, 2002 payment was incorrect. Pursuant to section 8129(b) of the Act and 10.433(3) of the implementing regulations, the Board finds that appellant is not without fault in creating the overpayment and, therefore, is not entitled to waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of the Office's regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship."⁶

ANALYSIS -- ISSUE 3

On appeal appellant expressed her concern regarding the requirement that she repay the overpayment by deducting \$500.00 from her continuing compensation payments. On this issue the Board looks at how the Office made its determination as to the repayment rate and whether the Office considered relevant factors to minimize hardship. In this case, the Office hearing representative did review the financial circumstances of appellant based on the recovery questionnaire that was submitted. The hearing representative noted that appellant had reported approximately \$940.00 per month in expenses, while her income included Social Security benefits of \$954.00 as well as a compensation payment of approximately \$1,800.00 per month. In view of the excess monthly income over expenses, the hearing representative determined that \$500.00 every 28 days from compensation payments would be an appropriate rate of repayment for the \$21,721.15 overpayment.

The decision as to the repayment rate does, therefore, appear to have been made based on a consideration of the relevant financial circumstances in the case. There is no evidence that the Office failed to considerer relevant factors that would minimize hardship to appellant. Although appellant suggests that a lower monthly repayment rate would make it easier to meet her expenses, the evidence of record did not establish a financial hardship based on a deduction of

⁶ 20 C.F.R. § 10.321.

\$500.00 every 28 days. Accordingly, the Board finds that the Office properly determined the rate of repayment in this case.

CONCLUSION

The Board finds that the Office properly determined that an overpayment of \$21,721.15 was created when appellant received a duplicate payment in that amount and that appellant was not entitled to waiver of the overpayment because she accepted a payment she should have known was incorrect. The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$500.00 from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2003 is affirmed.

Issued: February 20, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member