

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

N.L., Appellant)

and)

PEACE CORPS, GRENADA, EASTERN)
CARIBBEAN, Employer)

**Docket No. 08-76
Issued: April 10, 2008**

Appearances:
Appellant, 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 October 9, 2007 appellant filed a timely appeal from an October 1, 2007 decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation in the amount of \$1,347.43. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$1,347.43 for the period August 1 to September 1, 2007; and (2) whether the Office properly determined that she was at fault in accepting the overpayment and was therefore not entitled to waiver.

FACTUAL HISTORY

On July 28, 1991 appellant, then 41 years old, was sexually assaulted while serving as a peace corps' volunteer. On August 19, 1991 the Office accepted that she sustained employment-related post-traumatic stress disorder, and she was placed on the periodic rolls. By decision

dated December 14, 1993, appellant's wage-loss compensation was reduced to reflect that her actual earnings as a part-time pre-school teacher trainee fairly and reasonably represented her wage-earning capacity.¹ Her wage-loss compensation was deposited electronically.

By letters dated June 18 and 26, 2007, the Office informed appellant that a second opinion evaluation was scheduled for August 1, 2007. On July 15, 2007 appellant stated: "Please cancel. I don't need it. I am working." On July 20, 2007 the Office proposed to suspend appellant's wage-loss compensation for failure to cooperate with a scheduled examination. The Office noted that her reasons for requesting cancellation of the scheduled appointment were not valid and that she had to attend the examination scheduled for August 1, 2007. By letter dated July 23, 2007, appellant informed the Office that she wished to relinquish her claim.

In an August 31, 2007 decision, the Office suspended appellant's compensation, effective August 1, 2007.²

By letter dated August 31, 2007, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$1,347.43 for the period August 1 to September 1, 2007 because she received disability compensation after her wage-loss compensation was suspended effective August 1, 2007. The Office found her at fault in the creation of the overpayment because she knew or should have known that she was not entitled to wage-loss compensation after missing a scheduled second opinion evaluation. An overpayment worksheet contained in the record provides that, during this period, appellant received compensation totaling \$1,347.43. It shows that she received a direct deposit payment on September 1, 2007 for the period August 5 to September 1, 2007 and that the preceding direct deposit included four days of overpaid compensation, August 1 to 4, 2007.

By decision dated October 1, 2007, the Office found that appellant was at fault in the creation of an overpayment in compensation in the amount of \$1,347.43. Appellant was advised that she should forward the \$1,347.43 to the Office within 30 days.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act³ and Office regulations provide that an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.⁴ If an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the

¹ The December 14, 1993 decision amended a November 12, 1993 decision that failed to indicate that appellant's actual earnings were based on part-time work.

² Appellant did not file an appeal with the Board of this decision.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320.

period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.⁵

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of his or her responsibilities with respect to the medical examination scheduled. Either the claims examiner or the medical management assistant may contact the physician directly and make an appointment for examination. The claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment. The notification of the appointment must contain a warning that benefits may be suspended under section 8123(d) of the Act for failure to report for examination. The claimant must have a chance to present any objections to the Office's choice of physician, or any reasons for failure to appear for the examination, before the Office acts to suspend compensation.⁶

If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with section 8123(d) until the date on which the claimant agrees to attend the examination. Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. The claimant's statement that he or she will not appear for an examination is not sufficient to invoke the penalty. Refusal to schedule an examination at the direction of the Office is also insufficient to invoke section 8123(d).⁷

Section 8102(a) of the Act 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 his duty.⁸ Section 8129(a) of the Act 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.”⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$1,347.43. The record establishes that she received compensation from the date of her wage-

⁵ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (July 2000); *see E.B.*, 59 ECAB ____ (Docket No. 07-1618, issued January 8, 2008).

⁷ *Id.*

⁸ 5 U.S.C. § 8102(a).

⁹ 5 U.S.C. § 8129(a).

loss compensation which was suspended, August 1, 2007, until September 1, 2007. Appellant received compensation in the amount of \$1,347.43. As she was not entitled to receive compensation after her wage-loss compensation was suspended, the Office properly found that an overpayment in compensation in the amount of \$1,347.43 had been created.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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.”¹¹

Section 10.433(a) of the Office’s regulation provides that the Office:

“[M]ay 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 in 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; 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. (This provision applies only to the overpaid individual).”¹²

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant’s account. The Office may not deposit compensation into a claimant’s account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant’s intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.¹³

¹⁰ 5 U.S.C. §§ 8101, 8110.

¹¹ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

¹² 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹³ *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

ANALYSIS -- ISSUE 2

The Office found appellant at fault in the creation of the overpayment as she should have been aware that the payments she received by direct deposit for the period August 1 to September 1, 2007 were not proper because her wage-loss compensation had been suspended.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁴ The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹⁵ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁶

In this case, appellant received one compensation payment by direct deposit on September 1, 2007, one day after the decision to suspend her wage-loss compensation was issued on August 31, 2007. The suspension was effective August 1, 2007, and the overpayment included four days from the previous direct deposit period. The Office's regulations determine fault by what the claimant knew or should have known at the time of acceptance. With an electronic fund transfer, a claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. In this case, there is no evidence of record to show the period covered by the direct deposit.¹⁷ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period. The case will be remanded for the Office to determine whether appellant is entitled to waiver for this overpayment.

The Board finds that appellant was not at fault in the creation of the overpayment. A direct deposit made on September 1, 2007, one day after her wage-loss compensation was suspended on August 31, 2007, with an effective date of August 1, 2007. The case will be remanded to the Office to determine if appellant is entitled to waiver of the \$1,347.43 overpayment in compensation.

CONCLUSION

The Board finds that the Office properly determined that an overpayment arose in the amount of \$1,347.43. Appellant was not at fault in the creation of the overpayment. The case is remanded for a determination of whether she would be entitled to waiver.

¹⁴ *William E. McCarty*, 54 ECAB 525 (2003).

¹⁵ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁷ *See Karen K. Dixon*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2007 be affirmed, in part, set aside, in part, and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: April 10, 2008
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