

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

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**G.J., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, ROBINS  
AIR FORCE BASE, GA, Employer**

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**Docket No. 08-522  
Issued: June 13, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 11, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 5, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,107.39 for the period August 20 through September 1, 2007; and (2) whether the Office properly found that appellant was at fault in creating the overpayment.

**FACTUAL HISTORY**

Appellant, a 59-year-old customs inspector, filed a Form CA-2 claim for benefits, alleging that he experienced numbness in two of his left fingers and in his left elbow, causally related to factors of his employment. He stated that he first became aware of this condition on November 8, 2006. Appellant filed a claim for benefits on November 30, 2006, which the Office

accepted for cubital tunnel, left upper extremity and lesion of the left ulnar nerve. In its May 21, 2007 letter accepting the claim, the Office advised him:

“Once you return to work, or obtain new employment, notify this Office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, *return it to us immediately to prevent an overpayment of compensation.*” (Emphasis added).

The Office paid appellant appropriate compensation for total disability. He returned to full duty in a modified sheet metal mechanic job with the employing establishment on August 20, 2007.

In a letter to appellant dated August 30, 2007, the Office informed him that his monetary compensation would be reduced based upon his actual earnings. The Office also notified him that he would be receiving one last 28-day compensation check, which partially covered a period following his return to work. Appellant was instructed that to avoid an overpayment of compensation he should return this check to the Office and another check covering the correct period would be issued.

Appellant thereafter received a check for temporary total disability compensation through September 1, 2007, which he cashed.

By letter dated September 4, 2007, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$1,107.39, covering August 20 to September 1, 2007. The Office found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to receive compensation payments after he returned to work. The Office informed appellant that, if he disagreed with the decision, he could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review. On September 13, 2007 appellant responded to the Office’s letter, stating that he was not at fault for the creation of the overpayment. He asserted that he received and deposited his compensation check in the bank because his family needed the money and because he received the Office’s return to work letter on August 30, 2007, 10 days after he returned to work.

On September 24, 2007 the Office called appellant at his home and was advised that he wished to receive a decision based on the written record.

In a decision dated May 18, 2007, the Office finalized the preliminary determination regarding the overpayment of \$1,107.39. The Office also found that appellant was at fault in creating the overpayment of compensation in the amount of \$1,107.39 for the period August 20 through September 1, 2007. The Office stated that he should have been aware that he was not entitled to receive compensation checks after he returned to work on August 20, 2007.

### **LEGAL PRECEDENT -- ISSUE 1**

Compensation for total disability under the Act is payable when the employee starts to lose pay.<sup>1</sup> Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,107.39 for the period August 20 through September 1, 2007. The record shows that appellant received an overpayment during the period in question because he continued to receive checks for temporary total disability compensation after returning to full-time work on September 1, 2007. The Office calculated the \$1,107.39 overpayment by totaling the amount of temporary total disability compensation appellant received from August 20 to September 1, 2007 by taking the net compensation he received per calendar day, \$85.184, and multiplying it times 13, the total number of days he received the overpayment.<sup>3</sup> Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act<sup>4</sup> provides that an overpayment must be recovered 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>5</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

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<sup>1</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>2</sup> 20 C.F.R. § 500(a) (2003).

<sup>3</sup> The Office apparently arrived at this figure by taking the net amount of his compensation check for the period August 5 through September 1, 2007, \$2,385.16, and dividing it by 28 days.

<sup>4</sup> 5 U.S.C. § 8129(a)-(b).

<sup>5</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

(2) Failed to provide information which the individual 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.”<sup>6</sup>

### **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have been expected to know he was not entitled.<sup>7</sup> Appellant returned to full-time employment on August 20, 2007 and was, therefore, no longer entitled to temporary total wage-loss compensation. He was specifically advised by letter dated August 30, 2007 that he would receive one more compensation check for 28 days of temporary total disability compensation, that he was not entitled to the full amount of this check and that he should return this check to avoid an overpayment of compensation. Instead, appellant accepted the check and deposited it in the bank.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the check issued by the Office on September 1, 2007, which contained an overpayment in the amount of \$1,107.39 was in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,107.39 may not be waived. Thus, the November 5, 2007 Office decision is affirmed.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,107.39 for the period August 20 through September 1, 2007. The Board finds that the Office properly found appellant was at fault in creating the overpayment.

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<sup>6</sup> 20 C.F.R. § 10.433(a).

<sup>7</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 5, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 13, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board