

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

CAROLYN T. LAURIE, Appellant

and

**U.S. POSTAL SERVICE, MANHATTANVILLE
STATION, New York, NY, Employer**

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**Docket No. 04-1411
Issued: November 1, 2004**

Appearances:
Carolyn T. Laurie, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 4, 2004 appellant filed a timely appeal of an April 13, 2004 merit overpayment decision of the Office of Workers' Compensation Programs. The Board has jurisdiction to review this decision.¹

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,034.11; and (2) whether appellant was at fault in the creation of this overpayment.

FACTUAL HISTORY

On January 11, 2003 appellant sustained injuries, accepted by the Office as cervical radiculopathy and post-concussion syndrome, when a package fell on her head, neck and shoulder. She stopped work on January 14, 2003.

¹ 20 C.F.R. §§ 501.2(c) and 501.3.

On April 30, 2003 appellant filed a claim for compensation for disability during the period February 28 to April 30, 2003. On the employing establishment's side of this claim form, it reported on May 6, 2003 that appellant received continuation of pay from January 14 to February 27, 2003 and that she was in a leave-without-pay status from February 28 to April 30, 2003. Appellant subsequently submitted claim forms for continuing compensation.

On October 10, 2003 appellant filed a claim for compensation for a recurrence of disability, on which she indicated that she returned to work on January 30, 2003 and stopped work on February 1, 2003. On October 22, 2003 the employing establishment advised the Office that appellant returned to work from January 30 to February 2, 2003,² and that she received continuation of pay from February 3 to March 3, 2003. It submitted time analysis forms showing that appellant used 28 days of annual and sick leave from March 4 to April 25, 2003, interspersed with periods of leave without pay.

By check dated October 31, 2003, the Office paid appellant compensation for the period February 28 to September 19, 2003 in the net amount of \$16,230.66.

On November 6, 2003 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,338.39 that occurred because she received compensation for temporary total disability during periods when she received continuation of pay or paid leave. The Office preliminarily found that appellant was with fault in the creation of the overpayment because she "was aware or should have reasonably been aware that she was not entitled to receive compensation benefits for total disability after she was paid continuation of pay, annual leave and sick leave by the [p]ost [o]ffice during the period claimed."

Appellant returned to full-time limited duty on January 2, 2004. An Office memorandum of a telephone conference with appellant on April 6, 2004 indicated that appellant stated that she did not respond to the preliminary overpayment decision because she was waiting to receive compensation due to her for the period December 16, 2003 to January 1, 2004. Appellant was advised that this payment would be processed, but that the Office would be required to recoup the full compensation payment to repay the overpayment, which appellant agreed to, and would pursue recovery of any remaining balance. The Office sent appellant a copy of its memorandum of this conference and asked her to respond if it was not accurate. Appellant did not respond.

By decision dated April 13, 2004, the Office found that appellant received an overpayment in the amount of \$2,034.11, an amount calculated by subtracting the compensation due from December 16, 2003 to January 1, 2004, \$1,304.28, from the amount of the overpayment specified in the Office's preliminary determination. The Office finalized its preliminary finding of fault.

LEGAL PRECEDENT

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall

² Sunday, February 2, 2003 was a day appellant was not scheduled to work.

be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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.”³ No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁴

ANALYSIS

Appellant received an overpayment of compensation because she received compensation for total disability during periods between February 28 and April 25, 2003 for which she already had received continuation of pay or annual or sick leave. Appellant is not entitled to such duplicate payments under the Act.⁵ The Board finds that the Office correctly calculated the amount of the overpayment as \$3,338.39 by calculating, for the period February 28 to September 19, 2003, the amount of compensation to which appellant was entitled, exclusive of the dates of continuation of pay or paid leave, (\$12,892.27) from the amount of compensation she received during this period (\$16,230.66). The final overpayment amount was calculated by subtracting the \$1,304.28 appellant was owed in compensation from the amount of the overpayment.⁶ On appeal, appellant does not dispute the amount of the overpayment.

The Board further finds that the Office improperly determined that appellant was at fault in the creation of the overpayment of compensation. The Office applied the third standard of the regulations: acceptance of a payment she knew or should have known was incorrect. Even if

³ 5 U.S.C. § 8129.

⁴ 20 C.F.R. § 10.320(b).

⁵ See *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

⁶ The Office generally should not offset compensation due against an overpayment, as this precludes waiver of the entire overpayment without administrative due process as to the offset amount. *Diana L. Booth*, 52 ECAB 370 (2001). But here appellant agreed to the offset, in effect agreeing to repay part of the overpayment prior to the Office’s final overpayment decision.

appellant knew that she could not receive compensation for total disability during periods of continuation of pay or paid leave, this does not show that she knew or should have known that the check issued by the Office on October 31, 2003 for \$16,230.66, covering a period of almost 7 months, included payment for 28 days of paid leave and 2 days of continuation of pay. It cannot be presumed that appellant knew or should have known the amount of compensation she should receive for six, as opposed to seven, months of total disability, or that the Office's check incorrectly included compensation for periods during which she used paid leave.

CONCLUSION

Appellant received an overpayment of compensation in the amount of \$2,034.11, but she was not at fault in the creation of this overpayment. The case will therefore be remanded to the Office for consideration of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2004 decision of the Office of Workers' Compensation Programs is affirmed with regard to the existence and amount of the overpayment and reversed with regard to the finding of fault.

Issued: November 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member