

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

S.M., Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Washington, DC, Employer**

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**Docket No. 07-1995
Issued: May 9, 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 July 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 10, 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.¹

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$27,983.40 overpayment of compensation; (2) whether the Office properly determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$300.00 from her compensation payments every month.

¹ The record also contains a May 21, 2007 decision denying appellant's request for knee surgery. Appellant did not appeal this decision to the Board and the matter is not currently before the Board.

FACTUAL HISTORY

The Office accepted that on September 21, 2000 appellant, then a 44-year-old data worker, sustained a left knee sprain, left medial meniscus tear and lumbosacral strain due to a work-related vehicular accident. Appellant received compensation from the Office for periods of disability.² On October 3, 2002 appellant underwent resection of her medial and lateral menisci and debridement of the medial compartment and patellofemoral joint of her left knee.

The record contains a Form EN1032, signed on March 18, 2006, in which appellant indicated that she worked from May 30, 2004 to February 17, 2006 as a cashier for the City of Philadelphia. Appellant indicated that she earned \$533.22 per week.

In a June 2, 2006 letter, the Office advised appellant of its preliminary determination that she received a \$27,983.40 overpayment of compensation because she was “employed by the City of Philadelphia and earned wages from May 30, 2004 to February 17, 2006.” The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material.³ The Office requested that appellant submit evidence or argument if she wished to contest any aspect of the overpayment, including the fault determination, and requested that she submit certain financial information. In an accompanying memorandum, the Office indicated regarding the calculation of the overpayment:

“The claimant worked from May 30, 2004 to December 31, 2004 = 30 weeks + 52 weeks in 2005 = 82 weeks. The claimant earned \$15,652.56 in 2004 (30 weeks) + \$27,445.40 (50 weeks) = \$43,097.96 in 82 weeks. Thus, \$43,097.96 divided by 82 weeks = \$525.58 per week. Overpayment calculated as follows: \$29,149.94 (received by claimant) less \$1,166.54 (should have been received by the claimant) = \$27,983.40 overpayment.⁴”

Appellant requested waiver of the overpayment and submitted financial information. A telephone conference was held on May 16, 2007 during which appellant asserted that she did not know that she was overpaid because she had assumed she was being paid for a schedule award.

In a July 10, 2007 decision, the Office made a final determination that appellant received a \$27,983.40 overpayment of compensation. The Office also made a final determination that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the

² Appellant last worked for the employing establishment in October 2000.

³ The Office indicated that it did not learn of appellant’s private employment until it received the Form EN1032, she completed on March 18, 2006.

⁴ The record contains worksheets indicating that appellant received \$29,149.94 in compensation from May 30, 2004 to February 17, 2006 and that she should have received \$1,166.54 in compensation during the same period. The worksheet containing the \$1,166.54 figure makes note of actual pay per week of \$525.58. The record also contains a Social Security Administration document which indicates that appellant made \$15,652.56 in 2004 and \$27,445.40 in 2005.

overpayment. The Office indicated that the overpayment would be recovered by deducting \$300.00 from appellant's compensation payments every month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁵ 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 her duty.⁶ 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.”⁷

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁸

In determining whether a claimant has discharged her burden of proof and is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.⁹ Office procedure further specifies that a final decision of the Office must include findings of fact 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.”¹⁰ These requirements are supported by Board precedent.¹¹

ANALYSIS -- ISSUE 1

The Office determined that appellant sustained a left knee sprain, left medial meniscus tear and lumbosacral strain and she received compensation from the Office for periods of disability. The Office determined that she received a \$27,983.40 overpayment of compensation because she was “employed by the City of Philadelphia and earned wages from May 30, 2004 to

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8102(a).

⁷ 5 U.S.C. § 8129(a).

⁸ 5 U.S.C. § 8116(a).

⁹ 5 U.S.C. § 8124(a) 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.”

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹¹ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

February 17, 2006.” In a memorandum and worksheets, the Office indicated that appellant received \$29,149.94 in compensation from May 30, 2004 to February 17, 2006 but was only entitled to receive \$1,166.54 in compensation during the same period. The Office found that she was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material. It determined that the overpayment could not be waived because appellant was at fault in its creation.¹²

The Board finds that the Office did not provide sufficient findings and reasoning to support its determination that appellant received a \$27,983.40 overpayment of compensation. The record contains a worksheet indicating that appellant received \$29,149.94 in compensation from May 30, 2004 to February 17, 2006 but the record does not contain documents establishing that these monies were actually received. The record also contains a worksheet indicating that appellant should have received \$1,166.54 in compensation from May 30, 2004 to February 17, 2006. However, the Office did not clearly explain the basis for its determination that appellant was only entitled to receive \$1,166.54 in compensation during this period.

The Board notes that it appears that, in this brief worksheet, the Office might have attempted to effectuate a retroactive wage-earning capacity determination based on appellant’s actual wages as a cashier for the City of Philadelphia. However, the record does not contain any indication that a formal wage-earning capacity determination based on appellant’s actual wages was performed. Making such a wage-earning capacity determination requires that various conditions be met. For example, section 8115(a) of the Act provides that the “wage-earning capacity of an employee is determined by [her] actual earnings if [her] actual earnings fairly and reasonably represent [her] wage-earning capacity.”¹³ Moreover, for actual wages to fairly and reasonably represent wage-earning capacity, the position in which the wages are earned should not involve part-time, sporadic, seasonal or temporary work,¹⁴ nor may the position be a make-shift position designed for a claimant’s particular needs.¹⁵ The Board notes that the Office has not met any of these conditions for performing a retroactive wage-earning capacity determination.¹⁶

¹² The Office indicated that the overpayment would be recovered by deducting \$300.00 from her compensation payments every month.

¹³ 5 U.S.C. § 8115(a). Office procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant’s wage-earning capacity and work stoppage did not occur due to any change in the claimant’s injury-related condition. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

¹⁴ *Id.* at Chapter 2.814.7a (December 1993).

¹⁵ *See William D. Emory*, 47 ECAB 365, 372 (1996).

¹⁶ The Office has not even clearly established what appellant’s actual wages were as a cashier for the City of Philadelphia. The only evidence of appellant’s earnings for any period between May 30, 2004 and February 17, 2006 is a Social Security Administration document indicating that she made \$15,652.56 in 2004 and \$27,445.40 in 2005. The document does not provide any indication how these monies were earned.

At present, appellant would not be able to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁷ Given the Office's failure to adequately explain its findings regarding the fact and amount of the alleged overpayment, it is premature to consider the issues of fault, waiver of recovery and method of recovery. The case should be remanded to the Office so that it might provide sufficient explanation of the above-described matters. After such development it deems necessary, the Office should issue an appropriate decision regarding all relevant overpayment issues.

CONCLUSION

The Board finds that that the case is not in posture for decision regarding whether appellant received a \$27,983.40 overpayment of compensation, whether she was at fault in creating the overpayment such that waiver was precluded and whether the Office properly required repayment of the overpayment by deducting \$300.00 from her compensation payments every month. The case is remanded to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 10, 2007 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 9, 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

¹⁷ See *supra* note 10 and accompanying text.