

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

M.B., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Federal Plaza, NY, Employer**

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

**Docket No. 07-1623
Issued: April 2, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from an April 25, 2007 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and that he was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$5,714.91 because he received compensation for total disability from March 30 to June 11, 2005 while working part time; and (2) whether the Office properly found that he was at fault in the creation of the overpayment and thus not entitled to waiver.

FACTUAL HISTORY

On August 2, 1999 appellant, then a 39-year-old wildlife biologist, filed a claim alleging that he herniated a cervical disc on July 19, 1999 pulling a net through a surf zone in the performance of duty. The Office accepted his claim for cervical radiculitis.

On January 27, 2004 appellant sustained a recurrence of disability causally related to his July 19, 1999 employment injury. The Office paid him compensation for temporary total disability beginning that date. Appellant resumed intermittent work on February 9, 2004 but sustained a recurrence of disability on July 26, 2004. On November 16, 2004 he underwent a cervical discectomy and fusion at C5-6. On November 19, 2004 the Office placed him on the periodic rolls. The Office informed appellant that he must immediately notify it when he returned to work to avoid an overpayment of compensation.

Appellant returned to work for four hours per day on March 30, 2005. On June 1, 2005 he filed a claim for compensation for partial disability beginning April 4, 2005. Time and attendance reports from the employing establishment indicate that appellant began working six hours per day at the end of April 2005.

In a June 7, 2005 electronic mail message, a claims examiner noted that appellant had received an overpayment from March 31 to April 16, 2005. The claims examiner indicated that he would return checks for the period April 17 to May 14 and May 15 to June 11, 2005.

On February 13, 2007 the Office notified appellant of its preliminary determination that he received an overpayment of \$5,714.91 for the period March 30 to June 11, 2005 because he returned to work for four hours per day but continued to receive compensation for total disability. The Office calculated that he received an overpayment of \$2,162.40 for the period April 17 to June 11, 2005 and an overpayment of \$1,390.11 for the period March 30 to April 16, 2005. The Office informed appellant of its preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. The Office requested that he complete an overpayment recovery questionnaire. The Office advised appellant that, within 30 days of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecruitment hearing.

By decision dated April 25, 2007, the Office finalized its finding that appellant received a \$5,714.91 overpayment because he received compensation for total disability after he resumed part-time employment. It found that he was at fault in the creation of the overpayment and therefore not entitled to waiver. The Office determined that appellant should send a check for the entire amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act¹ provides that, while an employee is receiving compensation under the Act, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.²

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8116(a).

ANALYSIS -- ISSUE 1

The Office determined that appellant received an overpayment of \$5,714.91 for the period March 30 to June 11, 2005 because he received compensation for total disability after he returned to part-time employment. In order to confirm the continuing compensation payments, the record should establish the specific payments that were made, the date issued and the compensation period covered by the specific payments. The Board finds that the record is devoid of any evidence that compensation was paid for the period in question. The Office's statements and calculations are not enough; proof of payment must be in the record. Otherwise, the Board does not have sufficient evidence to review whether the Office properly determined the amount of the overpayment. There is no evidence such as a computer printout establishing the payment of compensation from March 30 to June 11, 2005. Therefore, the Office has failed to establish that an overpayment occurred in this case.³

CONCLUSION

The Board finds that the Office failed to establish the existence of an overpayment.⁴

³ See *F.A.*, Docket No. 07-1520 (issued October 23, 2007) (the Board found that the Office failed to establish that an overpayment existed as the record was devoid of any evidence that the specific payments were made); *J.C.*, Docket No. 06-1229 (issued September 14, 2006) (the Board found that the Office failed to establish an overpayment when there was no evidence with respect to individual payments issued during the relevant time period); *Salvator A. Schembari*, Docket No. 05-1309 (issued December 6, 2005) (the Board found that the Office failed to establish that an overpayment existed as the record was devoid of any evidence that specific payments were made, the date issued and the period covered by the specific payments).

⁴ In view of the Board's disposition of the first issue, the issue of fault is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2007 is reversed.

Issued: April 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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