

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

KAREN K. DIXON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Middletown, CT, Employer**

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**Docket No. 03-2265
Issued: November 9, 2004**

Appearances:
Linda DeCarlo, for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 22, 2003 appellant filed a timely appeal of a July 17, 2003 decision of the Office of Workers' Compensation Programs, finding that an overpayment of \$4,574.20 was created and appellant was at fault in creating the overpayment. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issues in this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$4,574.20 overpayment of compensation for the period January 14 to March 23, 2003, and (2) whether the Office properly denied waiver of the overpayment on the grounds that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

On December 10, 1998 appellant, then a 36-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel disease causally related to her federal employment. The Office accepted the claim for bilateral carpal tunnel syndrome, left hand basilar joint arthritis and bilateral cubital tunnel syndrome. Appellant began

working in a light-duty position at six hours per day on February 20, 2002. She received compensation for hours claimed as leave without pay; the compensation payments were directly deposited into a bank account. On August 24, 2002 appellant stopped working and she filed a claim for compensation (Form CA-7) commencing August 26, 2002.

By letter dated October 15, 2002, the Office issued a form letter (CA-1049) advising appellant that she would receive a regular payment of \$2,459.72 for the period October 6 to November 2, 2002 and future payments every 28 days. The record indicated that a payment of \$1,142.01 was directly deposited into appellant's bank account for the period August 26 to September 7, 2002. On October 11, 2002 a \$2,459.72 payment was direct deposited into appellant's account covering the period September 8 to October 5, 2002.¹ The subsequent compensation payment history is as follows: a payment of \$2,393.64 on November 2, 2002, payments of \$2,312.88 on November 30 and December 28, 2002 and January 25, 2003, payments of \$2,253.62 on February 22 and March 22, 2003, and a \$46.58 payment issued on April 14, 2003.

The record indicated that on January 14, 2003 appellant returned to work; she generally worked six hours and used two hours of leave without pay per day. In a letter dated May 29, 2003, the Office advised appellant that it had made a preliminary determination that an overpayment of \$4,574.20 had occurred during the period January 14 to March 22, 2003. An overpayment worksheet indicated that appellant had been paid \$5,607.99 in compensation during this period, but should have received \$1,033.79 in compensation, representing 61 hours of leave without pay and a \$73.52 health benefit refund.² With respect to fault, the Office made a preliminary determination that appellant was at fault because the CA-1049 advised her that she could not receive compensation after she returned to work.

In a statement dated June 2, 2003, appellant noted that both she and her husband used direct deposit and that "made it tough to sort out the incoming funds." She completed a overpayment recovery questionnaire and submitted additional financial information.

By decision dated July 17, 2003, the Office finalized its determination that an overpayment of \$4,574.20 was created and that appellant was at fault in creating the overpayment. The Office requested that appellant send a payment for the amount of the overpayment, and if she was unable to refund the overpayment immediately she should contact the Office so that appropriate arrangements for recovery could be made.

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

¹ The \$2,459.72 amount did not reflect deduction of health benefit premiums, and the subsequent payments issued reflected a health benefit deduction.

² The worksheet noted that appellant had refunded an April 19, 2003 payment of \$2,312.90.

limited circumstances.³ 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

The overpayment in this case was created when appellant returned to work on January 14, 2003. For the period January 14 to March 22, 2003, appellant was paid \$5,607.99 in compensation for wage loss. During this period appellant worked generally 6 hours per day; based on the evidence provided by the employing establishment, appellant used 61 hours of leave without pay. She was therefore entitled to 61 hours of compensation, and the Office also found that appellant was entitled to a health benefit refund of \$73.52. The Office accordingly determined that appellant should have received \$1,033.79 in compensation from January 14 to March 22, 2003. The record therefore indicates that an overpayment of \$4,574.20 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees’ Compensation Act⁴ 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.”⁵ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁶

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 had accepted payments she should have known were incorrect because the October 15, 2002 CA-1049 advised her that “each payment made through the Office’s automated system will include the period for which payment is made” and she could not keep a payment if she worked for any portion of the period covered by the payment. The CA-1049 does not, however, acknowledge that in this case that payments were not sent to appellant’s address but were directly deposited into her bank account. It did not advise appellant as to the period covered by a specific payment deposited into her bank account. A direct deposit payment does not indicate “the period for which payment is made.” By the time the Office issued its October 15, 2002 CA-1049, the Office had already deposited payments on

³ 5 U.S.C. § 8116(a).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129(b).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

September 27 and October 11, 2002. Although the CA-1049 indicates that payments are made in a 28-day cycle, there is no specific evidence in this case that is sufficient to put appellant on notice that the date a payment is deposited in her account represents compensation for the immediately preceding 28-day period.

Therefore when the January 25, 2003 payment of \$2,312.88 was deposited, the record does not establish that appellant should have known that the payment was incorrect – it would not be unreasonable for her to believe that the period covered was limited to a period prior to January 14, 2003. The Board finds that appellant is not at fault with respect to this payment.⁷

On February 22 and March 22, 2003, payments of \$2,253.62 were deposited into her account. As of February 22, 2003 appellant had been working for more than five weeks and she offered no probative evidence or argument as to why she felt these payments of temporary total disability were correct. She noted that both she and her husband had direct deposit payments, but there is no evidence to suggest that the bank statements failed to identify the compensation payments. Appellant was advised that she could not accept a payment if she worked during a portion of the period covered and that payments covered a 28-day period. The Board finds that appellant should have known that the February 22 and March 22, 2003 payments were incorrect.

The final payment included in the overpayment was a \$46.58 payment deposited on April 14, 2003. The overpayment worksheet identifies this payment as “CPI” for March 1 to 22, 2003. There is no indication that appellant was aware or should have been aware of the nature of the payment; appellant continued to be entitled to compensation for leave without pay hours and no evidence was presented that appellant should have been aware of an error in the \$46.58 payment.

With respect to fault, therefore, the Board finds that appellant is not at fault with respect to the January 25 and April 14, 2003 payments totaling \$2,359.46. The case will be remanded for the Office to consider waiver of this portion of the overpayment.

CONCLUSION

The Board finds that an overpayment of compensation of \$4,574.20 was created during the period January 14 to March 22, 2003 because appellant had returned to work and continued to receive compensation for total disability. Appellant is found not to be at fault with respect to payments deposited on January 25 and April 14, 2003 because there is no evidence that she should have known the payments were incorrect; she is at fault with respect to February 22 and March 22, 2003 payments.

⁷ See, e.g., *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1488, issued October 9, 2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 17, 2003 is affirmed with respect to fact and the amount of the overpayment. With respect to fault, the case is remanded for consideration of waiver as to the January 25 and April 14, 2003 payments totaling \$2,359.46.

Issued: November 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member