

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

D.E., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Bentonville, AR, Employer)

**Docket No. 09-240
Issued: July 23, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 3, 2008 appellant, through her representative, filed a timely appeal from the September 30, 2008 merit decision of the Office of Workers' Compensation Programs, which found her at fault in an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant was at fault in creating a \$1,583.11 overpayment from July 6 through August 2, 2008. Appellant's representative argues that the Office's September 30, 2008 decision is contrary to fact and law.

FACTUAL HISTORY

On March 17, 2006 appellant, then a 28-year-old transportation security screener, sustained an injury in the performance of duty while moving bags from a table to x-ray equipment. The Office accepted her claim for sprain/strain shoulder/arm unspecified right, and

sprain/strain of neck. Appellant received compensation for temporary total disability on the periodic rolls.

On June 15, 2006 the Office outlined the conditions under which appellant would receive compensation. It advised her that compensation benefits for total disability were payable only while she could not perform the duties of her regular job because of her injury at work and that she was expected to return to work, including light-duty or part-time work, if she was no longer totally disabled because of her injury. The Office further notified appellant, as follows:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the Office that you are working. (Emphasis in the original.)

On July 29, 2008 appellant advised the Office that she had returned to work on July 6, 2008.

On August 28, 2008 the Office made a preliminary determination that appellant was at fault in creating a \$1,583.11 overpayment from July 6 through August 2, 2008. It found that she was aware, or reasonably should have been aware, that she was not entitled to further compensation after she returned to work. The Office found that appellant knowingly accepted compensation to which she was not entitled. It noted its June 15, 2006 letter advising her to return any payment if she worked for any portion of the period covered by that payment. The Office explained how it calculated the overpayment.

Appellant did not respond to the preliminary overpayment determination. She did not request waiver and did not complete the overpayment recovery questionnaire.

In a decision dated September 30, 2008, the Office finalized the overpayment determination. It found that she was at fault in creating a \$1,583.11 overpayment from July 6 through August 2, 2008 because she knew or should have known that she was not entitled to further compensation benefits after she returned to work.

LEGAL PRECEDENT

The Federal Employees' Compensation Act places limitations on the right to receive compensation: While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.¹ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.² “Temporary total disability” is defined as the inability to return to the

¹ 5 U.S.C. § 8116(a).

² *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

position held at the time of injury or earn equivalent wages or perform other gainful employment.³

When an overpayment of compensation has been made 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. Section 8129(b) describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”⁴

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 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 she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect.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 she is being overpaid.⁶

ANALYSIS

The Board finds that appellant received an overpayment from July 6 through August 2, 2008. No employee is entitled to compensation for total disability after returning to work. Appellant returned to full-time work on July 6, 2008 and the Office continued to pay compensation for total disability through August 2, 2008. Fact of overpayment is established.

In its August 28, 2008 preliminary determination, the Office noted that appellant received periodic payments of \$1,583.11 every 28 days. Because the period of the overpayment was exactly 28 days, the overpayment was the full amount of a periodic payment. The Office also showed how deducting premiums for health and life insurance from \$1,780.00 in gross

³ 20 C.F.R. § 10.400(b) (1999).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(a) (1999).

⁶ *Id.* at § 10.433(b).

compensation gave the same figure. The record supports that appellant received an overpayment of \$1,583.11. The amount of overpayment is established.

When the Office placed appellant on the periodic rolls, it wrote her a letter outlining the conditions under which she would receive compensation. It explicitly advised her to notify them “immediately” when she went back to work and to return any payment if she worked any portion of the period covered thereby. This supports the Office’s finding that appellant knew or at least should have known that she was not entitled to the receipt of compensation for total disability when she was no longer totally disabled and returned to work. Further, she did not promptly notify the Office that she would be going back to work. Had appellant done so, the Office might have been able to prevent the overpayment. Instead, she waited until a July 29, 2008 telephone call to advise that she had returned to work over three weeks earlier on July 6, 2008. Appellant did not exercise a high degree of care in reporting events which affected her entitlement to or the amount of benefits. Therefore, under the circumstances, the Office properly found her to be at fault.⁷ The Board will affirm the Office’s September 30, 2008 decision.

CONCLUSION

The Board finds that appellant was at fault in creating a \$1,583.11 overpayment from July 6 through August 2, 2008.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2008 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: July 23, 2009
Washington, DC

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

David S. Gerson, Judge
Employees’ Compensation Appeals Board

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

⁷ The Office’s finding reasonably supports fault under both the second and third criteria, either for failing to provide information that she knew or should have known was material, or for accepting a payment that she knew or should have know to be incorrect.