

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

D.G., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Arlington, VA, Employer)

**Docket No. 06-1743
Issued: April 5, 2007**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 24, 2006 appellant filed a timely appeal of a June 13, 2006 merit decision of the Office of Workers' Compensation Programs concerning 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 overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment for the period June 21 to July 9, 2004, in the amount of \$1,148.28; and (2) whether the Office properly determined that he was not without fault in the creation of the overpayment and, therefore, not entitled to waiver.

FACTUAL HISTORY

On August 13, 2003 appellant, then a 42-year-old transportation security screener, filed a claim for back problems related to lifting passenger baggage in excess of 40 pounds. He did not

initially stop work. By letter dated October 22, 2003, the Office accepted the claim for lumbar strain/sprain. The Office advised appellant that compensation benefits for total disability were only payable while he could not perform work because of his injury. He was advised to inform the Office if he returned to work and to return any payment to the Office to minimize the possibility of an overpayment. Appellant was also advised of the penalties for accepting compensation payments to which he was not entitled. The Office paid wage-loss and medical compensation for all relevant periods. On June 21, 2004 appellant returned to full-time light-duty work at the employing establishment. He also notified the Office of his return to work.

On July 2, 2004 appellant filed a Form CA-7 claim for compensation for wage loss for the period June 26 to July 2, 2004. The form noted the penalties for accepting compensation to which a person is not entitled, which appellant acknowledged by his signature. On June 25, 2004 the Office paid \$726.71 in wage-loss compensation for the period June 12 to 25, 2004. On July 16, 2004 the Office paid \$726.71 wage-loss compensation for the period June 26 to July 9, 2004.¹ On August 6, 2004 the Office calculated a \$1,148.28 wage-loss compensation for the period June 21 to July 9, 2004.

By decision dated August 31, 2004, the Office terminated appellant's entitlement to wage loss and medical compensation benefits effective the same date.

On September 30, 2005 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,148.28, because he returned to full-time duty on June 21, 2004 but received compensation for temporary total disability from June 26 to July 9, 2004. The Office found that appellant was not without fault in the creation of the overpayment because he was paid his salary by the employing establishment and received compensation from the Office after he returned to work. The Office advised him that he had 30 days in which to submit evidence of argument if he disagreed with the preliminary determination. No response was received from appellant regarding the Office's preliminary determination.

By decision dated June 13, 2006, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$1,148.28. It found that he returned to full-time duty on June 21, 2004; however, compensation payments for total disability continued from June 26 to July 9, 2004 as appellant filed a CA-7 claim for time loss after he returned from work. The Office determined that appellant accepted payments he knew or should have known to be incorrect, because he received compensation payments for wage loss despite having returned to full-time duty. It finalized its determination that appellant was not without fault in the creation of the overpayment and, therefore, not entitled to waiver. Appellant was advised to either forward a check for the entire amount of the overpayment or to contact the Office to make arrangements for repayment.

¹ The gross amount of compensation is noted to be \$820.20.

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.² The Office regulation, at 20 C.F.R. § 10.500(a), provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to 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.³ 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.⁴

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to full-time duty on June 21, 2004. However, he received compensation for temporary total disability from June 26 to July 9, 2004. On June 25 and July 16, 2004 the Office issued compensation checks for the period June 12 to 25 and June 21 to July 9, 2004, respectively. In calculating the overpayment, the Office determined that for the period June 21 to July 9, 2004 appellant received compensation in the amount of \$1,148.28. This included \$820.20, for the entire period June 26 through July 9, 2004 and a portion from the period June 12 to 25, 2004 which reflected the portion paid from June 21 to 25, 2004 while appellant was working at the employing establishment. After he returned to full-time work on June 21, 2004, he had no entitlement to compensation on or after June 21, 2004. Thus, an overpayment of compensation was created for the period June 21 to July 9, 2004. Although appellant advised that he never received payment from the employing establishment, this is separate from compensation received under the Act. He has not submitted any evidence showing that he did not receive his regular salary while in receipt of compensation for the period June 21 to July 9, 2004. The Office properly determined that appellant received an overpayment of compensation in the amount of \$1,148.28 for the period June 21 to July 9, 2004.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows: 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.⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

² 5 U.S.C. § 8116(a).

³ 20 C.F.R. § 10.500(a).

⁴ See *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

⁵ 5 U.S.C. § 8129(b).

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁷

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“(b) 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.”⁸

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question he knew or should have known that the payment was incorrect.⁹

The overpayment of compensation occurred in this case when appellant accepted two compensation checks which encompassed periods after he returned to work on June 21, 2004. These checks covered the period June 12 to 25 and June 26 to July 9, 2004. Consequently, for appellant to be found at fault in creating the overpayments, the evidence must establish that, when he accepted these two compensation checks he knew or should have been expected to know that each check included a payment for a period of wage loss to which he was not entitled.¹⁰

With respect to the June 25, 2004 check which covered the period June 12 to 25, 2004, the record contains no evidence that appellant was apprised by the Office, as of the time he accepted the compensation checks, of the specific period the check covered so as to put him on

⁷ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁸ 20 C.F.R. § 10.433(b).

⁹ *See Robin O. Porter*, 40 ECAB 421 (1989).

¹⁰ *Id.*; *see also Michael R. Nixon*, 40 ECAB 398 (1988); *Marlene R. Pavlo*, 38 ECAB 716 (1987) (where the Board found that appellant was without fault where the record contained no evidence indicating that she was apprised by the Office, as of the time she received the compensation check, of the specific period the check covered so as to put her on notice that she was being paid incorrectly for a period of time during which she worked).

notice that he was being paid incorrectly for a period of time during which he worked.¹¹ If such evidence existed which established that appellant had notice that he was accepting an incorrect payment, this would establish fault. However, the record does not contain a copy of the compensation check in question. There is also no evidence in the record that any letter or other information accompanied the check which would have reasonably put appellant on notice that he had received an incorrect payment. As noted above, in determining whether an individual is without fault, the Office must consider an individual's understanding of the obligation to return payments which were not due. If there is no evidence which indicates that an individual knew or should have known at the time the incorrect payment was accepted that the payment was not due, the Office cannot meet its burden of proof in finding that such individual was at fault in accepting an incorrect payment. There is no other evidence of record which put appellant on notice that the June 25, 2004 compensation check was for a period of time to which he was not entitled to compensation. For this reason, the Office has not met its burden of proof in establishing that he was at fault in creating the portion of the compensation check issued June 25, 2004 to reflect the portion paid from June 21 to 25, 2004, while appellant was working at the employing establishment.

With respect to the second check issued July 16, 2004, which covered the period June 26 to July 9, 2004, the Office informed appellant that he must return checks received after he returned to work in order to avoid an overpayment of compensation. Appellant returned to work on June 21, 2004. Although he notified the Office that he had returned to work, the Office's error in not terminating compensation immediately upon receiving this notice does not excuse appellant's acceptance of payment for total disability during a period that he was working full time.¹² Additionally, appellant was advised in both the Office's acceptance letter of October 22, 2003 and on the CA-7 compensation claim form which he filed on July 2, 2004, of the penalty provision for accepting compensation for which he was not entitled. He should have been reasonably aware by this time that he could not receive wage-loss compensation for a period in which he had also returned to work. The Board finds that appellant knew or should have known that he was not entitled to the check issued July 16, 2004.¹³ As appellant was at fault in the matter of the overpayment for the second check issued on July 16, 2004, the overpayment of compensation cannot be waived.¹⁴

CONCLUSION

The Board finds that an overpayment of \$1,148.28, was created for the period June 21 through July 9, 2004. However, the Board finds that the Office did not meet its burden of proof in establishing that appellant was at fault in creating the overpayment of compensation for the

¹¹ *Robin O. Porter, supra* note 9.

¹² *Lynden F. Moser*, 37 ECAB 725, 728 (1986).

¹³ See *Claude T. Green*, 42 ECAB 274 (1990) (where the Board found that the lapse of time between the return to work and the continued receipt of compensation is to be considered in determining whether a claimant is at fault in creating an overpayment).

¹⁴ As the Office did not issue a final decision on recovery of the overpayment the Board has no jurisdiction regarding this matter. 20 C.F.R. § 501.2(c).

period paid June 21 to 25, 2004. Thus, the June 13, 2006 decision is reversed as to the finding of fault for the overpayment of compensation paid for the period June 21 to 25, 2004 and the case is remanded to the Office for a determination on the issue of whether appellant is entitled to waiver of the overpayment. The June 13, 2006 decision is affirmed as to the finding of fault for overpayment of compensation paid for the period June 26 to July 9, 2004.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case remanded for further action consistent with this decision.

Issued: April 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board