

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

MAY ANN CONROY, Appellant)	
)	
and)	Docket No. 04-1379
)	Issued: October 29, 2004
U.S. POSTAL SERVICE, POST OFFICE, North)	
Reading, MA, Employer)	
)	

Appearances:
Mary Ann Conroy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 29, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated March 22, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an \$1,186.21 overpayment in compensation for the period June 4 to July 7, 1995; (2) whether the Office properly found that appellant was at fault in the creation of an overpayment in compensation in the amount of \$1,186.21 and, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly required repayment of the overpayment at the rate of \$50.00 each compensation period.

FACTUAL HISTORY

On October 2, 1992 appellant, then a 36-year-old letter sorting machine operator, filed an occupational disease claim alleging that factors of her federal employment caused an arm injury.

On December 8, 1992 the Office accepted that she sustained left arm ulnar nerve entrapment. Appellant subsequently filed additional claims, and on August 23, 1994, the Office also accepted that she sustained employment-related tendinitis of the right hand.¹

Appellant missed intermittent periods of work and in July 1994 began working approximately four hours per day limited duty and submitted Form CA-8 claims for compensation for the additional hours. She received compensation in the amounts of \$2,569.96 for the period July 28 to October 8, 1994, \$943.56 for October 9 to November 4, 1994, \$893.90 for November 25 to December 2, 1994, \$943.56 for the period December 3 to 30, 1994, \$831.82 for December 31, 1994 to January 28, 1995 and \$1,266.36 for January 29 to March 3, 1995, \$933.64 for March 4 to 31, 1995, \$953.48 for April 1 to 29, 1995, \$1,225.90 for April 29 to June 3, 1995, and \$2,412.11 for the period June 4 to July 7, 1995. The record does not indicate that appellant received compensation for November 5 to 25, 1994, although she submitted a Form CA-8 claim for this period with leave analysis showing time away from work.

During this 1994 and 1995 period, appellant telephoned the Office on several occasions to inquire about her compensation. On January 4, 1995 she stated that she had not been paid for the period November 5 to 25, 1994, and on February 28, 1995 inquired about back payment for night differential. In a letter dated March 9, 1995, appellant alleged that she was entitled to night differential for the period October 5, 1991 to May 11, 1994. By letter dated May 5, 1995, the Office informed her that she needed to get information regarding entitlement to night differential from the employing establishment.

On July 14, 1995 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$1,186.21 for the period June 4 to July 7, 1995, because she was paid compensation for total disability but had been working four hours per day.² The Office found her to be at fault in the creation of the overpayment because she reasonably knew or should have been aware that she was not entitled to receive compensation for total disability.³

By letter dated August 16, 1995, appellant agreed that an overpayment in compensation had been created but contended that she was not at fault in the creation of the overpayment, stating that the amounts of the checks she received varied and that months would go by without checks. She thought the payments were adjustments to her compensation. Appellant also submitted an overpayment questionnaire and financial information.

Appellant continued to question the Office and the employing establishment regarding night differential and on October 10, 1995 and January 17, 1996, telephoned the Office inquiring about the overpayment. On September 20, 1996 appellant was paid \$3,879.89 for night

¹ On June 1, 1993 appellant received a schedule award for a 10 percent permanent loss of use of the left arm, for 31.2 weeks, to run from February 15 to September 21, 1993.

² The Office noted that she received \$2,412.11 in compensation for this period but should have received \$1,225.90, thus creating the \$1,186.21 overpayment in compensation.

³ The record also contains a July 7, 1995 decision, in which the Office found that appellant refused an offer of suitable work. Shortly thereafter she returned to full-time limited duty.

differential for the period September 22, 1993 to September 14, 1996.⁴ An undated memorandum in the record notes that the preliminary overpayment notice was 960 days delinquent and a final decision should be issued.

On November 1, 1998 appellant filed a claim for lateral epicondylitis, noting that she had missed work from October 16 to 21, 1998 for this condition. She stopped work on June 14, 1999 and has not returned. On August 19, 1999 the Office accepted that appellant sustained employment-related lateral epicondylitis. Appellant received appropriate compensation and was placed on the periodic rolls effective March 26, 2000. In March and November 2003, appellant was referred to vocational rehabilitation.

By decision dated March 24, 2004, the Office finalized its determination that appellant received an overpayment in compensation in the amount of \$1,186.21 and found that she was at fault because she accepted a payment which she knew or should have known to be incorrect. The Office found that appellant should repay at the rate of \$50.00 per month from her continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁵ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁶ No further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.⁷

ANALYSIS -- ISSUE 1

In this case, appellant does not dispute that she received an overpayment in compensation. The record indicates that for the period June 4 to July 7, 1995 she was working approximately four hours per day but continued receiving compensation based on total disability in the amount of \$2,412.11 for this period. As she was not entitled to receive compensation at the total disability rate, the Office properly found that an overpayment in compensation had been created.

The Board, however, is unable to determine if the amount of the overpayment calculated by the Office is correct. The compensation calculation of record indicates that to determine the \$2,412.11, a \$662.15 weekly pay rate at the three-quarters compensation rate was used. An overpayment worksheet specifies that appellant should have received compensation of \$1,225.90 for the period June 4 through July 7, 1995 and indicates that appellant had the wage-earning capacity rate of \$344.32 per week. The Board, however, is unable to determine how the Office

⁴ During this period, appellant was also apparently receiving \$104.00 in compensation every 28 days. (R803)

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8102(a).

⁷ 20 C.F.R. § 10.515(a).

arrived at the \$1,225.90 figure, which the Office deducted from the \$2,412.11, or compensation received, to arrive at the \$1,186.21 overpayment. The Board will therefore affirm the Office's finding regarding fact of overpayment but will remand the case on the issue of the amount of the overpayment. On remand, the Office must fully explain how the amount was determined and, if necessary, recalculate the amount of the overpayment in compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless "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."⁸

Section 10.433(a) of the Office's regulation provides:

"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 receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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)."⁹

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$1,186.21 overpayment, the Office stated that appellant knew or should have known that the payment she received for the period June 4 to July 7, 1995 was incorrect. The Board, however, finds that the Office improperly found appellant to be at fault.

There is no evidence in the case record that appellant knew when she accepted the compensation check for the period June 4 to July 7, 1995, that it included compensation to which she was not entitled. During the year previous to her receiving this payment, she had received checks in varying amounts and had repeatedly questioned the Office regarding her eligibility to night differential. Furthermore, there is no indication that appellant received compensation for the period November 2 to 25, 1994. Appellant, therefore, could reasonably have believed that the check covered an additional time period or included her claimed night differential. The record does not contain a copy of the check or documents accompanying it which would put

⁸ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

⁹ 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

appellant on notice that it was in an incorrect amount. In addition, despite her inquiries regarding the overpayment, the Office did not issue a final overpayment decision until March 24, 2004, almost nine years after it issued the preliminary decision on July 21, 1995. The Board therefore finds that there is no evidence that appellant knew or should have known, at the time she received the payment in question, that it was for an incorrect amount.¹⁰ The case will therefore be remanded for the Office to determine appellant's eligibility for waiver. In light of the foregoing, it is premature for the Board to address the issue of repayment of the overpayment from appellant's continuing compensation payments.

CONCLUSION

The Board finds that the Office properly found that an overpayment in compensation was created but did not fully explain how the amount of the overpayment was determined. The Office also improperly found appellant to be at fault. The case must, therefore, be remanded on the issue of the amount of the overpayment and for the Office to determine appellant's eligibility for waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2004 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: October 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ See *Diana L. Booth*, 52 ECAB 370 (2001).