

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

A.F., Appellant

and

**DEPARTMENT OF STATE, NATIONAL
PASSPORT CENTER, Portsmouth, NH,
Employer**

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**Docket No. 09-372
Issued: August 18, 2009**

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 November 17, 2008 appellant filed a timely appeal of the August 13, 2008 merit decision of the Office of Workers' Compensation Programs, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$4,852.06 for the period March 31 through May 10, 2008; and (2) whether appellant was at fault in creating the overpayment and therefore not entitled to waiver of recovery of the overpayment.

FACTUAL HISTORY

Appellant, a 67-year-old passport specialist, has an accepted claim for left rotator cuff sprain, which arose on or about December 7, 2006. The Office authorized a left shoulder arthroscopy, which was performed on June 7, 2007. Appellant stopped work on December 7,

2006 and remained off work for approximately 15 months. On July 3, 2007 the Office approved her leave buy-back request for the period December 7, 2006 through January 16, 2007. In August 2007, it paid appellant wage-loss compensation for the period January 17 through March 3, 2007. The Office subsequently placed her on the periodic compensation rolls effective August 5, 2007.¹

On March 31, 2008 appellant returned to work in a part-time, limited-duty capacity, working four hours per day. She subsequently filed a claim for compensation (Form CA-7) for four hours of lost wages per day beginning March 31, 2008. Appellant's entitlement to compensation based upon these claims for compensation was not determined as part of this overpayment decision. During a May 5, 2008 telephone conversation with the employing establishment, the Office learned that she had recently returned to work on a part-time basis. That same day, the Office terminated appellant's wage-loss compensation retroactive to March 31, 2008.

On June 18, 2008 the Office issued a preliminary determination that appellant received an overpayment of \$4,852.06 for the period March 31 through May 10, 2008. It explained that the overpayment occurred because she continued to receive wage-loss compensation for temporary total disability following her March 31, 2008 return to work. According to the Office, appellant had been receiving wage-loss compensation every 28 days in the amount of \$3,313.60. She reportedly had been paid for the periods March 16 through April 12, 2008 and April 13 through May 10, 2008, but was only entitled to compensation from March 16 through 30, 2008. Additionally, the Office indicated that it appeared that she was at fault in creating the overpayment because she accepted a payment that she knew or should have known to be incorrect.

On July 17, 2008 appellant requested that the Office make a final decision based on the written evidence. She also submitted an overpayment recovery questionnaire. Appellant reported total monthly income of \$2,124.00 and monthly expenses of \$2,606.00. Additionally, she reported assets of \$10,553.00. Appellant disagreed with the amount of the overpayment as well as the Office's preliminary finding of fault. With respect to the issue of fault, she indicated that she had called the Office as soon as she knew she was returning to work. Appellant further stated that she believed that she would still receive a check from the Office because she was going back to work only part time. Appellant explained that there were never any dates on the paperwork she received with her checks so she never knew what time period was covered. She also noted that nine months had elapsed before she received her first check in August 2007 and the first couple of months the checks were all different amounts. Appellant said she believed that the checks she received after going back to work were a continuation of the money that the Office owed her.

The Office issued a final overpayment decision on August 13, 2008. It found that appellant received an overpayment of \$4,852.06 because she was compensated for temporary total disability when in fact she was working part time. As to the issue of fault, the Office found that appellant knowingly accepted wage-loss compensation to which she was not entitled.

¹ There is no record of payment for wage-loss compensation for the interim period March 4 through August 4, 2007.

LEGAL PRECEDENT -- ISSUE 1

If an employee returns to work and has earnings, she is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period.² Where there are actual earnings and the continued receipt of wage-loss compensation for temporary total disability for the same period, an overpayment of benefits exists.

ANALYSIS -- ISSUE 1

The Office's June 18, 2008 preliminary determination indicated that appellant had been paid wage-loss compensation continuously from January 17, 2007 through May 10, 2008.³ The record indicates that appellant returned to work on a part-time basis beginning March 31, 2008. On April 12, 2008 the Office paid her net compensation of \$3,389.80 for temporary total disability for the period March 16 through April 12, 2006. On May 10, 2008 it disbursed another payment for temporary total disability for the period April 13 through May 10, 2008. Appellant's net compensation for this latter period was \$3,313.60. Because she had returned to work on March 31, 2008, she was only entitled to receive temporary total disability for the period March 16 through 30, 2008. Accordingly, appellant was entitled to only a portion (15 days) of the April 12, 2008 payment and none of the May 10, 2008 payment she received. The Office properly determined that she was overpaid \$4,852.06 for the period March 31 through May 10, 2008.

LEGAL PRECEDENT -- ISSUE 2

The Office is obliged to recover an overpayment unless adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.⁴ Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁵ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or

² 20 C.F.R. § 10.403(a)(c) (2008); *Daniel Renard*, 51 ECAB 466, 469 (2000).

³ As previously indicated, *supra* note 1, there is no record of payment of wage-loss compensation for the period March 4 through August 4, 2007.

⁴ 5 U.S.C. § 8129(b) (2006); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁵ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁶

The Office may consider waving an overpayment if the individual to whom it was made was not at fault in either accepting or creating the overpayment.⁷ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from the Office are proper.⁸ Recipient will be found to be at fault with respect to creating an overpayment if the individual “[a]ccepted a payment which ... she knew or should have known to be incorrect.”⁹

ANALYSIS -- ISSUE 2

When a disabled employee is placed on the periodic compensation rolls, the Office routinely advises the employee of this fact and issues a CA-1049 form identifying the weekly pay rate, the compensation rate, the gross payment any applicable deductions and the net amount to be disbursed.¹⁰ The CA-1049 form is generally accompanied by an EN1049 form, which explains the employee’s rights and responsibilities with respect to the receipt of compensation. This latter document provides pertinent information regarding returning to work and how to avoid an overpayment of benefits. It also includes a certification that the benefits recipient has read and understands the terms and conditions under which she may receive compensation. The record before the Board does not include copies of either CA-1049 or EN1049 form that predate the period of the overpayment.

In her response to the Office’s June 18, 2008 preliminary determination, appellant acknowledged receiving payments from the Office following her March 31, 2008 return to work. But she claimed that there were never any dates on the paperwork she received with her checks so she never knew what time period was covered. Appellant also indicated that she believed that she was entitled to this money because, among other things, she was only working part time.

The regulations indicate that, in addition to providing narrative descriptions to recipients of benefits, the Office includes on each periodic check a clear indication of the period for which payment is being made. Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment.¹¹ But given the absence of a CA-1049/EN1049 form, this presumption is unwarranted. The lack of a CA-1049/EN1049 form also calls into question the Office’s finding that appellant was at fault in creating the overpayment. If the Office did not properly notify appellant of her rights and responsibilities as

⁶ 20 C.F.R. § 10.437(a)(b).

⁷ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (June 2003).

¹¹ 20 C.F.R. § 10.430(a)(b).

a benefits recipient, it is difficult to find her at fault, particularly where she is entitled to continuing compensation based on her part-time employment status. Moreover, there is a 5-month period in 2007 where appellant appears not to have received any wage-loss compensation while she was off work. Appellant stated that she believed the Office still owed her money. Given these circumstances, the record does not establish that appellant “[a]ccepted a payment which ... she knew or should have known to be incorrect.”¹² Therefore, the Office’s finding of fault is reversed. The case will be remanded for consideration of waiver of recovery of the overpayment.

CONCLUSION

Appellant received an overpayment of \$4,852.06 for the period March 31 through May 10, 2008. However, the record does not establish that she was not at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2008 decision of the Office of Workers’ Compensation Programs is affirmed in part and reversed in part and the case is remanded for further action consistent with this decision of the Board.

Issued: August 18, 2009
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

¹² See *supra* note 8.