

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

D.S., Appellant)

and)

U.S. POSTAL SERVICE, LANCASTER)
PROCESSING & DISTRIBUTION CENTER,)
Lancaster, PA, Employer)

**Docket No. 08-415
Issued: July 8, 2008**

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 November 20, 2007 appellant filed a timely appeal from an August 28, 2007 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and that he was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation from May 26 to June 9, 2007 in the amount of \$1,378.94; and (2) whether he was at fault in the creation of the overpayment.

FACTUAL HISTORY

On July 13, 2006 appellant, then a 61-year-old clerk, filed a claim for an injury on that date in the performance of duty. The Office accepted the claim, assigned file number 032050609, for left shoulder strain and left shoulder impingement. Appellant did not stop work.

The Office also accepted that appellant sustained a right shoulder and upper arm sprain and a right biceps tendon rupture due to a traumatic injury on January 17, 2007. It assigned the case file number 032055044. On March 1, 2007 appellant underwent arthroscopic surgery on his right shoulder. He filed claims for compensation on account of disability (Form CA-7) requesting compensation beginning March 3, 2007. The Office paid appellant compensation for disability beginning March 3, 2007 based on his submission of CA-7 forms. It paid him \$37.50 in compensation for the period March 3 to 30, 2007, \$1,477.60 in compensation from March 31 to April 14, 2007, and \$2,967.19 in compensation from April 15 to May 12, 2007.

On May 24, 2007 appellant underwent arthroscopic surgery on his left shoulder. On May 28, 2007 he filed a Form CA-7 under file number 032055044 requesting compensation from May 12 to 26, 2007. The employing establishment indicated on the reverse side of the form that there were two claims. In an attached May 28, 2007 cover letter, appellant related, "I have not been released for the surgery on my right arm -- case 032055044 and also had surgery on my left arm case 0320050609 on May 24, 2007. I was [not] sure how you needed the paperwork completed so I submitted both." On June 12, 2007 he filed a Form CA-7 under file number 032050609 requesting compensation from May 26 to June 9, 2007.

On June 9, 2007 the Office paid appellant \$2,967.19 in compensation for the period May 13 to June 9, 2007 under file number 032055044. On June 26, 2007 it noted that appellant had filed a claim for compensation under file number 032050609 and requested that he submit information regarding his pay rate. A June 26, 2007 payment form indicates that the Office paid him \$1,378.94 in compensation for the period May 26 through June 9, 2007 under file number 032050609.

On July 30, 2007 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,378.94 for the period May 26 through June 9, 2007 because he received duplicate compensation payments. In an accompanying memorandum, it noted that appellant received \$1,378.94 in compensation at the 2/3 pay rate with no deductions for the period May 26 to June 9, 2007 under file number 032050609. Appellant also received \$2,967.19 at the 3/4 pay rate with deductions for the period May 13 to June 29, 2007 under file number 032055044. The Office found that he should have only received the payment of \$2,967.19 under file number 032055044; consequently, he received an overpayment of \$1,378.94. It further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. The Office requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a preresoupment hearing.

On August 21, 2007 appellant requested a decision on the written evidence. He contested the fault finding. Appellant maintained that he informed the Office that he had two cases when he sent in his request for compensation. He believed that the check "was for back payment and a variance in some of the percentages." Appellant described his monthly income and expenses.

By decision dated August 28, 2007, the Office finalized its finding that appellant received an overpayment of \$1,378.94 in compensation for the period May 26 to June 9, 2007 because he received compensation for the same period under two file numbers. It further finalized the

finding that he was at fault in the creation of the overpayment as he accepted a payment that he knew or should have known he was not entitled to receive. The Office determined that appellant should forward a check for the full amount of the overpayment as repayment.

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 When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.³

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained left shoulder sprain and impingement under file number 032050609 and right shoulder and upper arm sprain and a biceps tendon rupture under file number 032055044. Appellant underwent right shoulder surgery on March 1, 2007 and left shoulder surgery on May 24, 2007. He filed claims for compensation beginning March 3, 2007 under file number 032055044. The Office paid appellant compensation from March 3 to May 26, 2007 based on his submission of CA-7 forms. On May 28, 2007 appellant filed a Form CA-7 under file number 032050609 requesting compensation from May 26 to June 9, 2007. The Office paid appellant \$2,967.19 in compensation for the period May 13 to June 9, 2007 under file number 032055044 and \$1,378.94 in compensation for the period May 26 to June 9, 2007 under file number 032050609. As appellant received more than one payment covering the same period of wages, he received an overpayment of compensation.⁴ The Office determined that he properly received the check for \$2,967.19 in compensation paid at the 3/4 rate with deductions under file number 032055044 for the period May 13 to June 9, 2007. Appellant consequently was not entitled to the check for \$1,378.94 in compensation for the period May 26 to June 9, 2007 as it covered part of the same period for which he previously received compensation. The Board finds that he received an overpayment of \$1,378.94.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ 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

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8116(a).

³ See *Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

⁴ *Id.*

⁵ 5 U.S.C. § 8129(b).

against equity and good conscience.” Section 10.433 of the Office’s implementing regulations⁶ 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.”

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment, that he accepted a payment which he knew or should have known to be incorrect. In order for the Office to establish that he was at fault in creating the overpayment, the Office must show that, at the time he received the compensation check in question, he knew or should have know that the payment was incorrect.⁷

The Board finds that the evidence is insufficient to establish that appellant knew or should have known that he accepted an incorrect payment. Appellant asserted that he believed that the check for \$1,389.94 represented compensation for back payments. In a payment report dated June 26, 2007, the Office indicated that it had paid him \$1,378.94 in compensation for the period May 26 through June 9, 2007. There is no evidence, however, that the Office apprised appellant of the specific period covered by the \$1,378.94 check at the time he accepted the compensation. The record does not contain a copy of the compensation check in question or provide the date that the check was issued. There is also no evidence that any letter or other information accompanied the check which would have reasonably put appellant on notice that he had received an incorrect payment. If there is no evidence which indicates that an individual knew or should have known at the time the incorrect payment was accepted that the payment was not due, the Office cannot meet its burden of proof in finding that such individual was at fault in accepting an incorrect payment.⁸ Accordingly, the Office has not met its burden of proof to establish that appellant was at fault in creating the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from May 26 to June 9, 2007 in the amount of \$1,378.94. The Board further finds, however, that the Office has not established that he was at fault in the creation of the overpayment. The case is remanded to the Office for a determination of whether appellant is entitled to waiver of the overpayment.

⁶ 20 C.F.R. § 10.433.

⁷ *Diana L. Booth*, 52 ECAB 370 (2001).

⁸ *See Tammi L. Wright*, 51 ECAB 463 (2000); *Beverly E. Labbe*, 50 ECAB 440 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 28, 2007 is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this decision.

Issued: July 8, 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