

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

L.C., Appellant)	
)	
and)	Docket No. 08-209
)	Issued: June 16, 2008
U.S. POSTAL SERVICE, PLAZA STATION,)	
Pasadena, CA, Employer)	
)	

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 October 30, 2007 appellant filed a timely appeal from a May 9, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for a prerecoupment hearing and a May 18, 2007 merit decision 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 overpayment decision and over the May 9, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a prerecoupment hearing; (2) whether appellant received an overpayment of \$5,622.23 for the period August 7 through November 4, 2000 because she received compensation from the Office and sick and annual leave from the employing establishment; and (3) whether the Office properly found that she was at fault in creating the overpayment, thereby precluding waiver of the recovery of the overpayment.

FACTUAL HISTORY

This case is before the Board for the second time. On February 28, 2007 the Board affirmed an August 11, 2005 decision reducing appellant's compensation to zero effective September 14, 2004 as her actual earnings as a video coding specialist fairly and reasonably represented her wage-earning capacity.¹ The Board also affirmed in part and set aside in part a May 11, 2006 hearing representative's decision affirming the loss of wage-earning capacity determination and finding that the Office properly calculated appellant's pay rate for compensation purposes. The Board determined that the Office erred in calculating appellant's pay rate for compensation purposes from August 7, 2000 to September 14, 2004.² The Board found that, as appellant did not establish entitlement to compensation prior to August 7, 2000, the Office should have paid her compensation based on the pay rate in effect on that date of \$766.71 per week. The hearing representative acknowledged that the Office owed appellant additional compensation because it paid her at an inaccurate pay rate but found that it corrected the error by subtracting the amount it owed her from an overpayment that was created when she received compensation for total disability from August 7 to November 2, 2000 while also receiving leave from the employing establishment. The Board noted that such an offset was improper as it might permit an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in the Office's regulations. The Board remanded the case for the Office to further develop the issue of the appropriate pay rate. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

The record establishes that appellant received sick and annual leave from the employing establishment from August through November 2000. She also received compensation for disability from the Office during this period. On March 6, 2007 the Office informed appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$5,622.23 because she received compensation for total disability from August 7 through November 4, 2000 while also receiving leave from the employing establishment. The Office noted that the period did not include 24 hours of leave without pay used from October 10 to 13, 2000 and 6 hours of leave without pay used from November 3 to 4, 2000. The Office further found that appellant received compensation at an inaccurate pay rate from August 7, 2000 through September 13, 2004. The Office related "[T]he claimant's pay rate was tentatively determined using the pay rate effective on March 10, 2000 as it was unclear at the time whether compensation would be paid back to March. Therefore, the annual salary of \$39,515.00 (\$759.90 per week) was used instead of the correct annual salary in effect on August 7, 2000 of \$39,869.00 (\$766.71 per week)." The Office calculated that, using the correct pay rate and excluding the dates she received leave from the employing establishment, it owed appellant

¹ Docket No. 06-1620 (issued February 28, 2007). Appellant, a 43-year-old window clerk, filed an occupational disease claim on January 25, 2001, which the Office accepted for cervical and right shoulder strain. The Office paid her compensation beginning August 7, 2000 based on her pay rate effective March 10, 2000, the date she claimed compensation for disability. Appellant had not established entitlement to compensation for disability before August 7, 2000. The Office indicated, however, that it would pay appellant compensation based on her March 10, 2000 pay rate of \$39,515.00 a year, or \$759.90 per week, to prevent a possible overpayment of compensation. The Office asserted that it would owe her additional compensation based on her August 7, 2000 pay rate of \$39,869.00 per year if she did not establish entitlement to compensation beginning March 10, 2000.

² See *supra* note 1.

\$119,195.32 for the period August 7, 2000 through September 13, 2004. The Office paid her \$124,817.55 in compensation at the incorrect rate and during the time she received leave from the employing establishment, which resulted in an overpayment of \$5,622.23. The Office informed appellant of its preliminary finding that she was at fault in creating the overpayment as she should have known that she could not receive leave and compensation for disability at the same time. It requested that she complete the enclosed overpayment recovery questionnaire and notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

By letter dated April 4, 2007, postmarked April 6, 2007, appellant challenged the finding that she received an overpayment of compensation. She argued that receiving leave differed from receiving compensation. Appellant returned the overpayment recovery questionnaire with notations that its questions were inapplicable. She also marked through the option to request a telephone conference or a decision based on the written evidence. Appellant did not mark through the request for a hearing.

In a decision dated May 9, 2007, the Office denied appellant's request for a prerecoupment hearing as a matter of right on the grounds that it was untimely. The Office found that she could submit evidence regarding the overpayment to the Office.

By decision dated May 18, 2007, the Office finalized its preliminary determination that appellant received a \$5,622.23 overpayment of compensation for the period August 7 through November 4, 2000, excluding 24 hours of leave without pay from October 10 to 13, 2000 and 6 hours of leave without pay from November 3 to 4, 2000. It excluded from the overpayment the underpayment that was created when it paid her at an inaccurate pay rate from August 7, 2000 through September 13, 2004. The Office also finalized its finding that appellant was at fault in creating the overpayment as she should have known that she could not receive compensation for disability and leave from the employing establishment. The Office found that she should forward a check for the full amount to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Office's procedures on the recovery of overpayments are found in the Code of Federal Regulations at 20 C.F.R. § 10.321. The regulations provide that, before collecting an overpayment, the Office must provide the claimant with written notice of the fact and amount of overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fact and the right to request waiver of the overpayment.³ The regulations also provide that a claimant is entitled to submit additional evidence in writing or at prerecoupment hearing, that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment and that failure to request the hearing within this 30-day time period shall constitute a waiver of that right.⁴

³ 20 C.F.R. § 10.431.

⁴ 20 C.F.R. § 10.432.

ANALYSIS -- ISSUE 1

The Office notified appellant of its preliminary determination that she received an overpayment of compensation in a letter dated March 6, 2007. The Office informed her that she could request a telephone conference, a prerecoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. Appellant requested a prerecoupment hearing by letter postmarked April 6, 2007. As her request was postmarked more than 30 days after the Office's notification of overpayment, it was untimely. Thus, under the regulations appellant waived her right to a prerecoupment hearing.⁵ Accordingly, the Office properly denied her request for a prerecoupment hearing.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act⁶ provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.⁷ The Office's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."⁸

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.⁹ Section 8118(c) of the Act provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant received an overpayment of compensation. From August 7 through November 4, 2000, she received wage-loss compensation for total disability from the Office and sick and annual leave from the employing establishment.¹¹ As appellant used leave from the employing establishment, she was not entitled to receive compensation for disability from the Office.¹² She thus received an overpayment of compensation from August 7 through November 4, 2000, excluding 30 hours of

⁵ *Id.*

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Id.* at § 8129.

⁸ 20 C.F.R. § 10.500.

⁹ 5 U.S.C. § 8116(a).

¹⁰ *Id.* at § 8118(c).

¹¹ The Office properly excluded from this period 30 hours of leave without pay.

¹² 5 U.S.C. § 8118(c).

leave without pay, because she received both leave from the employing establishment and compensation for total disability from the Office.

The Board further finds that the Office properly determined that she received an overpayment of \$5,622.23. The Office calculated that it should have paid appellant \$119,195.32 from August 7, 2000 to September 14, 2004 using the appropriate higher pay rate in effect on August 7, 2000 of \$766.71 and excluding the periods in which she received leave from the employing establishment.¹³ The Office subtracted \$119,195.32 from \$124,817.55, the amount of compensation it paid her using the incorrect pay rate and during the time she received leave from the employing establishment from August 7 to November 4, 2000, to find a total overpayment of \$5,622.23.

Appellant has not challenged the amount of the overpayment but instead contends that she is entitled to receive both leave and compensation. She asserts that she needed to take paid leave rather than leave without pay in order to protect her position. The Act, however, specifically prohibits receiving wage-loss compensation from the Office while using annual or sick leave.¹⁴

Appellant further argues that the Office should not have withheld its underpayment of compensation during the period August 7, 2000 to September 14, 2004 when it paid her at an inaccurate pay rate as a partial recovery of the overpayment. Such an offset is not allowed if it permits an unrestricted recovery of the offset portion of the overpayment without regard to the factors set forth in the Office's regulations for considering waiver as it denies an appellant due process rights with respect to the amount offset.¹⁵ In this case, however, the Office found that she was at fault in the creation of the overpayment and thus not entitled to waiver of the recovery of any portion of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹⁶ 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 regulations¹⁷ 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

¹³ On prior appeal, the Board found that the Office should have paid appellant based on the pay rate in effect on August 7, 2000, the date disability began. *See supra* note 1.

¹⁴ 5 U.S.C. § 8118(c).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ 20 C.F.R. § 10.433.

“(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.”

The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measure to ensure that payments he or she receives from the Office are proper.¹⁸ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 3

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 to be incorrect. The Office must show that, at the time appellant received the compensation checks in question, she knew or should have know that the payment was incorrect.²¹ With respect to whether an individual is with fault, section 10.433(b) provides that the issue of fault 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.²²

Appellant received sick or annual leave from the employing establishment while also receiving compensation for total disability from the Office for the period August 7 through November 4, 2000, excluding 30 hours of leave without pay. The question is whether she accepted payments she knew or should have known to be incorrect when she accepted the Office’s compensation payments.

The Board finds that appellant was at fault in creating the overpayment which occurred from August 7 through November 4, 2000. She acknowledged that she took leave during the time in question but contends that she is entitled to both compensation and leave. In applying the tests to determine fault, the Office applies a “reasonable person” test.²³ While appellant argued that she was entitled to both disability compensation and leave, it was not reasonable for her to expect that she could receive compensation for total disability from the Office and also sick or

¹⁸ *Id.*

¹⁹ *Id.* at § 10.433(b).

²⁰ *Id.*

²¹ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

²² *Supra* note 19.

²³ *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

annual leave from the employing establishment. The Board thus finds that, under the circumstances of the case, she is not without fault in the creation of the overpayment.²⁴

CONCLUSION

The Board finds that the Office properly denied appellant's request for a prerecoupment hearing. The Board further finds that she received an overpayment of \$5,622.23 for the period August 7 through November 4, 2000 because she received compensation from the Office and sick and annual leave from the employing establishment and that she was not without fault in creating the overpayment, thus precluding waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 18 and 9, 2007 are affirmed.

Issued: June 16, 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

²⁴ The Board does not have jurisdiction to review the Office's finding that she should repay the entire amount of the overpayment in full. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. See 20 C.F.R. § 10.441(a); *Ronald E. Ogden*, 56 ECAB 278 (2005).