

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

CARLA MASSARO, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Allston, MA, Employer**

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**Docket No. 05-745
Issued: June 20, 2005**

Appearances:
Carla Massaro, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 9, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 3, 2004 which found an overpayment in the amount of \$6,454.44, that appellant was at fault in the creation of the overpayment and that she was not entitled to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.¹

ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$6,454.44 for the period December 28, 2003 to July 10, 2004; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery.

¹ Appellant did not appeal a decision dated July 23, 2004 which suspended appellant's benefits effective July 11, 2004 for failure to timely complete a Form CA-1032 updating her condition. It is therefore not before the Board on this appeal.

FACTUAL HISTORY

On December 27, 2000 appellant, then a 23-year-old distribution/window clerk, filed a traumatic injury claim alleging that on that date she sustained a right knee contusion in the performance of duty. Appellant's claim was accepted for right knee contusion, right knee arthroscopy and chondroplasty. The Office also accepted appellant's claim for a recurrence of disability as of January 14, 2002.

On December 1, 2003 appellant informed the Office that she was to return to work full duty as of December 29, 2003.

By letter dated August 2, 2004, the employing establishment informed the Office that appellant returned to work full duty with no restrictions on December 29, 2003 but continued to receive compensation payments for wage loss.

On September 7, 2004 the Office made a preliminary finding that appellant was overpaid in the amount of \$6,454.44 because she accepted compensation payments covering the period December 28, 2003 through July 10, 2004 after returning to full duty on December 29, 2003. She was found at fault in the creation of the overpayment. The record shows that appellant received compensation checks covering the period December 28, 2003 through July 10, 2004 totaling \$6,490.55. However, the Office determined that appellant should have only received \$36.11 during this time period to cover compensation payable for December 28, 2003, the date before she returned to work. By decision dated November 3, 2004, the Office finalized its decision that appellant received an overpayment in the amount of \$6,454.44 and that she was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act² provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.³

ANALYSIS -- ISSUE 1

The record shows that appellant received nine compensation checks for the period December 28, 2003 to July 10, 2004 totaling \$6,490.55. Because appellant received regular full-time wages from the employing establishment during the period December 29, 2003 to July 10,

² 5 U.S.C. § 8129(a).

³ *Id.* at § 8116(a).

2004, she was not entitled to disability wage-loss compensation for the same period. The Office deducted \$36.11 from the amount for the compensation she was entitled to on December 28, 2003. Accordingly, the Board finds that the record establishes that an overpayment was created in the amount of \$6,454.44.

LEGAL PRECEDENT -- ISSUE 2

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 the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. 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 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 know to be incorrect (this provision applies only to the overpaid individual).⁴

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments that she knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, it must show that, at the time she received the compensation checks in question, she knew or should have known that she was not entitled to receive compensation. Appellant received checks for total disability for the period December 29, 2003 to July 10, 2004 at the same time she was receiving her regular wages for full-time work. There was no reasonable basis on which she would expect compensation to continue. Appellant contends that she had received incorrect checks in the past and believed the checks represented back pay. The Board finds that this contention is without merit, as appellant continued to receive regular checks clearly marked for the time period after which she had returned to work. The Board finds that appellant accepted payments she knew or should have known to be incorrect and she is at fault under section 10.433(a). Since appellant was at fault in the creation of the overpayment, waiver of recovery of the overpayment is precluded.⁶

⁴ 20 C.F.R. § 10.433.

⁵ *Id.* at § 10.433(b).

⁶ The Board's jurisdiction over recovery of an overpayment is limited to review of those cases in which the Office seeks recovery from continuing compensation under the Act. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).

CONCLUSION

The Office properly determined that appellant was overpaid in the amount of \$6,454.44 and that, as she was at fault in the creation of the overpayment, was not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2004 is affirmed.

Issued: June 20, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member