

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

CARMEN LLERENA, Appellant)

and)

DEPARTMENT OF JUSTICE,)
EXECUTIVE OFFICE OF IMMIGRATION)
REVIEW, Miami, FL, Employer)

**Docket No. 05-1936
Issued: December 16, 2005**

Appearances:
Carmen Llerena, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On September 19, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 23, 2004. Under 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 the Office properly determined that appellant received an overpayment in the amount of \$489.19 for the period November 15 through 27, 2004; (2) whether the Office properly found that appellant was at fault in creating the overpayment; (3) whether the Office properly based appellant's pay rate for compensation on her date-of-injury pay rate.

FACTUAL HISTORY

Appellant, a 60-year-old legal assistant, injured her knees, neck, torso and lower back on January 30, 2004. By letter dated March 10, 2004, the Office accepted the claim for tear

cartilage or meniscus of the left knee and recurrent dislocation of the left knee and placed her on the periodic rolls. The March 10, 2004 Office letter informed appellant, under the heading "RETURNING TO WORK," that she had the responsibility to inform the Office immediately upon returning to work. This portion of the letter specifically stated:

"You are expected to return to work (including light-duty or part-time work, if available) as soon as you are able. Once you return to work or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent on an overpayment of compensation."

Appellant returned to work on November 15, 2004. The Office, however, continued to pay her temporary total disability compensation until November 27, 2004.

By decision dated January 20, 2005, the Office advised appellant that she had been paid at the incorrect pay rate of \$831.67 per week for the period July 19 through 30, 2004. The Office stated that the pay rate should have been \$790.23 per week, based on the annual salary of \$41,092.00 in effect on the date of injury, January 30, 2004. The Office noted that the annual salary of \$43,247.00, upon which the \$831.67 had been based, was not effective until May 30, 2004. The Office reissued this decision on January 28, 2005, stating that it had neglected to include appellant's appeal rights with the January 20, 2005 decision.¹ In a memorandum attached to the January 28, 2005 decision, the Office indicated that it was terminating collection action the overpayment, given that the overpayment was less than \$200.00 and did not result from either a refund due the Office as a result of third-party settlement or election of Office of Personnel Management (OPM) benefits where the debt can be recovered from the retroactive part of annuities held by OPM, and because collection action on the overpayment would exceed the expected recovery.²

On February 3, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$489.19 for the period November 15 through 27, 2004 because she had been receiving compensation to which she was not entitled. The Office found that appellant was at fault in the matter because she should have been aware that the payments she had been receiving were incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised appellant that when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat

¹ On February 16, 2005 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on June 10, 2004 which was causally related to her accepted condition. By letter dated September 13, 2005, appellant informed the Office that she filed the February 16, 2005 recurrence claim because she had telephoned the Office and was told to file a Form CA-2a to correct her salary from a weekly rate of \$790.23 to \$831.67.

² Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Actions, *Administrative Termination of Debt Collection*, Chapter 6.200.3(a) (September 1994).

the purpose of the law or would be against equity and good conscience. The Office informed appellant that, if she disagreed with the decision, she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the February 3, 2005 letter.

In a decision dated June 23, 2005, the Office finalized the preliminary determination regarding the overpayment of \$489.19. The Office further found that appellant was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act provides that an employee who receives continuing compensation, or 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, may not receive salary, pay or remuneration of any type from the United States.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$489.19 for the period November 15 through 27, 2004. The record shows that appellant received an overpayment during the period in question because she received a check in the amount of \$489.19 for temporary total disability compensation after returning to full-time work on November 15, 2004. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁴ provides that an overpayment must be recovered 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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁵

³ 20 C.F.R. § 10.400(b).

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide information which the individual 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.”⁶

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault in creating the overpayment. The Office applied the third standard, outlined above, in determining that appellant was at fault in creating the overpayment. If an overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected know she was not entitled.⁷ However, based on the circumstances of this case, the Board finds that appellant is not at fault in creating the overpayment. Appellant had been receiving her temporary total disability checks through direct deposit; following her return to work, she received an overpayment consisting of one check for \$489.19, covering one pay period. 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.⁸ However, the Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via 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. In the instant case, since the overpayment consisted of only one check, covering one pay period, with the first direct deposit check containing an overpayment following her return to work on November 15, 2004 – the record does not establish that a sufficient amount of time had passed for appellant to become aware of the fact that she had received an overpayment. Based on these facts, appellant could not be held to have known that she was no longer entitled to the amount of monthly compensation she had been receiving.

⁶ 20 C.F.R. § 10.433(a).

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002).

For these reasons, the Board finds that, under the circumstances of this case, appellant was not at fault for the overpayment of \$489.19. The Office's June 23, 2005 decision is reversed.

LEGAL PRECEDENT -- ISSUE 3

“Pay Rate for Compensation Purposes,” defined at 5 U.S.C. § 8101(4), is the greater of the employee’s pay as of the date of injury, the date disability begins, or the date of recurrence of disability if more than six months after returning to work. “Current Pay Rate” is defined as the current, or updated, salary or pay rate for the job the employee held at the time of injury.

ANALYSIS -- ISSUE 3

In the instant case, the Office advised appellant in its January 20 and 28, 2005 decisions that she had been paid at the incorrect pay rate of \$831.67 per week for the period July 19 through 30, 2004. The Office stated that the pay rate should have been \$790.23 per week, based on the annual salary of \$41,092.00 in effect on the date of injury, January 30, 2004. The Office noted that the annual salary of \$43,247.00, upon which her pay rate of \$831.67 had been based, was not effective until May 30, 2004. Given the fact that appellant returned to work within six months of her recurrence, the Office properly adjusted appellant’s pay rate for compensation purposes to \$790.23, her date-of-injury pay rate.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$489.19 for the period November 15 through 27, 2004. The Board reverses the Office’s finding that appellant was at fault in creating the overpayment. The Board finds that the Office properly based appellant’s pay rate for compensation on her date-of-injury pay rate.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2005 decision of the Office of Workers' Compensation Programs is affirmed regarding the amount of overpayment and appellant's pay rate and is reversed regarding the finding of fault and waiver.

Issued: December 16, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board