

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sulphur, LA, Employer**

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

**Docket No. 07-1673
Issued: January 3, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 5, 2007 appellant filed a timely appeal from a May 16, 2007 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and that she was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$2,138.82 for the period February 2 to March 17, 2007 because she returned to a full-time position with the employing establishment but continued to receive compensation for partial disability; and (2) whether the Office properly found that she was at fault in the creation of the overpayment.

FACTUAL HISTORY

On April 4, 2006 appellant, then a 44-year-old clerk, filed a claim alleging that she sustained an injury to her right back and right leg on April 3, 2006 while closing a gate. The Office accepted her claim for a sprain of the lower back. Appellant stopped work on April 4,

2006 and returned to part-time limited-duty employment on August 28, 2006. By letter dated September 18, 2006, the Office notified her that it was reducing her compensation based on her actual earnings as a part-time clerk effective September 3, 2006. The Office requested that she informed it if she received an increase in pay to avoid an overpayment of compensation.

Dr. James D. Perry, a Board-certified orthopedic surgeon and appellant's attending physician, released her to resume her regular full-time employment on December 4, 2006. She did not return to work. Appellant informed the Office on December 5, 2006 that she was unable to work due to a nonemployment-related illness and had filed for medical retirement.

On February 2, 2007 appellant accepted a full-time limited-duty position as a distribution/window clerk with the employing establishment at the same grade and step as her date-of-injury position. A time analysis form from the employing establishment indicated that after February 2, 2007 appellant used a combination of work hours, annual leave and leave without pay. In a telephone call on March 15, 2007, appellant informed a claims examiner that she signed the February 2, 2007 job offer and clocked in to work but did not work due to a nonemployment-related medical condition. She applied for disability retirement. Appellant saved every compensation check she received from the Office after January 2007.

In an electronic mail message dated March 15, 2007, the employing establishment related that appellant came in to work on certain days to provide assistance until her retirement. She did not work over four hours when she came to work.

The Office paid appellant compensation for partial disability in the amount of \$2,138.82 for the period February 2 to March 17, 2007. On April 16, 2007 the Office notified her of its preliminary determination that she received an overpayment of compensation in the amount of \$2,138.82 because she returned to a full-time position with the employing establishment on February 2, 2007 but continued to receive compensation from the Office for the period February 2 to March 17, 2007. The Office explained that it calculated the overpayment by dividing her compensation every four weeks for partial disability by 28 days to determine the amount it paid her per day and then multiplying this amount by the 44 days from February 2 to March 17, 2007. The Office further informed appellant of its preliminary determination that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. The Office additionally advised her that, within 30 days of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing. The Office requested that appellant submit an overpayment recovery questionnaire and supporting financial information.

On April 26, 2007 appellant maintained that her physician released her to return to full-time employment with restrictions on November 30, 2006. Due to a personal illness, she was unable to work beginning December 4, 2006. Appellant stated:

“It was suggested that I file for temporary disability retirement due to this illness. I brought all the documentation, duty status reports and [doctor's] excuses to my supervisor and talked with them explaining the entire situation.

“On December 28, 2006 I received another workers’ compensation check. I knew I should hold on to this check, as the [Office] would realize an error was made. On January 20, 2007 I received another workers’ compensation check. Again, I held on to the check.”

Appellant notified the employing establishment that she continued to receive checks from the Office and “informed them that they needed to get me off of workers[‘] compensation because I was off work on [leave without pay].” The employing establishment requested that she sign a job offer so that she could get off of workers’ compensation. Appellant signed the job offer but noted that she could not return to work because she had filed for disability retirement. She stated: “When I informed my [u]nion [s]teward about the workers’ compensation checks I had been receiving, he told me not to worry about them and that I was entitled to keep them as management failed to properly follow through with their responsibility and that I did all that was required of me.” Appellant received another workers’ compensation check on February 17, 2007. She notified her supervisor. On March 15, 2007 an Office claims examiner told appellant on the telephone that she would receive another workers’ compensation check shortly. The claims examiner informed her that she could keep the check as the employing establishment “did not follow through with their procedures.” Appellant told the claims examiner that she still had the checks in her possession. On April 3, 2007 her son required emergency medical treatment, some of which was not covered by insurance. Appellant related that she had kept the checks she received from the Office until the claims examiner told her she could keep them. She maintained that it would cause extreme hardship if she had to repay the overpayment. Appellant submitted a copy of medical bills relevant to her son’s medical treatment.

On May 5, 2007 appellant requested waiver of the overpayment and a decision based on the written evidence. She did not challenge fact or amount of the overpayment. Appellant submitted a completed overpayment recovery questionnaire without any supporting financial documentation. By decision dated May 16, 2007, the Office finalized its finding that she received an overpayment of \$2,138.82 for the period February 2 to March 17, 2007 because she received compensation for partial disability after she returned to work full time. The Office further finalized its finding that she was at fault in the creation of the overpayment and thus not entitled to waiver. The Office requested that she repay the overpayment by forwarding a check for the full amount.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees’ Compensation Act¹ defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.² The Office’s regulations state in pertinent part: “compensation for wage loss due to disability is available only for any periods during which an

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8116(a).

employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."³

ANALYSIS -- ISSUE 1

Appellant sustained low back strain on April 4, 2006. She returned to part-time limited-duty employment on August 28, 2006. On December 4, 2006 Dr. Perry released appellant to resume full-time employment with restrictions. She did not resume full-time work, however, due to a personal illness. On February 2, 2007 appellant accepted a full-time position with the employing establishment at the same grade and step as her date-of-injury position. She worked only occasionally after accepting the position due to her nonemployment-related condition. Appellant used a combination of work hours, leave and leave without pay during this period. The Office paid her compensation for partial disability in the amount of \$2,138.82 from February 2 to March 17, 2007. As appellant had accepted and returned to a full-time position at the employing establishment, she was not entitled to compensation for partial disability. Accordingly, she received an overpayment of compensation. The Office calculated the amount it paid appellant from February 2, to March 17, 2007 by dividing the compensation she received for partial disability every 28 days by 44, the number of days during the period, to find an overpayment of \$2,138.82. Appellant has not challenged either the fact or amount of the overpayment. The Board finds that appellant received an overpayment of \$2,138.82 for the period February 2 to March 17, 2007.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that “[a]djustment 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.” Section 10.433 of the Office's implementing regulations⁵ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

³ 20 C.F.R. § 10.500.

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433.

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because she accepted payments which she knew or should have known were incorrect. The Office must thus establish that, at the time she received the compensation checks in question, she knew or should have known that the payment was incorrect. Appellant informed the Office on March 15, 2007 that she had accepted a full-time job with the employing establishment on February 2, 2007. She “clocked in” to work on February 2, 2007 but did not work full time due to a nonemployment-related condition. Appellant related in correspondence to the Office dated April 26, 2007 that she continued to receive workers’ compensation checks which she knew she should hold on to “as the [Office] would realize an error was made.” She saved every workers’ compensation check that she received after January 2007. Appellant wanted to stop receiving workers’ compensation so she signed the February 2, 2007 job offer; however, she received another workers’ compensation check on February 17, 2007. On March 15, 2007 a claims examiner informed her that she would receive another check shortly. Appellant thus acknowledged that she knew when she received the workers’ compensation check covering the period February 2 to March 17, 2007 that she was not entitled to wage-loss compensation for that period. Thus, she is not without fault in the creation of the overpayment and waiver of the overpayment is not possible.

Appellant asserted that her union steward and an Office claims examiner told her that she could keep the check because it was the employing establishment’s mistake. The finding of fault, however, is based on appellant’s acceptance of payments that she knew or should have known to be incorrect. The fact that the Office was negligent in issuing payments to her does not relieve her of fault in accepting the incorrect payments.⁶

On appeal, appellant argues that she is unable to repay the overpayment due to unexpected medical expenses. As discussed above, however, waiver of the overpayment is precluded as she is at fault in the creation of the overpayment.⁷ Additionally, the Board notes that it does not have jurisdiction to review the Office’s recovery of the overpayment. The Board’s jurisdiction is limited to review those cases where the Office seeks recovery from continuing compensation under the Act.⁸

CONCLUSION

The Board finds that appellant received an overpayment of \$2,138.82 for the period February 2 to March 17, 2007 because she returned to a full-time position with the employing establishment but continued to receive compensation for partial disability. The Board further finds that she was at fault in the creation of the overpayment.

⁶ See *Williams E. McCarty*, 54 ECAB 525 (2003).

⁷ See 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.441(a); see also *Judith A. Cariddo*, 55 ECAB 348 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2007 is affirmed.

Issued: January 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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