

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

M.W., Appellant

and

**PEACE CORPS, ALAVERDI FAMILY
CENTER, Alaverdi, Armenia, Employer**

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**Docket No. 08-1912
Issued: February 24, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2008 appellant filed a timely appeal from a May 14, 2008 decision of the Office of Workers' Compensation Programs regarding 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 the Office properly determined that appellant received an overpayment of \$1,052.00 in compensation for the period May 14 to July 8, 2006; (2) whether the Office properly determined that appellant was at fault in creating the overpayment and therefore it was not subject to waiver; and (3) whether the Office properly required recovery of the overpayment from continuing compensation payments.

FACTUAL HISTORY

The Office accepted that on November 5, 2002 appellant, then a 39-year-old health extension specialist, sustained lumbar radiculopathy. She was removed from the employing

establishment effective August 19, 2003. Appellant received compensation on the daily rolls beginning August 19, 2003 and on the periodic rolls beginning on October 14, 2004. She remained under medical treatment through 2007.

In December 2004, the Office referred appellant to a vocational rehabilitation specialist. Appellant underwent vocational aptitude testing and participated in a job placement effort through October 2005. The vocational rehabilitation counselor performed labor market surveys. She found that entry level, part-time clerical jobs within appellant's physical restrictions were reasonably available in her commuting area. Entry level wages were \$10.00 an hour or \$200.00 for a 20-hour week.

By notice dated March 2, 2006 and finalized April 7, 2006, the Office reduced appellant's continuing compensation effective May 14, 2006, based on her ability to perform the selected position of data entry clerk (U.S. Department of Labor, *Dictionary of Occupational Titles* # 203.583.054) with wages of \$200.00 a week. It advised appellant that, effective May 14, 2006, her wage-loss compensation every 28 days would be reduced from \$1,594.00 to \$1,068.00.

On June 10, 2006 the Office issued appellant a compensation check in the amount of \$1,594.00 for the period May 14, to June 10, 2006. On July 8, 2006 it issued appellant a compensation check in the amount of \$1,594.00 for the period June 11 to July 8, 2006. On August 5, 2006 the Office issued appellant a compensation check in the amount of \$1,068.00 for the period July 9 to August 5, 2006. The record indicates that appellant deposited these checks.

By notice dated September 18, 2007, the Office advised appellant of its preliminary determination that an overpayment of \$1,052.00 was created as she accepted compensation payments from May 14 to July 8, 2006 that were issued at an incorrect rate. Appellant accepted the June 10 and July 8, 2006 compensation checks in the amount of \$1,594.00 each, whereas the April 7, 2006 decision reduced her compensation to \$1,068.00 every 28 days effective May 14, 2006. The Office made the preliminary determination that appellant was at fault in creation of the overpayment as she knew or reasonably should have known that she was not entitled to total disability compensation on and after May 14, 2006. The April 7, 2006 decision explained that effective May 14, 2006 she was entitled to \$1,068.00 every 28 days. Appellant was afforded 30 days to submit financial information or request a hearing.

On October 13, 2007 appellant requested a prerecoupment hearing. She asserted that she was not at fault in creation of the overpayment. At the hearing, held March 13, 2008, appellant stated that she did not dispute the fact or amount of the overpayment. She asserted that she was "confused" by the June 10 and July 8, 2006 checks "continuing to be issued for the full amount," that there was "something that was strange" in the checks. Appellant realized the "possibility of an error" and telephoned the Office. The hearing representative noted that there was no record of the call.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) with supporting documentation showing \$2,312.47 in monthly income, \$2,793.14 in monthly expenses and \$15,419.99 in bank and investment accounts.

By decision dated and finalized May 14, 2008, an Office hearing representative finalized the \$1,052.00 overpayment of compensation. He found that appellant was at fault in creation of the overpayment as she accepted payments she realized were for temporary total disability after her compensation had been reduced. The Office hearing representative further found that appellant had sufficient liquid assets such that recovery of the overpayment would not deprive her of funds needed for ordinary and necessary living expenses. He directed recovery of the overpayment in full from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act¹ 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 his duty.² Section 8129(a) of the Act provides, in pertinent part, that 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."³ The Office procedure manual identifies various situations when overpayments of compensation may occur.⁴

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar radiculopathy. Appellant received compensation on the daily and periodic rolls beginning on August 19, 2003. Effective May 14, 2006, the Office reduced appellant's continuing compensation payments from \$1,594.00 to \$1,068.00 based on her ability to perform a selected clerical position. It notified appellant of this reduction by an April 7, 2006 decision.

The evidence reflects and appellant does not dispute that she received \$3,188.00 in wage-loss compensation for the period May 14 to July 8, 2006, based on the June 10 and July 8, 2006 checks for \$1,594.00 each. However, appellant was entitled to receive only \$2,136.00 in compensation for the period May 14 to July 8, 2006, resulting in a \$1,052.00 overpayment of compensation. The Board therefore finds that the Office correctly determined that appellant received an overpayment of compensation in the amount of \$1,052.00 for the period in question.⁵

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a).

³ 5 U.S.C. § 8129(a).

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

⁵ *Alberto Pineiro*, 51 ECAB 310 (2000).

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the 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.⁶ Section 10.433 of the implementing regulations specifically 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.⁷ The regulation further provides 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.⁸ Under section 10.433 of the Office regulations, a recipient will be found to be at fault with respect to creating an overpayment, if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.⁹

Section 10.433(b) of the Office regulations provide, in relevant part, that the determination of fault “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.”¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment under the third standard noted above, because she accepted compensation payments at the total disability rate for the period May 14 to July 8, 2006 after her compensation had been reduced.

The Office’s April 7, 2006 decision clearly advised appellant that, as of May 14, 2006, she was entitled to \$1,068.00 in compensation every 28 days. At the October 13, 2007 prereducement hearing, appellant admitted that she knew compensation checks were issued for the former amount. She found this strange and that it suggested an error which prompted her to call the Office. Appellant’s statements demonstrate her knowledge that checks were issued for an erroneously high amount.

By depositing the checks, appellant accepted payments that she knew or should have known were incorrect. Therefore, she was at fault in the creation of the overpayment.¹¹ As

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

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.*

⁹ *Id.* at § 10.433(a)(3).

¹⁰ *Id.* at § 10.433(b).

¹¹ *Neill D. Dewald*, 57 ECAB 451 (2006).

appellant was aware that she was no longer entitled to total disability compensation on and after May 14, 2006, she accepted payments that she knew or should have known to be incorrect. Accordingly, the Board finds that appellant was at fault in the creation of the overpayment.¹² The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.¹³

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.¹⁴

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation. It shall determine the rate of recovery, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹⁵

ANALYSIS -- ISSUE 3

In the May 14, 2008 decision, the Office hearing representative noted that appellant had sufficient funds in bank and investment accounts to repay the overpaid amount of compensation. He directed recovery of the overpayment in full from appellant's continuing compensation payments. However, the Office did not set forth the amount of these deductions or the period during which they would be made. Without this information, the Board cannot determine if the rate of recovery would create an undue financial hardship.

Therefore, the case is not in posture for a decision regarding the rate of recovery of the overpayment. The case will be remanded to the Office for appropriate development to determine the amount and schedule of deductions from appellant's continuing compensation payments. Following this and any other necessary development, the Office will issue an appropriate decision in the case.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$1,052.00. The Board further finds that appellant was at fault in

¹² *Neill D. Dewald, supra* note 11.

¹³ 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁴ With respect to the 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); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁵ 20 C.F.R. § 10.441(a).

creation of the overpayment and it was therefore not subject to waiver. The Board further finds that the case is not in posture for a decision regarding the recovery issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2008 is affirmed in part, regarding the fact and amount of the overpayment and the finding of fault. The May 14, 2008 decision is set aside in part regarding the issue of recovery, and the case remanded for further development on the recovery issue consistent with this decision and order.

Issued: February 24, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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