



## **FACTUAL HISTORY**

On March 23, 1984 appellant, then a 35-year-old letter carrier, filed a claim for a traumatic injury to her back and hips occurring that date when she slipped on wet steps. The Office accepted the claim for low back strain, a fractured sacrum, displacement of an intervertebral disc, lumbosacral neuritis and psychogenic pain. Appellant stopped work on March 23, 1984 and received compensation for total disability. She returned to work for four hours a day on May 1, 1984 and to full-time work with restrictions on October 14, 1984. On September 2, 1988 appellant accepted a permanent limited-duty assignment as a clerk.<sup>2</sup>

On November 12, 2002 appellant filed a recurrence of disability claim on May 22, 2002 due to her March 23, 1984 work injury. She began working six hours per day on September 18, 2002 due to an increase in low back pain and leg pain and weakness. On January 21, 2003 the Office accepted that appellant sustained a recurrence of sprain/strain of the lumbar region and upgraded her case to include a disc herniation at L5-S1.

In a decision dated April 2, 2003, the Office reduced appellant's compensation based on its finding that her actual earnings working 30 hours per week as a mail processing clerk effective September 18, 2002 fairly and reasonably represented her wage-earning capacity. It paid her compensation of \$559.20 every four weeks for her loss of wage-earning capacity.

On January 5, 2007 appellant accepted a full-time position as a modified general clerk. In a December 28, 2007 EN1032, she reported her earnings as a full-time modified clerk.

On July 10, 2008 the employing establishment notified the Office that appellant had resumed full-time employment on January 8, 2007. On July 25, 2008 the employing establishment advised that effective January 8, 2007 she earned \$48,623.00 and that the current earnings for her date-of-injury position were \$46,698.00.

On August 11, 2008 the Office determined that appellant received an overpayment of \$12,220.86 because she returned to work for eight hours per day on January 8, 2007 with no loss of earnings but continued to receive compensation based on a loss of wage-earning capacity determination from January 8, 2007 through July 5, 2008.

On August 20, 2008 the Office notified appellant of its preliminary determination that she received an overpayment of \$12,220.86 for the period January 8, 2007 through July 5, 2008 because she receive compensation for a loss of wage-earning capacity after she returned to full-time employment. It calculated the overpayment by multiplying the amount that she received each day for her loss of wage-earning capacity by the number of days it paid her during the period in question. The Office then added adjustments for cost of living to find a total of \$12,220.86. It informed appellant of its preliminary determination that she was at fault in the creation of the overpayment. The Office requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified

---

<sup>2</sup> By decision dated November 20, 1998, the Office denied appellant's claim for a recurrence of disability from February 25 to 27, 1998 causally related to her March 23, 1984 work injury.

appellant 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 August 22, 2008 the Office divided appellant's actual earnings by the current pay rate for her date-of-injury position and determined that she had no loss of wage-earning capacity. On August 26, 2008 it advised her of its proposed retroactive termination of her compensation based on its finding that she had no loss of wage-earning capacity effective January 8, 2007.

On September 22, 2008 the Office finalized its finding that appellant received an overpayment of \$12,220.86 for the period January 8, 2007 through July 5, 2008 and that she was at fault in the creation of the overpayment. It found that she should forward a check for the entire amount as repayment of the overpayment.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of the Federal Employees' Compensation Act<sup>4</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup>

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>6</sup> The Office's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant sustained low back strain, a fractured sacrum, a displaced intervertebral disc, lumbosacral neuritis, a disc herniation at L5-S1 and psychogenic pain due to a March 23, 1984 work injury. She stopped work on the date of injury, resumed part-time limited-duty employment on May 1, 1984 and full-time limited-duty employment on October 14, 1984. Appellant began working six hours per day on September 18, 2002 due to increased back pain. On April 2, 2003 the Office reduced her compensation based on its determination that her actual earnings as a mail processing clerk 30 hours per week effective September 18, 2002 fairly and reasonably represented her wage-earning capacity. It paid her compensation for partial

---

<sup>3</sup> On September 29, 2008 the Office finalized its retroactive modification of appellant's loss of wage-earning capacity to zero effective January 8, 2007. As previously noted, appellant has not appealed this decision and thus it is not before the Board.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102.

<sup>6</sup> *Id.* at § 8116(a).

<sup>7</sup> 20 C.F.R. § 10.500.

disability. On January 5, 2007 appellant returned to work full time as a modified general clerk. Her actual earnings as a modified general clerk of \$48,623.00 exceeded the current earnings of her date-of-injury position of \$46,698.00; consequently, she had no loss of wage-earning capacity. The Office, however, continued to pay compensation in accordance with the April 2, 2003 loss of wage-earning capacity determination. As appellant returned to a full-time position with no loss of wage-earning capacity on January 5, 2007, she was not entitled to receive compensation after that date. Accordingly, she received an overpayment of compensation.

The Office calculated the amount that it paid appellant for the period January 8, 2007 through July 5, 2008 by multiplying the compensation she received for partial disability each day by the number of days she received compensation after she returned to full-time work and then adding adjustments for cost-of-living increases, to find an overpayment of \$12,220.86. Appellant has not challenged either fact or amount of overpayment. The Board finds that she received an overpayment of \$12,220.86 for the period January 8, 2007 through July 5, 2008.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>8</sup> provides, “[a]djustment 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.” Section 10.433 of the Office’s implementing regulations<sup>9</sup> provide that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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 to be incorrect.”

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.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in the creation of the overpayment because she accepted payments which she knew or should have known were incorrect. Appellant

---

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> 20 C.F.R. § 10.433.

<sup>10</sup> *Id.* at § 10.433(b); *Diana L. Booth*, 52 ECA B 370 (2001).

returned to full-time work with no loss of wages on January 8, 2007 but accepted payments of compensation for partial disability until July 5, 2008. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper<sup>11</sup> and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>12</sup> It was not reasonable for appellant to believe that she was entitled to receive compensation for partial disability because she worked only 30 hours per week after she resumed full-time employment. Accordingly, the Board finds that she was at fault in the creation of the overpayment and thus not entitled to waiver of the recovery of the overpayment. 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.<sup>13</sup>

On appeal appellant contends that she was not at fault in creating the overpayment but that instead it was the fault of the employing establishment and the Office. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payments which she knew or should have known that she was not entitled.<sup>14</sup> Appellant also argues that the Office should consider evidence that it was mailed on September 17, 2008 but was not received until September 22, 2008, after the issuance decision. The Board, however, has no jurisdiction to review newly submitted evidence on appeal.<sup>15</sup> Any new evidence would have to be resubmitted to the Office, along with a request for reconsideration.

### CONCLUSION

The Board finds that appellant received a \$12,200.86 overpayment of compensation because she continued to receive compensation for disability after she returned to full-time employment. The Board further finds that she was at fault in the creation of the overpayment and thus not entitled to waiver of the recovery of the overpayment.

---

<sup>11</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>12</sup> See *Sinclair L. Taylor*, 52 ECAB 227 (2001).

<sup>13</sup> Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing compensation. With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. 20 C.F.R. § 10.441; see *Miguel A. Muniz*, 54 ECAB 217 (2002).

<sup>14</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>15</sup> See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 22, 2008 is affirmed.

Issued: July 17, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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