

FACTUAL HISTORY

The Office accepted that on April 8, 2004 appellant, then a 41-year-old letter carrier, sustained a lumbar strain while loading a delivery vehicle. Appellant stopped work on April 9, 2004. Following a period of continuation of pay, she received wage-loss compensation.

In an August 6, 2004 letter, the Office notified appellant that she would receive wage-loss compensation payments every 28 days beginning July 10, 2004. Each payment would include the period for which payment was made. It advised appellant to submit immediate notice if she returned to work. If appellant worked for any period for which payment was made, she was to return the compensation check to the Office to avoid an overpayment.¹

Appellant returned to full-time work with no loss of wages on April 4, 2005.² She received compensation checks for the periods March 20 to April 16, 2005 and April 17 to May 14, 2005.

By notice dated January 22, 2008, the Office advised appellant of its preliminary determination that an overpayment of \$3,265.58 was created as she accepted compensation payments from April 4 to May 14, 2005, after appellant returned to work with no loss of wages on April 4, 2005.³ It made the preliminary determination that appellant was at fault in the creation of the overpayment as she knew or reasonably should have known that she was not entitled to payments after she returned to work with no wage loss. Appellant was afforded 30 days to submit financial information or request a hearing. She did not respond to the notice or provide financial information within 30 days.

By decision dated February 26, 2008, the Office finalized its preliminary determination of a \$3,265.58 overpayment of compensation. It found that appellant was at fault in the creation of the overpayment as she accepted payments made after she returned to work with no wage loss. The Office directed recovery of the overpayment through a lump-sum payment of the entire amount.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁴ 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.⁵ Section 8129(a) of the Act provides, in

¹ By decision dated March 4, 2005, the Office denied appellant's request for a lumbar support and an EMS (electronic muscle stimulator) unit. This decision is not before the Board on the present appeal.

² By decision dated June 6, 2005, the Office terminated appellant's wage-loss and medical benefits as the medical evidence demonstrated the accepted lumbar condition had ceased without residuals. This decision is not before the Board on the present appeal.

³ The Office calculated that for the period April 4 to May 14, 2005 appellant received \$3,265.58 in compensation.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8102(a).

pertinent part, that 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.”⁶ The Office’s procedure manual identifies various situations when overpayments of compensation may occur, including when a schedule award expires but compensation continued to be paid.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain on April 8, 2004. Appellant was off work from April 9, 2004 through April 4, 2005, when she returned to work with no loss of wages. The evidence reflects and she does not dispute that she received wage-loss compensation from the Office in the amount of \$3,265.58 for the period April 4 to May 14, 2005. As appellant was not entitled to receive any disability compensation as of April 4, 2005, the Board finds that the Office correctly determined that appellant received an overpayment of compensation in the amount \$3,265.58 for the period in question.⁸

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, 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.⁹ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ The regulation further provides that 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.¹¹ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient on the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.¹²

⁶ 5 U.S.C. § 8129(a).

⁷ Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Initial Overpayment Actions, Chapter 6.200.2 (May 2004).

⁸ *Alberto Pineiro*, 51 ECAB 310 (2000).

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

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.*

¹² 20 C.F.R. § 10.433(a)(3).

Section 10.433(b) of the Office's regulations provides, in relevant part, that the determination of fault "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."¹³

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment under the third standard noted above, because she accepted payments after April 4, 2005, the date she returned to work with no loss of wages. It advised appellant by August 6, 2004 letter of her obligation to return compensation checks encompassing any period after she returned to work.

By accepting payments after appellant returned to work on April 4, 2005 with no loss of wages, she accepted payments that she knew or should have known were incorrect. Therefore, appellant was at fault in the creation of the overpayment.¹⁴ She accepted compensation payments for the period April 4 to May 14, 2005, in the amount of \$3,265.58. As appellant was aware that she was no longer entitled to compensation after she returned to work with no wage loss, she accepted payments that she knew or should have known to be incorrect. Accordingly, the Board finds that appellant was at fault in the creation of the overpayment.¹⁵ The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.¹⁶

As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.¹⁷

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$3,265.58. The Board further finds that appellant was at fault in creation of the overpayment and it was therefore not subject to waiver.

¹³ 20 C.F.R. § 10.433(b).

¹⁴ *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁷ Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); *see Albert Pineiro*, *supra* note 8; *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2008 is affirmed.

Issued: December 4, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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