

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

J.E., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Denver, CO, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-1306
Issued: September 19, 2006**

Appearances:
J.E., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 17, 2006, which found 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 appellant received an overpayment in the amount of \$1,204.78 for the period January 1 through 21, 2006; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On November 7, 2004 appellant, a 56-year-old security screener, filed an occupational injury claim that was accepted for bilateral calcaneal spur and bilateral plantar fascial fibromatosis. Appellant stopped work on September 4, 2005 and was placed on the periodic rolls. On November 7, 2005 the Office notified appellant of her entitlement to compensation and

of her obligation to return to the Office any payment received for any period during which she was employed. Appellant returned to work on a full-time basis on January 1, 2006. The Office terminated her benefits as of January 17, 2006. However, she received compensation from the Office for the period December 25, 2005 through January 21, 2006.

An automated computer payment system (ACPS) form dated January 17, 2006, reflects a payment to appellant made by automatic deposit on January 21, 2006. This was for the period December 25, 2005 through January 21, 2006 in the net amount of \$1,638.49. A worksheet dated January 19, 2006 reflects appellant's entitlement to benefits for the period December 25 through 31, 2005 in the amount of \$433.71. An overpayment calculation worksheet dated January 19, 2006 noted that for the period December 25, 1995 through January 21, 2006, appellant had been paid the net amount of \$1,638.49, when she should have been paid \$433.71, resulting in an overpayment for that period in the amount of \$1,204.78.

In a preliminary overpayment decision dated February 13, 2006, the Office found that appellant had received an overpayment of compensation for the period January 1 through 21, 2006, due to the fact that she returned to work on January 1, 2006 but received compensation for total disability. The Office found her at fault in the creation of the overpayment, finding that appellant accepted payments that she knew or should have known were in error. The Office advised appellant of actions available to request a waiver instead of repaying the overpayment, including requesting that the Office issue a final decision based on the written evidence currently of record. The Office further advised appellant to submit a detailed explanation of her reasons for seeking a waiver; a completed Form OWCP-20; and supporting documents, to include copies of tax returns, bank account statements, bills, cancelled checks and pay slips. Appellant did not respond to the Office's preliminary overpayment determination.

By decision dated March 17, 2006, the Office found that an overpayment existed in the amount of \$1,204.78, and that appellant was at fault in the creation or acceptance of the overpayment. The Office further determined that appellant should repay the amount by submitting a payment to the Office in the amount of \$1,204.78.¹

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act² provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.³ When an overpayment has been made to an individual

¹ The Board notes that appellant submitted additional evidence after the Office rendered its March 17, 2006 decision. As this evidence was not considered by the Office prior to its decision of March 17, 2006, the evidence cannot now be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). The Board also notes that the Office issued a decision dated May 24, 2006 finding that appellant had no continuing injury-related disability and was, therefore, no longer entitled to compensation benefits. As the May 24, 2006 decision was issued after the filing of this appeal, it is not properly before the Board.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

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 the individual is entitled.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,204.78 for the period January 1 through 21, 2006.

Appellant returned to full-time employment on January 1, 2006 and was no longer entitled to receive compensation for wage loss after that date. She received compensation from the Office for the period December 25, 2005 through January 21, 2006 in the net amount of \$1,638.49. The record reflects that she was entitled to receive compensation for the period December 25 through 31, 2005 in the amount of \$433.71. Since appellant was not entitled to receive compensation after her return to full-time employment, the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,204.78 for the period January 1 through 21, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ provides that 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 this subchapter or would be against equity and good conscience. Section 10.433 of the Office's implementing regulation⁶ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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.”

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.⁷

⁴ *Id.* at § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433.

⁷ 20 C.F.R. § 10.433(b).

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 she was at fault in creating the overpayment, the Office must show that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.⁸

The record establishes that the January 21, 2006 payment from the Office was deposited directly into appellant's bank account. The record further establishes that appellant was not notified of the incorrect payment until February 13, 2006, when the Office issued its preliminary overpayment decision. The Board has distinguished such a situation from one in which a claimant receives a check in the mail covering a period of employment, knows or should know that she is not entitled to such compensation but decides nonetheless to cash or deposit the check.⁹ The Board has found that the mere direct deposit by the Office is not sufficient to establish fault by a claimant who has had no opportunity to make a decision on the deposit before it was transferred to her account. Although appellant was on notice of the Office's incorrect payment 23 days after the check was deposited to her account, she had no reason to suspect at the time such check was deposited on January 21, 2006 that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.¹⁰ Because the funds were deposited directly into her bank account, appellant was not in a position to immediately reject the amounts paid by the Office. Thus, given the circumstances of this particular case, the Board finds that appellant was not at fault in either creating or accepting the overpayment.¹¹ Accordingly, the Office's March 17, 2006 finding of fault is reversed. The case is remanded to the Office to determine whether appellant is eligible for waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,204.78 for the period January 1 through 21, 2006. The Board also finds that appellant was without fault in either the creation or the acceptance of the overpayment.

⁸ See *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006). See also *Lorenca Rodriguez*, 51 ECAB 295, 298 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

⁹ *William F. Salmonson*, 54 ECAB 152 (2002); *Leotis Hall*, Docket No. 02-2140 (issued February 5, 2004).

¹⁰ The Board has generally found that a claimant is not at fault for accepting the first incorrect payment, because the requisite knowledge is lacking at the time of deposit. See *Tammy Craven*, *supra* note 8.

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: September 19, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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