

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

SELMA NIX-NORWOOD, Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
ASHEVILLE VETERANS HOSPITAL,
Asheville, NC, Employer

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**Docket No. 06-608
Issued: June 15, 2006**

Appearances:
Selma Nix-Norwood, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 18, 2006 appellant filed a timely appeal from the December 12, 2005 merit decision of the Office of Workers' Compensation Programs, in which an Office hearing representative found her at fault in creating a \$2,447.39 overpayment for the period May 20 to July 3, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$2,447.39 for the period May 20 to July 3, 2003; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery.

FACTUAL HISTORY

On May 16, 2003 appellant, then a 55-year-old nursing assistant, injured her back while assisting a patient. The Office accepted the claim for a lumbar strain, lumbago and cervicgia.

Appellant stopped work on May 20, 2003. She returned to limited-duty work for four hours a day on September 29, 2003 and resumed full-time regular duties on October 14, 2003.

On July 9, 2003 appellant filed a Form CA-7 claim for compensation, for leave without pay for the period July 1 to August 1, 2003.

By letter dated August 1, 2003, the Office advised appellant that she would receive compensation payments for temporary total disability. The Office informed appellant that the first check would be in the net amount of \$2,941.29 for the period May 20 through July 12, 2003 and that she would receive a net amount of \$1,523.18 every four weeks thereafter commencing July 13, 2003. Appellant was advised to notify the Office immediately if she returned to work. The Office noted that each compensation payment showed the period covered by the payment and that if appellant worked for any portion of that period, she should return the payment to the Office. The Office records indicate that the compensation check was issued on August 1, 2003. By her signature dated August 17, 2003, appellant acknowledged that she understood the conditions under which she may receive compensation payments for temporary total disability.

In a letter dated November 12, 2003, the employing establishment advised the Office that appellant had received dual payments for the period May 20 to July 7, 2003. The employing establishment submitted records that, during this period, appellant received continuation of pay through June 30, 2003 and pay for sick or annual leave from July 1 to July 3, 2003.

By letter dated January 15, 2004, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$2,228.50 for the period May 20 through June 20, 2003 (42-calendar days) because she had received compensation benefits at the same time she received continuation of pay from her employer. The Office found that appellant was without fault in creating the overpayment. The Office asked appellant to submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment and advised her of her right to request a preresoupment hearing or a telephone conference.

In a letter dated February 13, 2004, appellant requested a preresoupment hearing and submitted a completed overpayment recovery questionnaire.

By decision dated June 29, 2004, an Office hearing representative found that the case was not in posture for decision and set aside the January 15, 2004 preliminary determination. The Office hearing representative instructed the Office to issue a new preliminary determination concerning overpayment with a finding that claimant was not without fault in the creation of the overpayment and correctly determine the amount of the overpayment.

By letter dated December 10, 2004, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$2,288.50 for the period May 20 through June 20, 2003 (42-calendar days) because she had received compensation benefits at the same time she received continuation of pay from her employer. The Office further found that appellant was at fault in creating the overpayment as she knew or should have known that she could not receive compensation benefits and wages from her employer for the

same time period. The Office advised appellant of the actions she could take and requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment.

In a letter dated January 3, 2005, appellant requested a prerecoupment hearing.

In a letter dated September 8, 2005, the employing establishment advised that it had recredited appellant's leave from July 1 to 3, 2003 and changed her time records to reflect continuation of pay on these dates for a total of 45 days of continuation of pay (COP) from May 20 to July 3, 2003. The overpayment was recalculated to be \$2,447.39 for the period May 20 to July 3, 2003 (45 days), which reflected the increased three days of COP paid by the employing establishment.

The prerecoupment hearing was held on October 18, 2005, where appellant challenged the Office's finding of fault. Appellant testified that she could not comprehend the information that was provided because she was hurt, angry and on medication and that she had not received the Office's August 1, 2003 letter. Appellant acknowledged that she received continuation of pay from May 20 to June 30, 2003. She testified that the continuation of pay went into direct deposit, but that she had gone approximately six weeks without any money before she received the Office's check and had her daughter deposit it in the bank. She expressed frustration over having to pay for the Office's mistake and refused to discuss her financial status.

By decision dated December 12, 2005, the Office hearing representative finalized the overpayment determination to reflect an amount of \$2,447.39 for the period May 20 to July 3, 2003 and the finding of fault. The Office further determined that the overpayment sum of \$2,447.39 could be repaid in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act¹ 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.² Section 8118(c) of the Act provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.³

¹ 5 U.S.C § 8129(a).

² 5 U.S.C § 8116(a).

³ 5 U.S.C. § 8118(c).

ANALYSIS -- ISSUE 1

The record reveals that appellant filed a claim for wage loss commencing July 1, 2003. During the period May 20 to July 3, 2003 (45 days), she was in receipt of continuation of pay from the employing establishment in addition to compensation payments for temporary total disability from the Office. The Office determined the amount of compensation appellant received for the period May 20 through July 3, 2003 totaled \$2,461.97 and, after deducting appellant's basic life insurance of \$13.98, an overpayment existed in the amount of \$2,447.39. Because appellant received regular full-time wages from the employing establishment during the period May 20 to July 3, 2003, she was not entitled to disability compensation from the Office for the same period. Thus, the record establishes that appellant received an overpayment of compensation in the amount of \$2,447.39 based on the dual payments.

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 known to be incorrect (this provision applies only to the overpaid individual).⁴

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 which 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, the Office must show that, at the time she received the compensation checks in question, she knew or should have known that the payment was incorrect.⁵ With respect to whether an individual is with fault, section 10.433(b) provides:

“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.”⁶

⁴ 20 C.F.R. § 10.433(a).

⁵ See *Diana L. Booth*, 52 ECAB 370 (2001); *Robin O. Porter*, 40 ECAB 421 (1989).

⁶ 20 C.F.R. § 10.433(b).

The record in this case supports that appellant received both continuation of pay from the employing establishment and pay for annual or sick leave while also receiving compensation for temporary total disability from the Office for the same period: May 20 to July 3, 2003 (45-calendar days).⁷ The only matter left to be determined is whether appellant accepted payments she knew or should have known to be incorrect when she accepted the Office's compensation check.

The Board finds that appellant was at fault in creating the overpayment that occurred from May 20 to July 3, 2003. Appellant asserts that she did not receive the Office's August 1, 2003 letter advising her of the circumstances under which she could receive compensation and that she was about to receive a compensation check for the period May 20 to July 12, 2003. The Board is not persuaded by appellant's assertions. It is noted that appellant signed and returned her acknowledgment of the receipt of this letter on August 17, 2003. In this signed statement, appellant acknowledged that she understood the circumstances under which she could receive compensation and that failure to comply with these conditions could result in an overpayment of compensation. This letter was sent to appellant on the same date, August 1, 2003, on which Office records indicate that the compensation check was sent to her.

Appellant therefore had explicit notice that she would be receiving a compensation check for temporary disability for the period beginning on May 20, 2003. The evidence establishes that she was aware that she received continuation of pay and leave pay for the same period. At the October 18, 2005 hearing, appellant acknowledged that the money she received for continuation of pay was direct deposited into her bank account. This supports the finding that appellant knew or should have known at the time she received the Office's check that she was in receipt of compensation for a period of time which the employing establishment had already paid wages. The record establishes that appellant accepted and deposited the Office's check. The Board finds that appellant is at fault in the matter of the resulting overpayment on the grounds that she accepted a payment that she knew or should have known to be incorrect. That the Office may have been negligent in issuing the check does not mitigate this finding.⁸ As appellant is with fault in the creation of the overpayment from May 20 to July 3, 2003, she is not eligible for waiver. The Office is required by law to recover this overpayment.⁹

CONCLUSION

The Board finds that appellant was with fault in a \$2,447.39 overpayment of compensation that occurred from May 20 to July 3, 2003. She accepted payment of compensation, which she knew or should have known was incorrect. Appellant is therefore not eligible for waiver.

⁷ As noted in the text of the decision, the employing establishment subsequently converted the three days of leave use, July 1 to 3, 2003, to continuation of pay and recredited appellant's leave account. However, at the time appellant received the overpayment, those three days were attributable to leave use.

⁸ See 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

⁹ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 12, 2005 is affirmed.

Issued: June 15, 2006
Washington, DC

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

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