

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

EARNEST FRANK, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SUPPLY CENTER, Oakland, CA, Employer**

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**Docket No. 06-478
Issued: June 1, 2006**

Appearances:
Earnest Frank, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 22, 2005 appellant filed a timely appeal of a December 6, 2005 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 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 an overpayment of \$2,740.00 was created; (2) whether the Office properly denied waiver on the grounds that appellant was not without fault in creating the overpayment; and (3) whether the Office properly directed that the overpayment should be recovered by deducting \$150.00 from appellant's continuing monthly compensation payments.

FACTUAL HISTORY

On August 30, 2000 appellant filed an occupational claim alleging that he sustained a lung condition as a result of exposure to fumes, chemicals and gas during his federal

employment. Appellant indicated on the reverse of the claim form that he had not worked since 1983. The Office accepted the claim for mild chronic bronchitis. He began receiving compensation for temporary total disability as of October 11, 2000. The compensation payments were direct deposited commencing in 2002.

In a letter received by the Office on February 11, 2005, appellant stated that his bank account was temporarily closed and requested that compensation payments be mailed to his home. A memorandum dated March 23, 2005, indicated that the payment for the period February 20 to March 19, 2005 had been sent to the closed bank account and a payment would be reissued. An April 5, 2005 memorandum indicated that appellant reported that he had not received the payment for February 20 to March 19, 2005. The Office indicated that the direct deposit payment had recorded an incorrect account and on April 6, 2005 the direct deposit payment included an incorrect bank routing number.

By memorandum dated April 11, 2005, the Office indicated that an emergency payment of \$1,370.00 for the period February 20 to March 19, 2005 had been deposited into appellant's account. Appellant continued to receive compensation for temporary total disability. On May 14, 2005 a payment of \$1,417.00 was direct deposited into appellant's account for the period April 17 to May 14, 2005.

By letter dated June 30, 2005, the Office advised appellant that it had tried to contact him by telephone with regard to incorrect payments to be issued on July 1, 2005. The Office advised appellant that it appeared he would receive two duplicate payments of \$1,370.00 for the period February 20 to March 19, 2005. He was advised to return the payment amount by personal check or money order. In a memorandum of telephone call dated July 11, 2005, the Office reported that appellant stated that his wife had "already spent the money as they did not know where it came from."

By letter dated July 13, 2005, the Office advised appellant of a preliminary determination of an overpayment of \$2,740.00 for the period February 20 to March 19, 2005. The Office stated that two payments of \$1,370.00 had incorrectly been deposited on July 1, 2005. A preliminary determination was made that appellant was at fault in creating the overpayment, as he accepted payments he knew or should have known were incorrect. The Office advised appellant of the actions he could take regarding the overpayment and requested that he complete the enclosed OWCP-20 form as the financial information was relevant to waiver and repayment issues.

By decision dated December 6, 2005, the Office finalized its determination that an overpayment of \$2,740.00 was created and that appellant was not entitled to waiver. The Office found that appellant could repay the overpayment by deducting \$150.00 every 28 days from his continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation 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 When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.²

ANALYSIS -- ISSUE 1

The record indicates that, although there were problems with the issuance of a compensation payment for the period February 20 to March 19, 2005, the Office ultimately issued a payment of \$1,370.00 on or about April 11, 2005. This payment represented the total compensation due appellant for the period in question. On July 1, 2005 the Office direct deposited two payments of \$1,370.00 for the same period. Since appellant was not entitled to additional compensation for the period February 20 to March 19, 2005, the \$2,740.00 in payments represents an overpayment of 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.”³

Section 10.433(a) of the Office’s regulations provides that the Office:

“[M]ay 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 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; (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).”⁴

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines the circumstances surrounding the overpayment. The degree of care

¹ 5 U.S.C. § 8116(a).

² See *Lawrence J. Dubuque*, 55 ECAB ____ (Docket No. 04-437, issued August 26, 2004).

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

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

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 determined that appellant was at fault because he accepted payments he knew or should have known were incorrect. The factual history of the case indicated that appellant was aware there was a problem with the initial payment attempts of \$1,370.00 representing compensation from February 20 to March 19, 2005. Appellant did receive the compensation payment through direct deposit in April 2005.

The incorrect payments were deposited on or about July 1, 2005. Appellant indicated in a telephone call to the Office on July 11, 2005 that he did not know where the money had come from and it was spent. There is no evidence of record that at the time the July 1, 2005 payments were accepted that appellant had any reasonable expectation that they represented an appropriate compensation payment. The problem with the February 20 to March 19, 2005 payment had been resolved and appellant was now receiving \$1,417.00 every 28 days. When he accepted the two payments of \$1,370.00, he knew or should have known they were incorrect. Moreover, the Office notified appellant by letter dated June 30, 2005 that the payments were incorrect. To the extent that appellant alleges that he accepted the payments before he actually received the letter, he should have been aware the payments were incorrect regardless of the June 30, 2005 letter.

Accordingly, the Board finds that appellant did accept payments he knew or should have known were incorrect. Under 5 U.S.C. § 8129, waiver of the overpayment is limited to individuals who are "without fault" in creating the overpayment. Pursuant to the standard set forth in section 10.433(a) of the Office's regulations, appellant is not "without fault" and therefore he is not entitled to waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of the Office's regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship."⁶

⁵ 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

⁶ 20 C.F.R. § 10.321.

The Office's regulations also provide:

“The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of the overpayment would defeat the purpose of the [Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.”⁷

ANALYSIS -- ISSUE 3

On appeal, appellant indicated that the \$150.00 deduction was burdensome based on his financial situation. The record, however, does not indicate that appellant provided any financial information to the Office although he had the opportunity to do so. It is the claimant's responsibility to submit information that may be used in determining the repayment rate. When an individual fails to provide the requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.⁸ In this case, the Office indicated that appellant was receiving \$1,417.00 every 28 days and could repay the overpayment by deducting \$150.00 from each payment until the overpayment was recovered. There is no evidence to show that the recovery rate was unreasonable based on the evidence of record.⁹

CONCLUSION

The Board finds that an overpayment of \$2,740.00 was created and the Office properly denied waiver of the overpayment as appellant was not without fault under 5 U.S.C. § 8129. The Board further finds that the Office properly determined the overpayment could be recovered by deducting \$150.00 from appellant's continuing compensation every 28 days.

⁷ 20 C.F.R. § 10.438.

⁸ See *Ralph P. Beachum, Sr.*, 55 ECAB ____ (Docket No. 03-2142, issued April 1, 2004); Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.4(c)(2) (September 1994).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 6, 2005 is affirmed.

Issued: June 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board