

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, BIRMINGHAM
PLANT, Birmingham, AL, Employer**

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**Docket No. 08-419
Issued: June 24, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 21, 2007 appellant filed a timely appeal from a September 17, 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 creating the overpayment.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$993.55 for the period June 27 through July 7, 2007 because she received compensation for disability after she returned to work; and (2) whether she was at fault in creating the overpayment.

¹ The record also contains a March 26, 2007 schedule award decision. Appellant has not appealed this decision and thus it is not before the Board. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On September 26, 2004 appellant, then a 36-year-old mail clerk, filed an occupational disease claim alleging that she sustained asthma, chronic obstructive pulmonary disease and chronic bronchitis due to factors of her federal employment. The Office accepted her claim for an aggravation of chronic airway obstruction pulmonary disease, an aggravation of chronic obstructive asthma and an aggravation of chronic bronchitis.²

Appellant stopped work in October 2006. The Office paid her compensation for disability beginning October 16, 2006. On June 20, 2007 the employing establishment offered appellant a position as a clerk/lobby assistant. The employing establishment instructed her to report for work on June 27, 2007 if she accepted the position. On June 26, 2007 appellant accepted the position but indicated that she was unable to begin work on June 27, 2007 because of an upper respiratory infection. She noted that she would advise of her return to work date after an appointment with her attending physician.

In a report of termination of disability and/or payment form dated July 16, 2007, (Form CA-3), the employing establishment noted that appellant resumed work on June 27, 2007. It requested that the Office remove her from the periodic rolls effective that date. In a letter dated July 24, 2007, the Office informed appellant that she would receive a compensation check for the period June 10 to July 7, 2007. It advised her that, as she had returned to work on June 27, 2007, she should return the check to avoid an overpayment of compensation.

Appellant informed the Office by telephone on July 31, 2007 that she had returned to work on July 23, 2007 and not June 27, 2007. A claims examiner requested that she submit medical evidence showing that she could not work until July 23, 2007 because of her employment injury.

On August 2, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of \$993.55 for the period June 27 through July 7, 2007 because she received compensation for total disability after she returned to work. The Office advised appellant of its preliminary determination that she was at fault in the creation of the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. The Office notified appellant 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.

On September 7, 2007 appellant telephoned the Office and explained that she had signed the job offer on June 27, 2007 but did not return to work until July 23, 2007. She submitted a July 20, 2007 letter from the employing establishment noting that her attending physician had released her to return to work. The employing establishment instructed appellant to report for work on July 23, 2007. On September 11, 2007 the employing establishment contacted the

² By decision dated April 6, 2006, the Office granted appellant a schedule award for a 30 percent permanent impairment of the lungs. She requested an oral hearing, which was held on January 9, 2007. By decision dated March 26, 2007, the hearing representative affirmed the April 6, 2006 schedule award determination. As previously noted, appellant has not appealed this decision and thus it is not before the Board.

Office and indicated that she had resumed work on July 23, 2007 but could not function in the offered position due to dust. Appellant worked intermittently until August 20, 2007 when she began working in a dust-free position.

By decision dated September 17, 2007, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$993.55. The Office determined that the overpayment arose because she received compensation from June 27 through July 7, 2007 even though she had returned to work on June 27, 2007. The Office further finalized its preliminary finding that appellant was at fault in creating the overpayment because she did not return the check for the period after she resumed work as instructed. The Office instructed her to submit a check for the entire amount as repayment of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

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.⁵ 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."⁶

In determining whether a claimant is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.⁷ Office procedure further specifies that a final decision of the Office must include a discussion of the evidence and provide clear reasoning which allows the claimant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.⁸

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102.

⁵ 5 U.S.C. § 8116(a).

⁶ 20 C.F.R. § 10.500.

⁷ 5 U.S.C. § 8124 provides: "The Office shall determine and make a finding of facts and make an award for or against payment of compensation...." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office shall contain findings of fact and a statement of reasons.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(e) (March 1997); see also *Paul M. Colosi*, 56 ECAB 294 (2005).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an employment-related aggravation of chronic obstruction pulmonary disease, an aggravation of chronic obstructive asthma and an aggravation of chronic bronchitis. The Office paid her compensation for disability beginning October 16, 2006.

In its September 17, 2007 overpayment decision, the Office determined that appellant received a \$993.55 overpayment of compensation for the period June 27 through July 7, 2007 because she received wage-loss compensation after she returned to work. The Office, however, has not adequately explained its finding that she returned to work on June 27, 2007 given the conflicting evidence regarding the date she resumed work.

On June 20, 2007 the employing establishment offered appellant a job as a clerk/lobby assistant with a report to work date of June 27, 2007. She accepted the position on June 26, 2007 but indicated that she could not return to work until after June 29, 2007 because of an upper respiratory infection and pending physician's appointment. On July 16, 2007 the employing establishment submitted a Form CA-3 informing the Office that appellant had returned to work on June 27, 2007 and that it should stop payment of compensation for disability effective that date. In a July 20, 2007 letter, however, the employing establishment instructed her to return to work on July 23, 2007. Appellant notified the Office on July 31 and September 7, 2007 that she had returned to work on July 23, 2007 rather than June 27, 2007. On September 11, 2007 the employing establishment noted that she had returned to work on July 23, 2007 but could not work in the offered position due to dust. The employing establishment did not specifically address whether July 23, 2007 was appellant's first day back at work. The Office concluded that appellant returned to work on June 27, 2007 and did not discuss the evidence supporting that she did not resume work until July 23, 2007 nor make appropriate factual findings after analyzing the evidence. The Office is required by statute and regulation to make findings of fact.⁹ The case will be remanded to the Office to produce a decision containing adequate findings and reasoning regarding whether appellant received an overpayment of compensation. After such development as it deems necessary, the Office should issue an appropriate decision.¹⁰

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation.¹¹ The case is remanded to the Office for the issuance of an appropriate decision.

⁹ 5 U.S.C. § 8124(a); 20 C.F.R. § 10.126; *Paul M. Colosi*, *supra* note 8.

¹⁰ The Board notes that as the Office was paying appellant compensation for disability due to her employment injury, it has the burden of proof to terminate compensation as of the date it finds that she was no longer totally disabled. *Paul L. Steward*, 54 ECAB 824 (2003).

¹¹ In view of the Board's disposition of whether an overpayment of compensation exists, it is premature to address the issues of the amount of overpayment and the fault determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 17, 2007 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 24, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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