

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

Y.K., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF INVESTIGATION, New York, NY,)
Employer)

Docket No. 08-2044
Issued: March 24, 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 June 21, 2008 appellant filed a timely appeal of a May 7, 2008 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$1,100.81 overpayment of compensation; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.

FACTUAL HISTORY

On February 10, 2004 appellant, then a 52-year-old language specialist, sustained a herniated disc at L2-3 when she moved a heavy chair. Effective March 26, 2004, she was placed on the periodic compensation rolls for temporary total disability. The record shows that

appellant returned to work on May 24, 2004 for two days a week (Mondays and Thursdays), eight hours a day.¹ She claimed compensation for leave without pay for May 25 to 28 and June 2, 4, 8, 9 and 11, 2004. Appellant received wage-loss compensation from the Office for total disability for 48 hours between May 24 and June 12, 2004.²

On February 14, 2005 the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$1,100.81 because she worked and received pay from the employing establishment for 48 hours between May 24 and June 12, 2004 and also received wage-loss compensation benefits from the Office for the same period. It made a preliminary determination that she was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect. The Office stated that appellant was not entitled to receive disability compensation for lost wages for dates when she worked and was paid by the employing establishment. Appellant was advised to submit evidence or argument if she disagreed with the fact or amount of the overpayment or if she wished to contest the preliminary finding of fault and request a waiver of recovery of the overpayment.

On February 21, 2005 appellant requested waiver of recovery of the overpayment. She asserted that she was not at fault in the creation of the overpayment because she notified the Office of her return to work on May 24, 2004.

By decision dated May 7, 2008, the Office finalized the determination that appellant received an overpayment of \$1,100.81 between May 24 and June 12, 2004 because she received wage-loss compensation from the Office at the same time that she worked and received pay from the employing establishment.³ It determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.⁴

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation as specified by the Federal Employees' Compensation Act⁵ for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁶ Section 8116(a) of the Act states that, while an

¹ The record shows that appellant worked only one day the first week, Monday, May 24, 2004, because her physician placed her off work Thursday, May 27, 2004. The second week she worked Tuesday, June 1, 2004 instead of Monday, May 31, 2004 which was a holiday.

² The Board notes that review of a 2004 calendar shows that the dates of May 29 and 30, June 5 and 6 and June 12, 2004 were Saturdays and Sundays.

³ The Board notes a typographical error in the May 7, 2008 decision. The Office inadvertently stated that the period of disability began June 24, 2004 rather than May 24, 2004.

⁴ Subsequent to the May 7, 2008 decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

employee is receiving workers' compensation benefits, he or she "may not receive salary, pay or remuneration of any type from the United States, except ... in return for service actually performed...."⁷ Office regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related condition prevents him or her from earning the wages earned before the work-related injury.⁸

ANALYSIS -- ISSUE 1

The Board finds that the Office correctly determined that appellant received an overpayment of compensation from May 24 to June 12, 2004. The record shows that appellant received both wage-loss compensation from the Office and pay from the employing establishment for working two days a week during that period. As noted, an employee is entitled to receive wage-loss compensation only for a period of time during which the employee's work-related condition prevents him or her from earning the wages earned before the work-related injury. However, it is not clear from the record before the Board whether the amount of the overpayment determined by the Office is correct. The Office found that there was an overpayment of wage-loss compensation because appellant worked, and was paid by the employing establishment, for 48 hours, or 6 days, between May 24 and June 12, 2004. The record shows that she claimed compensation for leave without pay for May 25 to 28 and June 2, 4, 8, 9 and 11, 2004. Appellant returned to work on May 24, 2004 and apparently worked June 1, 3, 7 and 10, 2004, or five days.⁹ Thus, there is a discrepancy in the record regarding the number of days that appellant claimed that she worked between May 24 and June 12, 2004, five days, and the number of days included in the overpayment, six days. On remand, the Office should determine the actual days that appellant worked between May 24 and June 12, 2004 and recalculate the amount of the overpayment if necessary.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, 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.¹⁰ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ The regulation further provides that 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.¹² Under the regulations, a recipient

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.500(a).

⁹ Appellant did not claim disability on May 24 or June 1, 3, 7, or 10, 2004.

¹⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.*

will be found to be at fault with respect to creating an overpayment if he or she “[a]ccepted a payment which he or she knew or should have known to be incorrect.”¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew, or should have known, to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, the Office must show that, at the time she received the compensation check in question, she knew or should have known that the payment was incorrect.¹⁵ With respect to whether an individual is with fault, section 10.433(b) of the Office’s regulations provides that whether or not the Office determines that an individual was with 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.¹⁶

The Board finds that the Office correctly determined that appellant was at fault in creating the overpayment from May 24 to June 12, 2004. Appellant acknowledged, and the record establishes, that she received a compensation check for the period May 24 to June 12, 2004 which included wage-loss compensation for days that she worked and was paid by the employing establishment. Appellant was aware or reasonably should have been aware that she was not entitled to receive both wage-loss compensation and pay from the employing establishment for the same period of time, *i.e.*, that she was not entitled to be paid twice for the same period of time. The Board therefore finds that appellant is at fault in the creation of the overpayment from May 24 to June 12, 2004 because she accepted payments that she knew or should have known to be incorrect. That the Office may have been negligent in issuing the compensation check to appellant does not mitigate this finding.¹⁷ Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment which the employee knew or should have been expected to know she was not entitled to receive.¹⁸ The Office’s finding that appellant was at fault in the creation of the overpayment is proper under the facts and the circumstances of this case, as she knew or should have known that she was not entitled to accept a wage-loss compensation check for the entire period May 24 to June 12, 2004 for the same period that she worked and received pay for that work from the employing establishment. As appellant is at fault in the creation of the overpayment from

¹³ *Id.* at § 10.433(a)(3).

¹⁴ *Id.* at § 10.433(b).

¹⁵ *See Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ 20 C.F.R. § 10.433(b).

¹⁷ *See id.* at § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁸ *See Diana L. Booth*, 52 ECAB 370 (2001).

May 24 to June 12, 2004, she is not eligible for waiver. The Office is required by law to recover this overpayment.¹⁹

CONCLUSION

The Board finds that further development is required on the issue of the amount of overpayment. On remand, the Office should determine the specific days that appellant worked between May 24 and June 12, 2004. It should then recalculate the overpayment amount if necessary. The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment and was therefore not eligible for waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2008 is affirmed as to the issue of fact of overpayment and fault but is remanded for the Office to determine the correct amount of the overpayment.

Issued: March 24, 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

¹⁹ 20 C.F.R. § 10.441(b).