

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

H.E., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Shreveport, LA, Employer)

Docket No. 09-965
Issued: December 3, 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 March 3, 2009 appellant filed a timely appeal of the December 3, 2008 decision of the Office of Workers' Compensation Programs, which found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$1,196.76 overpayment of compensation for the period August 29 to September 27, 2008; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 17, 2008 appellant, then a 60-year-old housekeeping aid supervisor, was injured while lifting boxes off of a pallet. The Office accepted that he sustained a sprain of the

lumbar back region and contusion of the back. Appellant stopped work on March 19, 2008 and was placed on the periodic rolls.

By a letter dated April 30, 2008, the Office advised appellant of his diagnosed conditions and his eligibility for benefits. In an attached Form CA-1008, it advised him of certain information concerning the circumstances under which he could receive compensation. The Office advised:

“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.”

In a letter dated August 21, 2008, the Office outlined appellant’s entitlement to compensation benefits and his responsibility to return to work in connection with the injury accepted by the Office. In an attached EN1049 the Office provided:

“OVERPAYMENTS. To minimize the possibility of an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.

“CERTIFICATION. I have read the information contained in the EN1049 and understand the conditions under which I may receive compensation and the items I must report to the Department of Labor, Office of Workers’ Compensation Programs, in connection with my claim. I agree to be bound by these conditions. I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for the resulting overpayments.”

The employing establishment offered appellant a job as a temporary, part-time supervisory housekeeping aid for four hours a day. On August 29, 2008 appellant accepted the position and returned to work the same day.

In a compensation termination report dated October 6, 2008, the Office noted that appellant returned to work, four hours per day, on August 29, 2008. It noted that prior to that time he was on the periodic rolls receiving compensation for his work-related injury. The Office noted that appellant’s case history revealed that he continued to receive compensation through September 27, 2008 and that an overpayment of benefits was created.

In an October 22, 2008 fiscal payment worksheet, the Office calculated that appellant was overpaid net benefits of \$1,196.76 for the period August 29, to September 27, 2008. It noted that he returned to work four hours per day on August 29, 2008 but that total disability compensation benefits continued to be paid through September 27, 2008, for a total of 30 days. The Office calculated the overpayment to be \$1,196.76. It noted that, for the period August 29

to September 27, 2008, a 30-day period, appellant was paid gross benefits of \$2,138.84. The Office further noted that, for the period including August 29, September 1 to 5, September 8 to 12, September 15 to 19 and September 22 to 26, 2008, he worked 4 hours per day for a total of 84 hours and was entitled to \$942.08.

In an October 22, 2008 letter, the Office informed appellant that it made a preliminary determination that he had received a \$1,196.76 overpayment of compensation from August 29 to September 27, 2008 because he continued to receive compensation benefits for temporary total disability from August 29 to September 27, 2008 after he had returned to work part time, four hours per day, on August 29, 2008. It found that he was at fault in creating the overpayment because he accepted payment that he knew or reasonably should have known to be incorrect. It also informed him that he had the right to submit evidence or argument if he disagreed with the Office's finding. The Office also informed appellant that he had a right to a precoupment hearing before an Office hearing representative. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

In a decision dated December 3, 2008, the Office found that appellant received a \$1,196.76 overpayment of compensation from August 29 to September 27, 2008, for which he was at fault in creating. It advised that the overpayment occurred because he returned to work part time, four hours per day, on August 29, 2008 and continued to receive compensation for total disability until September 27, 2008. The Office found that appellant was at fault in creating the overpayment because he reasonably should have been aware that he was not entitled to compensation benefits for total disability while working part time. It stated that he should forward a check for the entire amount of the overpayment and if he was unable to refund the amount he was instructed to contact the Office and make arrangements for recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.¹

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to part-time work, four hours per day at the employing establishment on August 29, 2008. He continued to receive wage-loss compensation for total disability through September 27, 2008. As noted above, appellant is not entitled to receive compensation for total disability after he has returned to work. Thus, an overpayment occurred in the amount of \$1,196.76. Appellant did not dispute the calculation of the overpayment.

Since the evidence indicated that appellant returned to part-time work for four hours daily on August 29, 2008, he would not be entitled to any compensation for wage loss after that date.

¹ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

The record shows that the Office calculated that, from August 29 to September 27, 2008, appellant received \$2,138.84 in total disability compensation but should have received only \$942.08 for partial disability. It subtracted \$942.08 from \$2,138.84 and found that the difference between the amount of compensation appellant received and the amount he should have received was \$1,196.76 and therefore this is the amount of the overpayment. The Office explained how the overpayment occurred and provided this to him with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,196.76 for the period August 29 to September 27, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act provides as follows:

“Adjustment or recovery 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.”²

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.³

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁴

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”⁵

² 5 U.S.C. § 8129(b).

³ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁴ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁵ 20 C.F.R. § 10.433(b).

Section 10.430(a) of the Office's regulations advises that the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes that, by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment.⁶

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant accepted the compensation checks in question, he knew or should have known the payments were incorrect.⁷

The Board notes that the Office erroneously issued wage-loss compensation for total disability while appellant was only entitled to wage-loss compensation for four hours a day. However, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment to which he knew or should have known that he was not entitled.⁸ On April 30, 2008 the Office advised appellant in a CA-1008 form of dual benefits and provided: "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." Likewise, in a letter dated August 21, 2008, the Office outlined appellant's entitlement to compensation benefits and his responsibility to return to work in connection with the injury accepted by the Office. In an attached EN1049 the Office provided:

"OVERPAYMENTS. To minimize the possibility of an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working."

Furthermore, the Office includes on each periodic check a clear indication of the period for which payment is being made. By doing this, it puts the recipient on notice that a payment was made and the amount of the payment.⁹ This is evidence that appellant should have been aware that, when he accepted the compensation for the period in question, he was not entitled to receive wage-loss compensation for total disability for a period when he worked.

⁶ *J.R.*, 60 ECAB ____ (Docket No. 08-1107, issued June 15, 2009). 20 C.F.R. § 10.430.

⁷ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ See *J.R.*, *supra* note 6.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant accepted wage-loss compensation from August 29 to September 27, 2008, which he knew or should have known was incorrect. As appellant was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,197.76 may not be waived.¹⁰

On appeal, appellant asserts that he was not at fault in creating the overpayment and noted the difficulty he had in getting his claim accepted and in obtaining compensation. However, as noted above, the evidence supports that he knew or should have known that he could not accept compensation for total disability during a period in which he worked four hours daily.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from August 29 to September 27, 2008 and that he was at fault in creating the overpayment.

¹⁰ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 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