

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

T.L, Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Kansas City, MO, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1820
Issued: February 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 16, 2008 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated March 4 and June 10, 2008 finding that she received an overpayment of compensation. She also appeals a May 5, 2008 merit decision denying her claim for compensation for disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$5,285.00 for the period August 6 through December 23, 2006; (2) whether she was at fault in the creation of the \$5,285.00 overpayment of compensation; (3) whether the Office properly found that appellant was not disabled from employment beginning March 25, 2000 due to her June 17, 1999 work injury; and (4) whether she received an overpayment of compensation in the amount of \$146,718.55 for the period March 25, 2000 through December 5, 2006.

FACTUAL HISTORY

This case is before the Board for the fifth time. The relevant factual history is set forth. The Office accepted that on June 17, 1999 appellant, a 37-year-old mail processor, sustained a left shoulder contusion, a left ankle sprain, a right foot sprain and tarsal tunnel syndrome. She worked full time with restrictions following her injury. The employing establishment terminated appellant for cause on March 24, 2000. The Office paid her compensation for four hours per day beginning July 16, 2000. By decision dated March 15, 2001, it terminated appellant's compensation effective March 12, 2001 on the grounds that she had no further employment-related disability. On August 1, 2002 the Board reversed the termination of compensation benefits.¹ The Board found that the Office had not met its burden of proof that appellant had no further disability due to her accepted employment injury.

The Office paid appellant compensation for eight hours per day retroactive to March 15, 2001. On January 18, 2005 the employing establishment again notified the Office that it had removed appellant for cause on March 24, 2000 for failing to follow instructions and being absent from her work assignment.

On July 1, 2005 the Office proposed to reduce appellant's compensation based on its finding that she had the capacity to earn wages in the constructed position of customer service clerk. On July 29, 2005 it rescinded its proposed reduction and noted that she worked four hours per day limited-duty prior to her termination from the employing establishment for cause on March 24, 2000.

On September 23, 2005 the Office reduced appellant's compensation benefits to four hours per day effective September 3, 2005 and indicated that it was terminating her benefits effective September 4, 2005. In an order dated February 7, 2006, the Board set aside the September 23, 2005 decision and remanded the case for a final decision supported by findings of fact and conclusions of law.² The Board found that it was unclear whether the Office was attempting to terminate appellant's wage-loss compensation or reduce her compensation based on her wage-earning capacity in a selected position.

On October 14, 2005 the Office reduced appellant's compensation for wage loss effective September 4, 2005 to four hours per day. It reissued the decision on April 14, 2006.

On May 5, 2006 the Office notified appellant of its preliminary determination that she received an overpayment of \$51,534.47 because she received compensation for eight hours per day instead of four hours per day for the period March 25, 2000 through September 3, 2005. It determined that she was without fault in creating the overpayment.

On May 5, 2006 appellant requested a review of the written record. She noted that at the time of her injury she worked four hours regular duty and four hours light duty daily and submitted clock rings supporting that she worked full time.

¹ Docket No. 02-56 (issued August 1, 2002).

² Order Remanding Case, Docket No. 06-389 (issued February 7, 2006).

By decision dated July 20, 2006, the Office terminated appellant's compensation and authorization for medical benefits effective August 6, 2006 based on its finding that she had no further employment-related disability.

On August 21, 2006 the Board issued an order setting aside the Office's October 14, 2005 decision reducing appellant's compensation and remanding the case for an appropriate decision with findings of fact and conclusions of law.³ The Board found that the Office had not sufficiently referenced the medical evidence in reducing her compensation effective September 4, 2005.

By decision dated November 14, 2006, the Office reduced appellant's compensation effective September 4, 2005 based on its finding that she could work four hours per day light duty. In a decision dated December 6, 2006, a hearing representative affirmed the Office's July 20, 2006 termination decision.

On December 29, 2006 the Office calculated that appellant received an overpayment of compensation in the amount of \$5,285.00 because it continued to pay her compensation for total disability subsequent to the termination of her benefits. On January 25, 2007 it notified appellant of its preliminary determination that she received an overpayment of \$5,285.00 because she received compensation for total disability from August 6 through December 23, 2006 after the termination of her benefits. The Office further advised her of its preliminary determination that she was at fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified her 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 February 21, 2007 appellant requested a prerecoupment hearing. She challenged fact and amount of overpayment and the fault finding.⁴

By decision dated July 23, 2007, the Board affirmed the July 20 and December 6, 2006 decisions terminating appellant's compensation and authorization for medical benefits effective August 6, 2006 on the grounds that she had no further residuals of her June 17, 1999 work injury.⁵

A hearing was held on December 12, 2007. Appellant related that she believed that she was entitled to keep the compensation she received after the termination decision because she had received a statement from a judge indicating that she could get benefits while a case was on appeal.

³ Order Remanding Case, Docket No. 06-393 (issued August 21, 2006).

⁴ By decision dated February 28, 2007, the Office finalized its determination that she received an overpayment of \$5,285.00 for which she was at fault in creating. As she had requested a prerecoupment hearing, the hearing representative set aside this overpayment decision.

⁵ Docket No. 07-752 (issued July 23, 2007).

In a decision dated March 4, 2008, an Office hearing representative set aside the Office's preliminary finding that appellant received an overpayment of \$51,534.47 for the period March 25, 2000 through September 3, 2005. She noted that the Office determined that the overpayment occurred because it paid appellant compensation for eight hours per day rather than four hours per day. The Office hearing representative found, however, that as the employing establishment terminated her for cause, she had no disability after March 24, 2000. She remanded the case to the Office "for a decision on entitlement and determination as to whether [appellant] was overpaid after the date of her termination from employment, March 24, 2000." The hearing representative affirmed the Office's finding that appellant received a \$5,285.00 overpayment of compensation because she continued to receive compensation from August 6 through December 6, 2006. She determined that she was at fault and thus not entitled to waiver.⁶

By decision dated May 5, 2008, the Office determined that appellant had not established that she was disabled after March 25, 2000 due to her employment injury. It noted that she was removed for cause and that the limited-duty work would have remained available to her and thus she had no disability.

On May 5, 2008 the Office issued a preliminary determination that appellant received an overpayment of \$146,718.55 because she was paid compensation from March 25, 2000 through December 5, 2006. It notified her of its preliminary determination that she was without fault in the creation of the overpayment and requested that she provide information supporting waiver.

By decision dated June 10, 2008, the Office determined that appellant was entitled to waiver of the \$146,718.55 overpayment of compensation. It found that her total monthly expenses exceeded her monthly income and because recovery would defeat the purpose of the Federal Employees' Compensation Act and cause undue hardship.

LEGAL PRECEDENT -- ISSUE 1

The Act⁷ 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 duty.⁸ Section 8129(a) of the Act provide that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office, by decreasing later payments to which the individual is entitled.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left shoulder contusion, left ankle sprain, right foot sprain and tarsal tunnel syndrome due to a June 17, 1999 work injury. By decision

⁶ On March 14, 2008 the Office notified appellant that she should forward a payment of \$75.00 per month until the overpayment was repaid.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8102(a).

⁹ 5 U.S.C. § 8129.

dated July 20, 2006, it terminated her entitlement to compensation benefits effective August 6, 2006 after finding that she had no further employment-related disability. On July 23, 2007 the Board affirmed the termination of appellant's compensation. The Office, however, continued to pay appellant wage-loss compensation in the amount of \$5,285.00 from August 6 through December 23, 2006. Appellant thus received a \$5,285.00 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its implementing regulations, 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.¹⁰ Section 10.433 of the implementing regulations provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.¹² Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.¹³ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁴

ANALYSIS -- ISSUE 2

By accepting payments after her entitlement to benefits was terminated effective August 6, 2006, appellant accepted payments that she knew or should have known were incorrect. In its July 20, 2006 termination decision, the Office notified her that it was terminating her compensation on August 6, 2006. The record reflects that a copy of the Office's decision was properly mailed to appellant at her address of record in the ordinary course of business and is thus presumed to have been received.¹⁵ Appellant has not submitted evidence to rebut the presumption of receipt.¹⁶ Accordingly, she received notice that the Office had terminated her wage-loss benefits and that she was not entitled to receive any compensation payments subsequent to August 6, 2006. As discussed, however, the Office paid her compensation from August 6 through December 23, 2006 in the amount of \$5,285.00. Appellant thus accepted payments that she knew or should have known to be incorrect. Accordingly, the

¹⁰ 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ *Id.* at § 10.433(a).

¹² *Id.*

¹³ *Id.* at § 10.433(a)(3); *Tammy Craven*, 57 ECAB 589 (2006).

¹⁴ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁵ *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

¹⁶ *Id.*

Board finds that she was at fault in the creation of the overpayment. The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.¹⁷

On appeal, appellant contended that the Office did not provide her with a date that her compensation would cease and thus she was not responsible for the overpayment. The Office, however, clearly notified her in its decision that her compensation was terminated effective August 6, 2006. As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 8128 of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹⁹ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.²⁰ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.²¹

It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.²² This holds true where the Office later decides that it erroneously accepted a claim.²³ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment. The Office is required to provide a clear explanation of the rationale for rescission.²⁴

ANALYSIS -- ISSUE 3

¹⁷ See 20 C.F.R. § 10.435(a); *D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁸ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); see *Albert Pineiro*, 51 ECAB 310 (2000).

¹⁹ 5 U.S.C. § 8128; see also 20 C.F.R. § 10.610.

²⁰ *John W. Graves*, 52 ECAB 160 (2000); *Eli Jacobs*, 32 ECAB 1147 (1981).

²¹ *John W. Graves*, *supra* note 20; *Doris J. Wright*, 49 ECAB 230 (1997).

²² *Linda L. Newbrough*, 52 ECAB 323 (2001).

²³ *Id.*

²⁴ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005); see also 20 C.F.R. § 10.610.

The Office paid appellant compensation for disability from March 24, 2000 until August 6, 2006, when it terminated her benefits. On May 5, 2006 it informed her of its preliminary determination that an overpayment occurred because it should have paid her compensation for four hours rather than eight hours a day from March 24, 2000 to August 6, 2006. On March 4, 2008 an Office hearing representative set aside the May 5, 2006 decision after noting that appellant was terminated for cause by the employing establishment on March 24, 2000 and thus had no disability under the Act. She remanded the case for the Office to make a determination on her entitlement to benefits after March 24, 2000.

By decision dated May 5, 2008, the Office found that appellant had not established that she was disabled after March 25, 2000 due to her June 17, 1999 employment injury. The Board finds that, by determining retroactively that she was not entitled to compensation for wage-loss after March 25, 2000, the Office effectively conducted a rescission of its prior payment of compensation for wage loss beginning that date. As the Office determined that appellant sustained disability causally related to her federal employment, it may not terminate compensation without establishing either that the disability ceased or that it is no longer related to the employment.²⁵ This holds true where it later decides that it erroneously accepted a claim.²⁶ In its May 5, 2008 decision, the Office did not purport to rescind acceptance that appellant was disabled from March 25, 2000 through August 6, 2006. Instead, it impermissibly shifted the burden of proof to appellant to establish disability for that period. As the Office failed to issue an appropriate decision rescinding its finding that appellant was entitled to compensation for disability from March 25, 2000 through August 6, 2006, it did not meet its burden of proof to establish that she was not entitled to wage-loss compensation for that period.²⁷

CONCLUSION

The Board finds that appellant received an overpayment of \$5,285.00 for the period August 6 through December 23, 2006 and that she was at fault in the creation of the overpayment. The Board further finds that the Office improperly found that appellant had not established that she was disabled from employment beginning March 25, 2000 due to her June 17, 1999 work injury.

²⁵ See *Linda L. Newbrough*, *supra* note 22.

²⁶ *Id.*

²⁷ In view of the Board's disposition of the issue of whether the Office properly found that appellant was not entitled to compensation for disability from March 25, 2000 through August 6, 2006, the issue of whether she received an overpayment of compensation in the amount of \$146,718.55 is moot. The Board further notes that the Office waived recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 10 and May 5, 2008 are reversed and the decision dated March 4, 2008 is affirmed.

Issued: February 18, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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