

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

M.F., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, RONALD REAGAN)
NATIONAL AIRPORT, Washington, DC,)
Employer)

**Docket No. 08-253
Issued: July 15, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 30, 2007 appellant filed a timely appeal from a September 27, 2007 decision of the Office of Workers' Compensation Programs, which found that he received an overpayment of compensation in the amount of \$785.06. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$785.06 for the period November 10 through 23, 2005; (2) whether the Office properly determined that he was at fault in accepting the overpayment and was therefore not entitled to waiver; and (3) whether the Office properly required repayment of the overpayment in a lump sum.

FACTUAL HISTORY

On June 6, 2003 appellant, then a 53-year-old security screener, sustained an employment-related lumbar strain when he lifted a heavy piece of luggage. The claim was later expanded to include cervical spondylosis, and on April 14, 2005 he underwent authorized discectomy at C5-6. By letter dated April 27, 2005, the Office informed appellant that he was being placed on the periodic rolls, effective April 17, 2005. Appellant was advised to notify the Office immediately when he returned to work to avoid an overpayment in compensation, and that, if he worked during any period covered by a compensation payment, he must return the payment to the Office. He received his compensation by check payment. Appellant briefly returned to work for the period November 10 through 23, 2005 and acknowledged this on an Office Form EN1032 on March 24, 2006.

By letter dated July 26, 2007, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$785.06 for the period November 10 through 23, 2006 because he continued to receive disability compensation during a period when he had returned to work. The Office found him at fault in the creation of the overpayment because he should have been aware that there was no entitlement to wage-loss compensation during a period when he was earning wages. An overpayment worksheet and computer-generated overpayment printout provide that appellant received a periodic payment for the period October 29 to November 25, 2006, and that, as appellant worked for the period November 10 through 23, 2006, an overpayment in compensation in the amount of \$785.06 was created.

By decision dated September 27, 2007, the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$745.06 for the period November 10 through 23, 2006. Appellant was instructed to forward the \$745.06 to the Office within 30 days.¹

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act² provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.³ Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴ Section 10.500 of the Office's regulations provides that "compensation for wage loss due to disability is available only for any periods during which an employee's work-related

¹ By decision dated March 19, 2007, the Office reduced appellant's compensation based on his capacity to earn wages as an escort driver, and by decision dated October 30, 2007 an Office hearing representative affirmed that decision. Appellant has not filed an appeal of that decision with the Board.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

medical condition prevents him or her from earning the wages earned before the work-related injury.”⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation. By his own admission, the record supports that appellant returned to work on November 10, 2005, continued to work through November 23, 2005, and continued to receive wage-loss compensation for this period. As he was not entitled to compensation for the period of his return to work, the amount of compensation that he received for the period November 10 to 23, 2005 represented an overpayment in compensation.⁶

The Board however finds that the case is not in posture for decision regarding the amount of the overpayment because the Office used the wrong dates in computing the amount of the overpayment. Appellant returned to work on November 10, 2005 and worked through November 23, 2005 yet the Office declared in its August 27, 2007 decision that he had worked from November 10 through 23, 2006 and determined the amount of the overpayment based on pay rate information for a return to work in November 2006 rather than the proper pay rate of November 10, 2005. The case must therefore be remanded to the Office for further findings, supported by documentation, regarding the exact compensation appellant received for the correct period in which he received both wage-loss compensation from the Office and earned wages at the employing establishment, that is November 10 through 23, 2005, to be followed by an appropriate decision.

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.”⁷

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

⁵ 20 C.F.R. § 10.500.

⁶ *W.F.*, 57 ECAB 705 (2006).

⁷ 5 U.S.C. § 8129; *see Danny E. Haley*, *supra* note 4.

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).”⁸

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines 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.⁹

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment because he knew or should have known he was not entitled to wage-loss compensation for the period in November 2005 when he also worked. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper,¹⁰ and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹¹

In this case, by letter dated April 27, 2005, the Office clearly advised appellant that he was to immediately inform the Office upon his return to work to avoid an overpayment in compensation, and that, if he worked during any period covered by a compensation payment, he had to return the payment to the Office. Under these circumstances, appellant should have known that he could not receive wage-loss compensation during any period that he worked.¹² He returned to work in November 2005 but did not immediately inform the Office and did not return the compensation for the period he worked. While appellant acknowledged on March 24, 2006 that he had briefly returned to work in November 2005, that did not relieve him of the continuing obligation to return payments that he knew or should have known were incorrect.¹³

Based on the evidence of record, the Board finds that appellant accepted compensation he knew or should have known was incorrect. Under section 10.433(a) of the Office’s regulations, he is properly found to be at fault pursuant to section 8129 of the Act and is not entitled to waiver of the overpayment in compensation.¹⁴ In view of the Board’s finding regarding the amount of the overpayment, the issue of whether the Office properly required repayment is moot.

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

⁹ 20 C.F.R. § 10.433(b); *Neill A. Dewald*, 57 ECAB 451 (2006).

¹⁰ *Danny E. Haley*, *supra* note 4.

¹¹ *Sinclair L. Taylor*, *supra* note 8.

¹² *Neill A. Dewald*, *supra* note 9.

¹³ *Id.*

¹⁴ *Id.*

CONCLUSION

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment in compensation and would thus not be entitled to waiver. The case is not in posture for decision regarding the amount of the overpayment and is remanded for a determination of the correct amount.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 27, 2007 be affirmed in part, vacated in part and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: July 15, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁵ The Board notes that, on appeal, appellant further asserted that his health insurance had been improperly terminated. By letter dated December 18, 2007, the Office notified appellant's congressional representative that appellant's health insurance coverage was retroactively reinstated to the date of termination, September 3, 2006, and that, if he had medical bills from that period, he could submit them to his health insurance carrier for payment.