

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

A.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Norfolk, VA, Employer**

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**Docket No. 09-219
Issued: July 27, 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 October 28, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 18, 2008 concerning an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,389.69 for the period June 19 through August 13, 2002; and (2) whether the Office properly found that appellant was at fault in creating the overpayment and not entitled to waiver.

FACTUAL HISTORY

On October 16, 2001 appellant, then a 49-year-old city carrier, filed a claim alleging that his degenerative disc disease and herniated disc conditions were caused or aggravated by his employment duties. He was first aware of his condition on October 9, 2001 and that it was caused or aggravated by his employment on October 19, 2001. Appellant stopped work on

October 26, 2001. He later returned to work with restrictions. The Office accepted the conditions of degenerative disc disease and lumbar sprain.

On June 24, 2002 appellant claimed a recurrence of disability due to the October 9, 2001 injury commencing on June 18, 2002. He stopped work on June 19, 2002. The Office adjudicated the recurrence as a new claim and assigned a new claim case number. Appellant returned to work in a limited-duty capacity on August 19, 2002.

Appellant subsequently filed a Form CA-7 claim for leave buyback for the period June 19 through August 13, 2002. On August 20, 2004 the Office issued appellant a compensation payment in the amount of \$3,389.69 under the current claim for the period June 19 through August 13, 2002 for 237 hours of time lost. The record reflects that the Office also paid appellant compensation in the amount of \$3,391.47 under the other claim number for the period June 22 through August 13, 2002 for 237 hours of time lost.

In a November 12, 2004 letter to the postmaster, appellant advised that he received a check for \$3,389.69 from the Office in the latter part of September 2004. He also contacted an Office claims examiner who told him that he would look into the matter and whether an overpayment had been created. Appellant stated that, since he did not receive any letter from the Office informing him that the check was an overpayment, he deposited the check three weeks later for fear of losing it.

In a November 24, 2004 letter, Terri Melchers, a human resources specialist, informed the Office that on August 24, 2004 the employing establishment called appellant to advise him that the compensation check he just received or was about to receive in the amount of \$3,389.69 was an overpayment and he needed to return the check to avoid an overpayment. She indicated that on October 25, 2004 appellant advised her office that he was going to contact the Office.

On July 3, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$3,389.69 for 237 hours on August 20, 2004 because he received wage-loss compensation for the same period, June 19 to August 13, 2002, under a different claim number. It advised appellant of its preliminary determination that he was at fault in creating the overpayment as he knew or should have known that he could not receive wage-loss compensation twice for the same period of time under the two separate claims. The Office requested that he complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It informed appellant that, if he disagreed with the decision, he could submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review. No additional information was received.

By decision dated August 18, 2008, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$3,389.69 which was paid on August 20, 2004 for 237 hours for the period June 19 to August 13, 2002. It found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery. The Office requested that he forward a check in the amount of \$3,389.69.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act 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.¹ 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 Secretary of Labor by decreasing later payments to which the individual is entitled.²

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 may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for degenerative disc disease and lumbar sprain and paid appropriate benefits. On June 24, 2002 appellant filed a claim alleging a recurrence of his back condition on June 18, 2002. The Office accepted this claim for a back condition under a different claim number and paid appropriate compensation of time lost during the period June 22 through August 13, 2002. The record establishes that the Office also paid appellant leave buyback compensation in the amount of \$3,389.69 for 237 hours of time lost during the period June 19 through August 13, 2002 under the present claim number. As appellant had already been compensated for 237 hours of time lost from June 22 through August 13, 2002, he received duplicative payment covering the same period. Appellant therefore received a \$3,389.69 overpayment in compensation.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (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

¹ 5 U.S.C § 8102(a).

² *Id.* at § 8129(a).

³ *Id.* at § 8116(a).

⁴ *See Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁵

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.⁶

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

In this case, appellant has two accepted back conditions: one accepted under the current file and the other under a separate claim number. He claimed compensation for 237 hours of time lost during the period June through August 2002 and was reimbursed for leave buyback for the same period under both files. Even if the overpayment resulted from the negligence on the part of the Office, this does not excuse appellant from accepting payment which he knew or should have known he was not entitled.⁷ The employing establishment notified appellant on August 24, 2004 that the compensation check from the Office in the amount of \$3,389.69, issued on August 20, 2004 constituted an overpayment and that the check should be returned. The record reflects that appellant received the check for \$3,389.69 from the Office in the latter part of September 2004 and he contacted the Office when he received the check as he thought it was an overpayment. However, he deposited the check into his account and failed to return it to the Office.

The evidence reflects that appellant knew or should have known that he was not entitled to the dual receipt of compensation for the same period. The employing establishment informed appellant prior to receipt of the check that it represented an overpayment. While appellant called the Office upon receipt of the check, he did not return it as requested. Instead, he deposited the check even though the period for which payment was being made was clearly noted on the check and was the same period compensated for under the other claim.

The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment. As appellant was not without fault under the third standard recovery of the overpayment of compensation in the amount of \$3,389.69 may not be waived.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$3,389.69 for which he was at fault in creating.

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 27, 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