

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

C.P., Appellant

and

**DEPARTMENT OF THE ARMY,
FORT BLISS, TX, Employer**

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**Docket No. 08-2314
Issued: June 12, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision concerning an overpayment dated July 28, 2008. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,065.81 for the period February 19 through March 15, 2008; and (2) whether the Office properly found she was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 38-year-old health insurance technician, filed a Form CA-2 claim for benefits on November 6, 2006, alleging that she strained her left shoulder in the performance of duty on July 6, 2006. The Office accepted the claim for aggravation of bursae and tendons disorder of the left shoulder.

In the December 21, 2006 letter advising appellant that she would be paid temporary total disability compensation, the Office stated:

“You are expected to return to work (including light duty or part-time work, if available) as soon as you are able. Once you return to work, or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

The Office commenced appropriate compensation for temporary total disability and placed appellant on the periodic rolls.

In a work capacity evaluation dated February 6, 2008, Dr. Richard S. Westbrook, Board-certified in orthopedic surgery and appellant’s treating physician, indicated that appellant could return to work for four hours per day on February 18, 2007, then for six hours per day as of March 3, 2008.

On June 26, 2008 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$1,065.81 for the period February 19 through March 15, 2008 because she received compensation to which she was not entitled. It found that appellant was at fault in the matter because she continued to receive compensation for temporary total disability when he should have been aware, after returning to work on February 19, 2008, that the payments she had been receiving were incorrect. The Office calculated the amount of the overpayment by taking her net monthly, 28-day compensation payment from May 29 to June 7, 2008, \$2,103.45, dividing it by 28 days, which amounted to \$75.123, and multiplying this figure by 26 days, the period for which she received the overpayment, which amounted to \$1,953.20. It then subtracted the net amount of compensation appellant was entitled to for the period February 19 through March 15, 2008, based on 54 hours of leave with pay for the partial disability compensation she was owed, \$887.39. This created an overpayment of \$1,065.81. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. It further advised appellant that when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. 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 precouplement hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the May 18, 2005 letter. Appellant did not respond to this letter within 30 days.

In a decision dated July 28, 2008, the Office finalized the preliminary determination regarding the overpayment of \$1,065.81.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees' Compensation Act is payable when the employee starts to lose pay.¹ Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.² Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,065.81 for the period February 19 through March 15, 2008. The record shows that appellant received an overpayment during the period in question because she continued to receive temporary total disability compensation after she returned to work on February 19, 2008. The Office calculated the \$1,065.81 overpayment by totaling the amount of temporary total disability compensation appellant received during the period February 19 through March 15, 2008, \$1,953.20, and subtracting the net compensation for partial disability to which she was actually entitled for the period, \$887.39, in accordance with the procedure outlined above. Based on this determination, it properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁴ provides that 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁵

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"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 the individual knew or should have known to be incorrect; or

¹ 20 C.F.R. § 10.401(a) (2003).

² *Id.* at § 10.500(a) (2003).

³ *Id.* at § 10.403(b) (2003).

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

(2) Failed to provide information which the individual 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....”⁶

ANALYSIS -- ISSUE 2

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

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have been expected to know she was not entitled.⁷ Appellant was informed by the Office in its December 21, 2006 letter that she was required to notify the Office as soon as she returned to work and to return any payment of compensation to the Office in order to avoid an overpayment of compensation. She returned to work on February 19, 2008 but did not return any compensation received after that date, even though she knew or should have known that an overpayment would be created if she accepted compensation benefits after her return to work.

The Board has held however 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.⁸ After appellant’s receipt of the first direct deposit, for which fault may not be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled. However, the Office became aware that it was erroneously sending compensation checks to appellant immediately after it sent her the first direct deposit check following her return to work. Therefore, for receipt of the first direct deposit, the Board finds that appellant was without fault. While appellant accepted the overpayment by gaining control of the funds deposited into her checking 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. As the first direct deposit was the only one containing an erroneously issued compensation payment, appellant is without fault with regard to the overpayment of \$1,065.81 for the period February 19 through

⁶ 20 C.F.R. § 10.433(a).

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

⁸ That Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office, or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.

March 15, 2008. This case must therefore be remanded to the Office for a determination as to whether appellant is entitled to a waiver of the overpayment of compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,065.81 for the period February 19 through March 15, 2008. The Board finds that appellant was not at fault in creating the overpayment. This case is remanded to the Office for a waiver determination.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2008 decision of the Office of Workers' Compensation Programs be affirmed in part, reversed in part and remanded for further development consistent with this opinion.

Issued: June 12, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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