

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

D.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
East Meadow, NY, Employer**

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**Docket No. 08-1225
Issued: January 8, 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 March 12, 2008 appellant filed a timely appeal of a December 26, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who found appellant at fault in the creation of an overpayment and not entitled to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,032.16 for the period June 27 to July 9, 2005; and (2) whether the Office properly found that appellant was at fault in creating the overpayment, thus precluding waiver of the recovery of the overpayment.

FACTUAL HISTORY

On December 11, 2002 appellant, then a 31-year-old part-time flexible carrier, filed a traumatic injury claim alleging that on that date she injured her left leg and hand when she slipped and fell on an icy surface in the parking lot. The Office accepted the claim for left

shoulder strain and also accepted her February 4, 2003 and August 3, 2004 claims for recurrences of disability.

By letter dated December 28, 2004, the Office informed appellant that she was being placed on the periodic rolls effective December 26, 2004. Appellant was advised to notify the Office immediately when she returned to work to avoid an overpayment of compensation and that, if she worked during any period covered by a compensation payment, she must return the payment to the Office.

The record contains a computer printout showing that on July 9, 2005 appellant was paid compensation for total disability for the period June 12 to July 9, 2005 in the amount of \$2,064.32. She was paid wage-loss compensation for partial disability. Appellant was paid \$412.47 for partial disability for the period June 25 to July 8, 2005¹ and \$532.98 for the period July 9 to 22, 2008.²

On February 21, 2007 the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$1,078.02 for the period June 25 through July 8, 2005. It found that appellant had returned to limited-duty part-time work on June 25, 2005 but continued to receive wage loss for total and partial disability through July 8, 2005. The Office found that appellant was at fault in creating the overpayment because she failed to return the compensation check for total disability to which she was not entitled. As to the compensation for partial disability, it found that it had been correctly calculated. The Office informed appellant that, if she disagreed with the decision, she could, within 30 days, submit evidence or argument to the Office or request a prerecoupment hearing with the Branch of Hearings and Review.

Appellant requested a prerecoupment hearing. By decision dated May 17, 2007, the Office hearing representative remanded the case for a redetermination as to the period and amount of the overpayment. The Office hearing representative noted that appellant returned to work part time on June 27, 2005 and that she was paid compensation for temporary total disability as well as compensation for partial disability for the period June 27 to July 9, 2005.

On June 22, 2007 the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$1,032.16 for the period June 27 to July 9, 2005. It found that appellant had returned to part-time work on June 27, 2005 but continued to receive compensation for wage loss for both partial and total disability through July 9, 2005. The Office found that appellant was at fault in creating the overpayment because she failed to return the check to which she was not entitled. It noted that the amount paid for appellant's partial disability during the period of the overpayment was correct. The Office informed appellant that, if she disagreed with the decision, she could, within 30 days, submit evidence or argument to the Office or request a prerecoupment hearing with the Branch of Hearings and Review.

Appellant requested a prerecoupment hearing.

¹ This amount represented payment for partial disability of 39.72 hours.

² This amount represented payment for partial disability for 41.31 hours.

By decision dated December 26, 2007, an Office hearing representative found that an overpayment in the amount of \$1,032.16 had occurred from June 27 through July 9, 2005. The hearing representative found that appellant was at fault in creating the overpayment as she knew or should have known that the compensation payment was incorrect as she returned to work and began receiving her salary and compensation for her partial wage loss. The hearing representative found that appellant did not submit documentation regarding her current financial status; therefore, he was unable to render a decision on an equitable repayment schedule.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation under the Act the employee may not receive salary, pay or remuneration of any type from the United States. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation except in limited specified instances.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,032.16 for the period June 27 through July 9, 2005. The record shows that appellant received an overpayment during the period in question because she received wage-loss checks for both partial and temporary total disability compensation after returning to part-time work on May 15, 2005. The Office calculated the \$1,032.16 overpayment by totaling the amount of temporary total disability compensation appellant received for the period in the total amount of \$1,105.89. It subtracted \$73.73, the amount she should have been paid for June 26, 2005, to reach the amount overpaid of \$1,032.16. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that an overpayment of compensation shall be recovered by the Office 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.⁵ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁶ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁷

³ 5 U.S.C. § 8116(a); *see 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).

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ *Diana L. Booth*, 52 ECAB 370 (2001); *William G. Norton, Jr.*, 45 ECAB 630 (1994).

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault 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."⁸

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

"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."⁹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for it to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time she received the compensation check in question, she knew or should have known that the payment was incorrect.¹⁰

The record establishes that, on July 9, 2007, the Office made a direct deposit of \$2,064.32 into appellant's bank account. On February 21, 2007 it issued its first preliminary determination of the overpayment. Following the May 17, 2007 hearing representative's remand order, the Office issued a revised preliminary determination of the overpayment. It found in the February 21, 2007 preliminary determination of overpayment that appellant was aware or should have been aware that she was not entitled to the entire payment because she had been informed that overpayment might occur if she did not report her return to work.

The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹¹ The Board has held that receiving one or two erroneous direct deposit payments over a short time immediately following an employees return to work does not constitute the requisite knowledge to find that the claimant is at fault in the creation of the overpayment.¹² However, the Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

¹⁰ *Diana L. Booth*, *supra* note 7.

¹¹ *W.P.*, 59 ECAB ___ (Docket No. 08-202, issued May 8, 2008); *Tammy Craven*, 57 ECAB 689 (2006).

¹² *Tammy Craven*, *supra* note 11 at footnote 6.

greater amounts than previously received.¹³ The Board has noted that an employee's failure to return an overpayment is immaterial to the issue of whether he or she was at fault in its creation.¹⁴

The Board finds that appellant was without fault for the deposit of \$1,032.16 into her account on July 9, 2005. While appellant accepted the overpayment by gaining control of the funds deposited into her account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account.¹⁵

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act¹⁶ if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹⁷ The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$1,032.16 overpayment. After such further development as is necessary, the Office should issue an appropriate decision on whether the overpayment should be waived.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,032.16, during the period June 27 to July 9, 2005, because she incorrectly received temporary total disability compensation after she returned to work. The Board, however, finds that the Office improperly found that appellant was at fault in creating the overpayment.

¹³ *Id.* at footnote 7.

¹⁴ *Id.*

¹⁵ *Supra* note 11.

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

ORDER

IT IS HEREBY ORDERED THAT the December 26, 2007 decision of the Office of Workers' Compensation Programs is affirmed with respect to fact and amount of overpayment and is set aside with respect to the issue of waiver of the recovery of the overpayment.

Issued: January 8, 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