

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

M.E., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Atlanta, GA, Employer

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**Docket No. 08-350
Issued: June 18, 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 November 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 25, 2007 merit decision concerning an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$1,611.11 overpayment of compensation for the period January 29, 2006 to August 4, 2007; and (2) whether the Office abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

The Office accepted that on March 29, 2005 appellant, then a 41-year-old supervisor of transportation security screening, sustained a low back sprain and right shoulder sprain/strain

when she carried and tossed luggage. She stopped work on August 7, 2005 and the Office paid her compensation for extended periods of disability.

The record contains documents, including monthly payment reports, detailing the compensation that appellant received between January 29, 2006 and August 4, 2007. These documents reveal that her compensation was calculated based on a pay rate derived from her pay on August 7, 2005 totaling \$595.78.¹ A December 15, 2005 Office document indicated that this figure was comprised of \$529.78 of base pay, \$39.60 of night differential pay and \$26.40 of Sunday pay.

In late July 2007, appellant returned to full-time work for the employing establishment. She did not receive disability compensation from the Office after August 4, 2007.² The record contains employing establishment documents from August 2007 confirming that appellant was entitled to receive \$529.78 in base pay and \$26.40 of Sunday pay on August 7, 2005. The documents show, however, that appellant actually was entitled to receive \$11.55 of night differential pay on August 7, 2005 rather than the \$39.60 figure used in prior pay rate calculations for determining her compensation. Therefore, her total pay on August 7, 2005 was \$567.72 rather than \$595.78.

In a September 7, 2007 letter, the Office advised appellant of its preliminary determination that she received a \$1,611.11 overpayment of compensation for the period January 29, 2006 to August 4, 2007.³ It indicated that she received an incorrect amount of Office compensation during this period because an improper pay rate calculation occurred due to the fact that she was only entitled to receive \$11.55 of night differential pay on August 7, 2005 (the date her pay rate was fixed) rather than the \$39.60 figure actually used in pay rate calculations.⁴ The Office indicated that it had determined that appellant was not at fault in the creation of the overpayment and provided her an opportunity to contest the fact and amount of the overpayment as well as to request waiver of the overpayment. It requested that she complete and return an attached form concerning her finances and advised her that failure to submit the requested information within 30 days of the date of the letter would result in denial of waiver of the overpayment. Appellant did not respond.

In an October 25, 2007 decision, the Office finalized its preliminary determination that appellant received a \$1,611.11 overpayment of compensation for the period January 29, 2006 to August 4, 2007. It found she was not at fault in the creation of the overpayment but that the

¹ The Office based appellant's pay rate on her pay on August 7, 2005, the date she first sustained disability due to the accepted employment injury.

² It appears that appellant earned more in the job she returned to than she did in her date-of-injury job.

³ In this notice and other documents, the Office actually stated that the \$1,611.11 overpayment was created between January 29, 2006 to June 4, 2007. However, the payment reports and other documents in the record show that the Office only inadvertently indicated that the overpayment was created between January 29, 2006 to June 4, 2007.

⁴ The Office attached worksheets showing that appellant actually received \$35,299.77 between January 29, 2006 and August 4, 2007 but was only entitled to receive \$33,688.66 for this period when the figure for night differential was corrected.

overpayment was not subject to waiver as she had not responded within the allotted time to its preliminary notice of overpayment by submitting the requested financial information.⁵

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁶ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁷ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁸

Section 8105(a) of the Act provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”⁹ Section 8101(4) of the Act defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$1,611.11 overpayment of compensation for the period January 29, 2006 to August 4, 2007. Appellant received compensation between January 29, 2006 and August 4, 2007 that was calculated based on a pay rate derived from pay

⁵ The Office also determined that the overpayment would be recovered through payments of \$125.00 per month. As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8102(a).

⁸ 5 U.S.C. § 8129(a).

⁹ 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

¹⁰ 5 U.S.C. § 8101(4).

on August 7, 2005 totaling \$595.78.¹¹ The Office presented documents from the employing establishment showing that appellant actually was entitled to receive \$11.55 of night differential pay on August 7, 2005 rather than the \$39.60 figure used in prior pay rate calculations for determining her compensation. The record also contains documents which show that appellant received \$35,299.77 in Office compensation for the period January 29, 2006 to August 4, 2007 whereas she was only entitled to receive \$33,688.66 for this period when the correct figure for night differential on August 7, 2005 is used. Therefore, the Office properly determined that appellant received a \$1,611.11 overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹² These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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."¹³ When the Office finds a claimant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.438 of the Office's regulations provides:

"(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

"(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished."¹⁴

¹¹ This figure was comprised of \$529.78 of base pay, \$39.60 of night differential pay and \$26.40 of Sunday pay. The Office based appellant's pay rate on her pay on August 7, 2005, the date she first sustained disability due to the accepted employment injury. *See supra* notes 9 and 10 and accompanying text concerning when to assess monthly pay for pay rate calculation purposes. Appellant has not challenged the Office's use of the date August 7, 2005, the date when her disability began and the record does not otherwise show that use of this date was improper.

¹² *See Robert Atchison*, 41 ECAB 83, 87 (1989).

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.438.

ANALYSIS -- ISSUE 2

The Board finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment. The Office properly determined that appellant did not establish entitlement to waiver of the overpayment under the above-described standards. Appellant did not provide sufficient financial information within the appropriate time period to show that she was entitled to waiver of the overpayment. In its September 7, 2007 preliminary notice of overpayment, the Office indicated that it had determined that appellant was not at fault in the creation of the overpayment and provided her an opportunity to contest the fact and amount of the overpayment as well as to request waiver of the overpayment. It requested that appellant complete and return an attached form concerning her finances and advised her that failure to submit the requested information within 30 days of the date of the letter would result in denial of waiver of the overpayment. However, appellant did not submit the requested financial information within the allotted time and, under 20 C.F.R. § 10.438, the Office properly denied waiver of the \$1,611.11 overpayment.¹⁵

CONCLUSION

The Board finds that appellant received a \$1,611.11 overpayment of compensation for the period January 29, 2006 to August 4, 2007. The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

¹⁵ See *supra* note 14 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 25, 2007 decision is affirmed.

Issued: June 18, 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