

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

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**J.P., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
TRANSPORTATION SECURITY  
ADMINISTRATION, Employer**

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**Docket No. 07-1478  
Issued: February 20, 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 May 1, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs overpayment decision dated April 11, 2007. Under 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 in the amount of \$28,317.34, for the periods January 9 to 22, 2005 and June 12, 2005 to November 25, 2006; and (2) whether it properly found that he was at fault in creating the overpayment.

**FACTUAL HISTORY**

Appellant, a 48-year old baggage screener, injured his left knee while lifting luggage on August 17, 2004. He filed a claim for benefits which the Office accepted for torn

cartilage/meniscus of the left knee and sprain/strain of his left knee and leg. In its February 4, 2005 letter accepting the claim, the Office advised appellant:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result....” (Emphasis in the original.)

The Office paid appellant appropriate compensation for total disability and placed him on the periodic rolls. Appellant returned to work on January 18, 2005. The Office, however, continued to pay him temporary total disability compensation until November 25, 2006.

On February 1, 2007 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$28,317.34, for the periods January 9 to 22, 2005 and June 12, 2005 to November 25, 2006 because he received compensation to which he was not entitled. It found that appellant was at fault in the matter because he should have been aware that the payments were incorrect. The Office noted that appellant had submitted copies of five checks, for which payment was cancelled, each in the amount of \$1,510.36: one for the pay period ending on February 19, 2005, cancelled on May 1, 2006; one for the pay period ending on March 19, 2005, cancelled on June 1, 2006; one for the pay period ending on April 16, 2005, cancelled on July 3, 2006; one for the pay period ending on May 14, 2005, cancelled on August 2, 2006; and one for the pay period ending on June 11, 2005, cancelled on September 1, 2006. The Office stated that the fact that appellant had returned these payments indicated that he was aware that he was not entitled to the payments after he returned to work. It further noted that he had been informed on February 4, 2005 that he needed to return any payments he received after returning to work.

The Office advised appellant that if, he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. It further advised appellant that, when he was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the Act or would be against equity and good conscience. The Office informed appellant that, if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the October 20, 2003 letter. Appellant did not respond to this letter within 30 days.

In a decision dated April 11, 2007, the Office finalized the preliminary determination regarding the overpayment of \$28,317.34. It noted that appellant had been advised by letter dated February 1, 2007 that a preliminary finding had been made that an overpayment had occurred, but had not responded within 30 days. Therefore, the Office found that appellant was not entitled to waiver.

**LEGAL PRECEDENT -- ISSUE 1**

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.<sup>1</sup> Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.<sup>2</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$28,317.34, for the periods January 9 to 22, 2005 and June 12, 2005 to November 25, 2006. The record shows that appellant received an overpayment during the period in question because he received payment of temporary total disability compensation after returning to full-time work on January 18, 2005. The Office calculated the \$28,317.34 overpayment by totaling the amount of temporary total disability compensation appellant received for the period of January 9 to 22, 2005, \$755.18 and subtracting the amount of compensation to which he was entitled, \$372.66, for an overpayment of \$382.50; added the sum of \$12,082.88, representing eight payments of \$1,587.16, for the period February 19 to March 18, 2006; and added eight more payments of \$1,510.36, for the period March 19 to November 25, 2006, totaling \$12,697.28, for a total overpayment of \$28,317.34. The Office properly found that appellant received an overpayment of compensation in the stated amount during this period.

**LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act<sup>3</sup> provides that 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>4</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

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<sup>1</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>2</sup> 20 C.F.R. § 500(a) (2003).

<sup>3</sup> 5 U.S.C. § 8129(a)-(b).

<sup>4</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

(2) Failed to provide information which the individual 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.<sup>5</sup>

### **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. Even if an overpayment resulted from negligence on the part of the Office, this does not excuse appellant from accepting payment which he knew or should have been expected to know he was not entitled to.<sup>6</sup> Appellant returned to work on January 18, 2005 and was, therefore, no longer totally disabled. He knew or should have known that he was no longer entitled to wage-loss compensation. Upon his receipt of payments for total disability compensation following his return to work, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate or return the check issued for total disability because he had returned to work during the period covered by the check. Appellant did return five of the checks, each in the amount of \$1,510.36, thus indicating his knowledge that he was not entitled to these payments. However, he failed to return all of the other checks he received after January 18, 2005 which resulted in a total overpayment of \$28,317.34.

The Board finds that appellant reasonably knew or should have known that the payments issued by the Office for the periods January 9 to 22, 2005 and June 12, 2005 to November 25, 2006 were incorrect. As appellant is not without fault under the third standard noted above, recovery of the overpayment of compensation in the amount of \$28,317.34 may not be waived. The Office's April 11, 2007 decision is affirmed.<sup>7</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$28,317.34, for the periods January 9 to 22, 2005 and June 12, 2005 to November 25, 2006. The Board finds that the Office properly found that appellant was at fault in creating the overpayment.

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<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>7</sup> The Board notes that appellant submitted additional evidence to the record following the April 11, 2007 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 11, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 20, 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