United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 08-1418**
	)	**Issued: December 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2008 appellant filed a timely appeal of the January 17, 2008 decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a $51,898.12 overpayment of compensation for the period September 5, 2002 to January 10, 2006; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation.

FACTUAL HISTORY

The Office accepted that on December 9, 1992 appellant, then a 44-year-old distribution clerk, sustained bilateral tendinitis and bilateral carpal tunnel syndrome, for which she underwent a right carpal tunnel release on January 7, 1998. She had previously filed several separate

claims, which had been accepted for employment-related back injuries.[1] Appellant stopped work in 1998 and was placed on the periodic rolls.

On July 1, 1999 appellant filed a claim for a schedule award.

On February 9, 2000 the employing establishment offered appellant a job as a distribution clerk. On February 11, 2000 appellant rejected the position.

In a letter dated July 24, 2000, the Office advised appellant that the offered position was suitable, advised her of the sanctions for refusal of suitable work and allowed her 30 days to reply. The letter provided:

> "[Section] 8106(c)(2) of the Federal Employees' Compensation Act states that '[a] partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, secured for him is not entitled to compensation.' Therefore, any claimant who refuses an offer of suitable employment (or fails to report for work when scheduled) is not entitled to any further compensation for wage loss or [s]chedule [a]ward."

On August 24, 2000 appellant advised that she could not perform the duties of the job offer.

On October 30, 2000 the Office advised appellant that the position of a distribution clerk was suitable work. It afforded appellant 15 additional days to accept the job offer. In a letter dated October 31, 2000, appellant elected to receive retirement benefits from the Office of Personnel Management (OPM).

In a decision dated November 16, 2000, the Office terminated appellant's compensation under section 8106(c) on the grounds that she failed to accept suitable work. It provided:

> "[Section] 8106(c)(2) of the Act states in part that '[a] partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, secured for him or her, is not entitled to compensation.'"

Appellant filed several requests for reconsideration and the Office denied modification in decisions dated March 5 and June 27, 2001 and February 25, 2002. She appealed to the Board and in a decision dated February 3, 2003, the Board affirmed Office's termination of compensation based on her refusal of suitable work.[2]

[1] In 1976, appellant was hit in the back with a cash drawer; in 1977, 1978 she developed low back pain from lifting mail trays; in 1992 she was restricted to working four hours a day and lifting no more than 10 pounds but she developed back pain and on August 17, 1992 she stopped work completely. This is appellant's tenth appeal before the Board. *See* ECAB Docket Nos. 96-363, 97-907, 00-360, 00-2063, 02-1799, 02-0010, 02-1798, 02-1799 and 03-0010.

[2] Docket No. 02-1798 (issued February 3, 2003).

On July 10, 2003 appellant filed a second claim for a schedule award. In a July 11, 2003 report, her treating physician stated that she had reached maximum medical improvement. Thereafter, in the course of developing the claim, the Office solicited opinions from Office medical advisers and an impartial medical examiner. The impartial specialist found that maximum medical improvement was reached on September 5, 2002.

On December 4, 2003 the Office granted appellant a schedule award for 56 percent permanent impairment of the bilateral upper extremities. The period of the award was from September 5, 2002 to January 10, 2006. The Office issued appellant a check for the period September 5, 2002 to November 29, 2003 in the amount of $19,280.43. On December 27, 2003 it issued appellant a check for the period November 30 to December 27, 2003 in the amount of $1,208.00. On January 16, 2004 appellant agreed to a lump-sum payment of $28,993.69 for the remainder of the schedule award covering the period February 22, 2004 to January 10, 2006. The Office issued the $28,993.69 payment on February 24, 2004.

On December 9, 2005 appellant filed a claim for an additional schedule award. On June 9, 2006 she indicated that she was previously granted a schedule award and was entitled to an additional award for work-related impairment.

In a June 9, 2006 disability benefit payment worksheet, the Office noted that on November 16, 2000 appellant's monetary compensation had been terminated precluding entitlement to a schedule award. It noted that the Board affirmed the termination decision on February 3, 2003. The Office further noted that appellant was paid a schedule award for 56 percent permanent impairment of the bilateral upper extremities for the period September 5, 2002 to January 10, 2006. The claims examiner determined that appellant was not entitled to a schedule award because she refused to accept suitable employment and retired and therefore an overpayment was created in the amount of $51,898.12.

In a July 8, 2008 letter, the Office informed appellant that it made a preliminary determination that she had received a $51,898.12 overpayment of compensation from September 5, 2002 to January 10, 2006 because she was granted a schedule award for 56 percent permanent impairment of the bilateral upper extremities after her benefits were terminated effective November 16, 2000 because she refused suitable work pursuant to 5 U.S.C. § 8106(c). The Office noted that appellant was not entitled to compensation after she refused an offer of suitable work. It found that appellant was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have know to be incorrect. The Office informed appellant that she had the right to submit evidence or argument if she disagreed with the Office's finding. It also informed appellant that she had a right to a prerecoupment hearing before an Office hearing representative. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

On August 2, 2006 appellant requested a telephone conference which was held on August 14, 2007. In a memorandum of conference she asserted that she filed her claim for a schedule award on July 1, 1999 prior to the November 16, 2000 decision terminating her compensation benefits and she believed that she was entitled to the schedule award. The examiner noted on November 16, 2000, the Office terminated appellant's compensation effective

the same date and as such, no compensation, regardless of when the CA-7 form was filed, should have been paid after the November 16, 2000 Office decision.

Appellant submitted an overpayment questionnaire dated September 12, 2007. She indicated that she was not married and had $67.00 in cash and $142.00 in a checking account. Appellant listed monthly income of $1,372.00 and monthly expenses totaling $1,184.00. She submitted supporting financial information and two court orders noting that she was guardian of two minor children effective 2004.

By decision dated January 17, 2008, the Office found that appellant received a $51,898.12 overpayment of compensation from September 5, 2002 to January 10, 2006, for which she was at fault in creating. It advised that the overpayment occurred because appellant received payment for a schedule award for 56 percent permanent impairment of the bilateral upper extremities on September 4, 2003 after her benefits were terminated effective November 16, 2000 because she refused suitable work pursuant to 5 U.S.C. § 8106(c). The Office noted that appellant was not entitled to compensation benefits after November 16, 2000, because she refused an offer of suitable work. It noted that modification of the November 16, 2000 termination decision was denied on June 27, 2001 and February 25, 2002 and the Board affirmed the decision on February 3, 2002. The Office found that appellant was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect as she was aware that her compensation was terminated as of November 16, 2000 and no compensation could be paid on or after that date. It stated that appellant should forward a check for the entire amount of the overpayment and if she was unable to refund the amount she was instructed to contact the Office and make arrangements for recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Act[3] states:

"(c) A partially disabled employee who --

(1) refuses to seek suitable work; or

(2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

Office regulations, at 20 C.F.R. § 10.517, provide, in pertinent part:

"(a) 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

[3] 5 U.S.C. § 8106(c).

"(b) After providing the two notices described in [s]ec[tion] 10.516, [the Office] will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103."[4]

ANALYSIS -- ISSUE 1

The record indicates that on November 16, 2000 the Office terminated appellant's compensation under section 8106(c) on the grounds that she failed to accept suitable work. Appellant eventually appealed this issue to the Board and, in a decision dated February 3, 2003, the Board affirmed Office's suitable work termination. On July 1, 1999 and July 10, 2003 she filed claims for a schedule award. On December 4, 2003 the Office granted appellant a schedule award for 56 percent permanent impairment of the bilateral upper extremities in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* The period of the award was from September 5, 2002 to January 10, 2006 and the medical evidence indicates that appellant reached maximum medical improvement after the Office terminated her monetary benefits on November 16, 2000.[5]

As noted above, the penalty provision of section 8106(c) bars appellant's claim for a schedule award for the period after the termination of compensation based on her refusal to accept a suitable offer of employment. Since the evidence indicated that appellant's compensation was terminated pursuant to section 8106(c) on November 16, 2000, she would not be entitled to compensation after that date. Accordingly, an overpayment of compensation was created when the Office issued appellant a schedule award for a period after November 16, 2000.

The Office explained how the overpayment occurred and noted that appellant's overpayment was calculated based on her receipt of a schedule award after her benefits were terminated pursuant to section 8106(c) and provided this to her with the preliminary notice of overpayment.

In a June 9, 2006 disability benefit payment worksheet, the Office noted, after monetary compensation was terminated on November 16, 2000, it issued appellant a schedule award for 56 percent permanent impairment of the bilateral upper extremities for the period September 5, 2002 to January 10, 2006. In a compensation payment history worksheet dated June 8, 2006, it noted that appellant was paid the schedule award for the period September 5, 2002 to November 29, 2003 in the amount of $19,280.43, for the period November 30 to December 27, 2003 in the amount of $1,208.00, for the period December 28, 2003 to January 24, 2004 in the amount of $1,208.00, for the period January 25 to February 21, 2004 in the amount of $1,208.00 and for the period February 22 to 23, 2004 in the amount of $28,993.69. The Office calculated a total overpayment of $51,898.12 for the period September 5, 2002 to January 10, 2006. The

[4] *See Alfred R. Anderson*, 54 ECAB 179 (2002); *Stephen R. Lubin*, 43 ECAB 564 (1992) (where the Board found that the penalty provision of section 8106(c) may serve as a bar to compensation pursuant to appellant's claim for a schedule award for the period after the termination of compensation based on a refusal to accept a suitable offer of employment).

[5] *See Lubin, id.*

Board finds that the Office's determination of the amount of the overpayment is proper and is supported by the evidence of record.

On appeal, appellant indicated that she disputed the fact of the overpayment and asserted that the Office did not timely issue a decision on her schedule award claim filed on July 1, 1999. She contends that the Office deliberately delayed in processing her schedule award claim until December 2003, which precluded her from obtaining a schedule award after the November 16, 2000 termination of benefits decision. Appellant further contends that the claims examiner properly granted her a schedule award based on the medical evidence in the case record and the impairment rating provided by the referee physician.

The Board notes that there is no evidence that appellant had reached maximum medical improvement on July 1, 1999, the date she filed the CA-7 form or at anytime before the Office terminated monetary benefits on November 16, 2000. It is well established that a schedule award cannot be determined and paid until a claimant has reached maximum medical improvement.[6] Rather, appellant's treating physician, Dr. Hampton J. Jackson, Jr., indicated on July 11, 2003, that appellant reached maximum medical improvement and provided an impairment rating. No other medical evidence relied upon in determining the schedule award indicated that maximum medical improvement was reached before November 16, 2000. Therefore, the evidence does not support that appellant was eligible for a schedule award before November 16, 2000. Thus, she had no entitlement to any portion of the December 4, 2003 schedule award.[7]

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.[8] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment."[9]

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;

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[6] *See Joseph R. Waples*, 44 ECAB 936 (1993).

[7] *See Lubin, supra* note 4.

[8] 5 U.S.C. § 8129(b).

[9] *Gregg B. Manston*, 45 ECAB 344 (1994).

(2) failed to furnish information which the individual knew or should have known to be material;

(3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[10]

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."[11]

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant accepted the compensation checks in question, she knew or should have known the payments were incorrect.[12]

The Board notes that the Office erroneously issued the schedule award in question. However, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the appellant from accepting payment to which she knew or should have known that she was not entitled.[13] The Office advised appellant in a July 24, 2000 letter of the sanctions for refusal of suitable work and provided "5 U.S.C. § 8106(c)(2) of the Act states that '[a] partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, secured for him is not entitled to compensation.' Therefore, any claimant who refuses an offer of suitable employment (or fails to report for work when scheduled) is not entitled to any further compensation for wage loss or [s]chedule [a]ward." Likewise, in the November 16, 2000 decision terminating appellant's compensation under section 8106(c) the Office stated, "5 U.S.C. § 8106(c)(2) … states … that '[a] partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, secured for him or her, is not entitled to compensation.'" This is evidence that appellant should have been aware that, as of November 16, 2000, she was not entitled to receive a schedule award after the November 16, 2000 termination decision.

[10] *Kenneth E. Rush,* 51 ECAB 116 (1999).

[11] 20 C.F.R. § 10.433(b).

[12] *See Claude T. Green,* 42 ECAB 174, 278 (1990).

[13] *See Russell E. Wageneck*, 46 ECAB 653 (1995).

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant accepted payment for a schedule award granted on December 4, 2003, which she knew or should have known was incorrect. As appellant was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of $51,898.12 may not be waived.[14]

CONCLUSION

The Board finds that appellant received an overpayment of compensation from September 5, 2002 to January 10, 2006 and that she was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).