

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

RONALD E. OGDEN, Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
Syracuse, NY, Employer**)

**Docket No. 05-1911
Issued: May 19, 2006**

Appearances:
Ronald E. Ogden, 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 September 14, 2005 appellant filed a timely appeal from a June 15, 2005 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment in the amount of \$43,789.35 and that he was at fault in the creation of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUE

The issue is whether the Office properly issued the June 15, 2005 overpayment decision.

FACTUAL HISTORY

This case is before the Board for the second time. In a decision dated January 25, 2005, the Board affirmed an October 27, 2003 Office decision finding that appellant received an overpayment of compensation for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997 based on his forfeiture of compensation for those periods.¹ The Board further

¹ *Ronald E. Ogden*, Docket No. 04-288 (issued January 25, 2005).

affirmed a finding that he was at fault in the creation of the overpayment. The Board found, however, that appellant timely notified the Office of his employment for the period June 3 to August 5, 1997 and thus did not forfeit his entitlement to compensation for that period. The Board remanded the case for recalculation of the amount of overpayment. The findings of fact and conclusions of law from the prior Board decision are hereby incorporated by reference.

On remand, the Office issued a final overpayment decision dated June 15, 2005 finding that appellant received an overpayment of compensation in the amount of \$43,789.35 and that he was at fault in its creation. The Office calculated the amount of the overpayment appellant received for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997 as instructed by the Board. The Office further found, however, that appellant also received an overpayment of compensation for the period June 3 to August 5, 1997 as he had earnings from employment while receiving compensation for total disability. The Office determined that appellant was at fault in the creation of the overpayment for the period June 3 to August 5, 1997 because he failed to notify the Office of his return to work. The Office included the period June 3 to August 5, 1997 in calculating the total amount of the overpayment as \$43,798.35.²

LEGAL PRECEDENT

Under section 8129 of the Federal Employees' Compensation Act³ and the implementing regulation, 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.⁴

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, the Office will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁵ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁶ Additionally, the Office is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.⁷ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.⁸ The recipient of the alleged overpayment may present evidence in response to the Office's

² The Office noted that the prior overpayment decision erroneously subtracted the amount of court ordered restitution paid by appellant twice from the total amount of overpayment, \$50,126.61. The Office subtracted the court ordered restitution paid by appellant, \$6,337.26 from \$50,126.61, to find a total overpayment of \$43,789.35.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁵ 20 C.F.R. § 10.431(a).

⁶ *Id.* at § 10.431(b).

⁷ *Id.* at § 10.431(c).

⁸ *Id.* at § 10.431(d).

preliminary notice either in writing or at a prerecoupment hearing.⁹ The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.¹⁰ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹¹

The Office procedure manual provides as follows:

“Once an overpayment is identified and calculated, the OE [Office examiner] is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, the OE is responsible for issuing a final decision...”¹²

The procedure manual further provides:

“*If the claimant is determined to be with fault*, Form CA-2201 [preliminary finding notice] must be released ... within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. Form CA-2201 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of (a) fact and amount of overpayment; (b) fault; and (c) waiver. Along with Form CA-2201, the OE should provide a clearly written statement explaining how the overpayment was calculated.”¹³ (Emphasis in the original.)

ANALYSIS

In the prior appeal, the Board affirmed the Office’s finding that appellant received an overpayment of compensation for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997 because he forfeited his entitlement to compensation. The Board further determined that he was at fault in the creation of the overpayment for these periods. The Board found, however, that the Office failed to establish that appellant forfeited his entitlement to compensation for the period June 3 to August 5, 1997 because he timely disclosed his employment on a Form CA-1032 dated August 6, 1997. The Board remanded the case for the Office to recalculate the overpayment of compensation based on appellant’s forfeiture of compensation for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997. On remand, the Office issued a final overpayment decision dated June 15, 2005 and calculated the amount of overpayment based on the periods July 1, 1993 to February 27, 1997, May 2 to 23, 1997 and June 3 to August 5, 1997. The Office included the compensation paid appellant for

⁹ *Id.* at § 10.432.

¹⁰ *Id.*

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (May 2004).

¹³ *Id.* at Chapter 2.600.4(a)(1) (May 2004).

temporary total disability from June 3 to August 5, 1997, which it found to be an overpayment, in its calculation of the total overpayment amount. The Office found that appellant received an overpayment of compensation from June 3 to August 5, 1997 because he obtained compensation for temporary total disability while he had earnings from employment. The Office further found that appellant was at fault in the creation of the overpayment because he failed to immediately notify the Office of his employment.¹⁴

The Office failed to follow its proper procedures in issuing the June 15, 2005 decision. The Office's regulations provide that, before seeking to recover an overpayment or adjust benefits, the Office will advise the individual in writing that the overpayment exists and the amount of the overpayment.¹⁵ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.¹⁶ The Office must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹⁷ The Office's procedure manual further provides that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.¹⁸ In this case, the Office issued a final decision which changed the basis for finding an overpayment of compensation for the period June 3 to August 5, 1997 from appellant's forfeiture of compensation to finding an overpayment of compensation because he earned wages while in the receipt of compensation for total disability. The Office further determined that he was at fault in the creation of the overpayment. According to the Office's implementing regulations and its own procedure manual, the Office should have issued appellant a preliminary determination of overpayment covering this period and a preliminary finding of fault before issuing a final overpayment decision regarding the period June 3 to August 5, 1997. Consequently, the Board finds that the Office improperly issued its June 15, 2005 decision.

CONCLUSION

The Board finds that the Office improperly issued its June 15, 2005 decision. On remand, the Office should issue a preliminary determination of overpayment for the period June 3 to August 5, 1997 according to its procedures. The Office should further issue a *de novo* decision regarding the amount of overpayment for the periods previously affirmed by the Board based on his forfeiture of compensation, July 1, 1993 to February 25, 1997 and May 2 to 23, 1997.

¹⁴ The Board notes that in its previous decision it found that appellant timely reported his employment from June 3 to August 5, 1997 to the Office.

¹⁵ 20 C.F.R. § 10.431(a).

¹⁶ *Id.* at § 10.431(b).

¹⁷ *Id.* at § 10.431(d).

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2005 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 19, 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