

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

GINA Y. GONZALES, Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Corpus Christi, TX, Employer**

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**Docket No. 04-561
Issued: March 9, 2005**

Appearances:
Gina Y. Gonzales, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 23, 2003 appellant filed a timely appeal of a September 16, 2003 decision of an Office of Workers' Compensation Programs' hearing representative, finalizing a preliminary finding that an overpayment of \$1,170.11 was created and that 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 found that an overpayment of \$1,170.11 was created during the period March 13 to May 18, 2002; and (2) whether the Office properly found that appellant was at fault in creating the overpayment and therefore was not entitled to waiver.

FACTUAL HISTORY

On August 19, 2000 appellant, then a 31-year-old supply clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury on August 10, 2000 in the performance of duty. The Office accepted the claim for lumbar sprain, left ankle sprain and left Achilles

bursitis or tendinitis. Appellant stopped working on August 11, 2000 and began receiving compensation for temporary total disability.

In a letter (Form CA-1049) dated September 25, 2000, the Office advised appellant that she would continue to receive compensation payments every 28 days. The Office stated that, if appellant returned to work, she must notify the Office immediately. Appellant was also advised that even if she notified the Office of a return to work, if she received a payment that covered a period during which she had worked, she must return the payment to the Office.

The Office referred appellant to a vocational rehabilitation counselor in May 2001, and the counselor submitted periodic reports regarding the vocational rehabilitation efforts. In a report dated April 30, 2002, the rehabilitation counselor noted that, on March 12, 2002, appellant indicated that she had accepted a job as a tutor. The rehabilitation counselor indicated that on March 29, 2002 appellant reported that she returned to work on March 13, 2002; the counselor indicated that appellant earned \$50.00 per day at two days per week.

The record indicates that appellant continued to receive compensation for temporary total disability after her return to work. Appellant received a payment of \$957.24 dated March 23, 2002 for the period February 24 to March 23, 2002, a supplemental payment of \$10.48 for the period March 1 to 23, 2002, payment of \$970.00 dated April 20, 2002 for the period March 24 to April 20, 2002, and a payment of \$970.00 dated May 18, 2002 for the period April 21 to May 18, 2002.

In a letter dated July 5, 2002, the Office advised appellant of its preliminary determination that an overpayment of \$1,170.11 was created during the period March 13 to May 18, 2002 because she had returned to work and continued to receive compensation for temporary total disability. The Office indicated that appellant had received \$2,321.07 in compensation during the period, but she should have received \$1,150.96 based on actual earnings of \$100.00 per week. With respect to fault, the Office made a preliminary determination that appellant was at fault because she accepted payments she knew or should have known were incorrect.

Appellant requested a precoupment hearing, which was held on May 13, 2003. By decision dated September 16, 2003, the Office hearing representative finalized the overpayment determination with respect to amount and fault.

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 limited circumstances.¹ 20 C.F.R. § 10.500 provides that “compensation for wage loss due to

¹ 5 U.S.C. § 8116(a).

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 record indicates that appellant returned to work on March 13, 2002 at two days per week earning \$50.00 per day as a tutor. Once she returned to work, she was not entitled to receive compensation for temporary total disability. Appellant continued to receive compensation for temporary total disability through May 18, 2002, therefore an overpayment of compensation was created.

To determine the amount of the overpayment, the Office calculated the amount of compensation appellant should have received during the period March 13 to May 18, 2002. The Office used the *Shadrick*² formula to determine the appropriate amount of compensation payable based on actual earnings of \$100.00 per week, and calculated that appellant should have been paid \$1,150.96. The record indicated that appellant was paid \$2,321.07 in compensation from March 13 to May 18, 2002. Accordingly, an overpayment of \$1,170.11 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act³ 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."⁴ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.⁵

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

On appeal, appellant did not contest the amount of the overpayment but argued that she was not at fault in creating the overpayment. Appellant stated that she was told by Robert Williams, an Office rehabilitation specialist assigned to the case, to turn in all correspondence and pay information to the rehabilitation counselor, Donna Johnson. The finding of fault, however, was not based on a lack of notification. The rehabilitation counselor was aware that appellant had returned to work on March 13, 2002. The Office found that appellant was at fault

² 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

³ 5 U.S.C. §§ 8101 *et seq.*

⁴ 5 U.S.C. § 8129(b).

⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

because she accepted a payment she knew or should have known was incorrect. In this regard, the CA-1049 letter dated September 25, 2000 clearly advised appellant that if she returned to work she could not receive compensation for total disability during a period that she worked. Moreover, appellant was advised that she must return any payment covering a period during which she worked, regardless of whether she had notified the Office.

The Office issued a March 23, 2002 payment for temporary total disability compensation that covered the period through May 23, 2002. It was in the same amount as appellant had previously received for total disability and she should have known it was incorrect because it covered a period during which she had worked and therefore was not totally disabled. When appellant received subsequent payments she should have known that these were incorrect for the same reason. Appellant accepted the payments and did not return the payments as directed by the CA-1049 letter. Under section 10.433(3), appellant is at fault in creating the overpayment and is not entitled to waiver of the overpayment.⁶

CONCLUSION

The Board finds that an overpayment of \$1,170.11 was created during the period March 13 to May 18, 2002 because appellant had returned to work and continued to receive compensation for total disability. The Board further finds that appellant is not entitled to waiver of the overpayment because she accepted payments she knew or should have known were incorrect.

⁶ The fact that the Office may have been negligent in continuing to issue compensation checks for total disability after the rehabilitation counselor was advised that appellant returned to work does not excuse appellant's acceptance of such checks, which she knew or should have known had to be returned to the Office. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 16, 2003 is affirmed.

Issued: March 9, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member