

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

L.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Monroe, MI, Employer**

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**Docket No. 09-1344
Issued: April 6, 2010**

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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2009 appellant filed a timely appeal from an April 9, 2009 merit 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 this decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,144.52 from November 10, 2007 to October 25, 2008; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly set the repayment schedule.

FACTUAL HISTORY

On April 4, 2005 appellant, then a 57-year-old rural carrier, sustained right shoulder and head injuries when she was struck by a motorcycle while making a left hand turn in her motor vehicle at work.

The Office accepted the claim for a right shoulder strain, right shoulder impingement, closed head injury, head contusion, postconcussive syndrome, organic affective disorder due to

medical condition, cognitive disorder, post-traumatic stress disorder, mood disorder due to a medical condition, panic disorder without agoraphobia and adjustment disorder without mixed anxiety and depressed mood. Appropriate compensation benefits were paid. Appellant returned to work on a part-time basis for two hours a day, four days a week on January 17, 2007. The record reflects that she was placed on the periodic compensation rolls on November 26, 2007. The Office determined appellant's earnings to be \$92.02 per week and based her compensation payments on that basis, through an informal loss of wage-earning capacity (LWEC) determination.

In a letter dated September 24, 2008, Nancy Steffin, an employing establishment health and resource management specialist, requested that the Office take appellant off the periodic rolls, because her being on the periodic rolls was causing her to inadvertently receive duplicate payments. She noted that appellant was currently scheduled to work with restrictions for two hours a day on Wednesdays and two hours a day on Thursdays, and received wage-loss compensation for the remainder from the Office. When appellant requested sick or annual leave for the hours she worked, she was only allowed to receive full days off. The system did not recognize part day leave usage. As a result, appellant would receive eight hours of leave when she was also receiving six hours of compensation benefits, rendering receipt of dual benefits. Ms. Steffin noted that the problem would continue as long as appellant was automatically on the paid rolls. She estimated an overpayment in excess of \$3,000.00 but would provide the Office with the exact dates that appellant was overpaid.

Effective October 25, 2008, appellant was taken off the periodic rolls. She was further advised that any further request for compensation would have to be requested through a CA-7 form.

On February 5, 2009 the employing establishment provided the pay history for appellant during the period November 24, 2007 to October 11, 2008 when dual payments were made. It indicated that she received compensation in the amount of \$10,473.80, but was entitled only to \$5,056.16, creating an overpayment in the amount of \$5,417.64.

In a February 23, 2009 memorandum, the Office stated that appellant was paid on the periodic rolls for the period November 25, 2007 to October 28, 2008 for 48 weeks. It advised that she was paid for time worked and leave usage during that period for a total of \$10,473.80.

The Office indicated that appellant was also paid \$156.22 under the informal LWEC for the two-week period November 10 to 24, 2007 bringing the total payment to \$10,630.02. Ten thousand-six hundred thirty dollars and two cents divided by 50 weeks equals \$212.60 per week. Appellant was only eligible, however, to receive \$92.02 per week according to the informal LWEC for this period. The Office explained that the gross compensation actually due to appellant from November 10, 2007 through October 25, 2008, including all actual earnings, was equal to \$25,856.00, while the gross compensation actually paid was \$29,436.50, resulting in an overpayment of \$3,580.50 (\$29,436.50 minus \$25,856.00 equaling \$3,580.50).

The Office noted that the employing establishment had also erroneously been making deductions from appellant's pay for health benefits; whereas the Office was also deducting those benefits from her compensation. These duplicate deductions occurred during the period

January 27, 2007 to February 13, 2009. The Office subtracted this amount from the amount due (\$3,580.50 minus \$2,435.98 equaling \$1,144.52) and found the overpayment to be \$1,144.52.

On March 9, 2009 the Office advised appellant of its preliminary determination of an overpayment of benefits in the amount of \$1,144.52, explaining the above-referenced calculations. It found that she was not at fault in creating the overpayment. Appellant was informed of actions she could take within 30 days if she sought to challenge the overpayment or request waiver of the overpayment. If she wished a waiver of the overpayment, she was specifically directed to submit financial information by completing an overpayment recovery questionnaire within 30 days. No response to the preliminary determination was received.

In a decision dated April 9, 2009, the Office finalized its preliminary findings on the fact and amount of the overpayment. It noted that appellant was afforded 30 days to take action but that no response was received from her. The Office requested that she should forward a check in the amount of \$1,144.52 or they would begin collecting \$200.00 every 28 days from her continuing compensation.¹

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.² 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.³ If an employee returns to work and is in a paid leave status, she is not entitled to receive wage-loss compensation for temporary total disability for the same time period.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,144.52. Appellant was working two hours per day, two days a week and receiving compensation from the Office for the remainder. She was also receiving eight hours of paid leave for intermittent periods of time from November 10, 2007 to October 28, 2008. An employee cannot be paid by the employing establishment or receive paid leave and receive compensation for the same period.⁵ As noted above, appellant should have received gross compensation from November 10, 2007 through October 25, 2008 of \$25,856.00 based on her actual earnings, but she actually received gross compensation for this period of \$29,436.50,

¹ On March 13, 2009 the Office placed appellant on the periodic compensation rolls as it found that she was temporarily totally disabled due to March 12, 2009 surgery. The Office calculated her net compensation every 28 days as \$4,518.76.

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ *See* 20 C.F.R. § 10.401(a).

⁵ *See id.*; *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

which resulted in an overpayment of \$3,580.50 (\$29,436.50 minus \$25,856.00 equals \$3,580.50). The Office deducted from this overpayment amount the appropriate amount of health benefit premiums that had been deducted twice from appellant and calculated the final overpayment to be \$1,144.52. The Board finds that the calculation provided by the employing establishment and relied upon by the Office were accurate and the Office properly calculated the amount of the overpayment of compensation received from November 10, 2007 to October 25, 2008. The Board affirms the April 9, 2009 decision as to the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): Adjustment 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 the Act or would be against equity and good conscience.⁶

Office regulations, at 20 C.F.R. § 10.438, state that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁷

ANALYSIS -- ISSUE 2

Although the Office found appellant without fault in creating the \$1,144.52 overpayment, she bears responsibility for providing the financial information necessary to support a request for waiver. It requested that she provide financial information and submit any request for waiver within 30 days of the preliminary overpayment determination. As appellant failed to respond within 30 days, as requested by the Office, under the implementing federal regulations, the Board finds that the Office properly denied waiver of recovery of the overpayment pursuant to 20 C.F.R. § 10.438(b).⁸

⁶ 5 U.S.C. § 8129.

⁷ 20 C.F.R. § 10.438.

⁸ *Id.* at § 10.438(b) provides that failure to submit the requested information within 30 days shall result in the denial of waiver of an overpayment. See *R.W. (A.T.)*, 59 ECAB ____ (Docket No. 07-1845, issued December 7, 2007); *Madelyn Y. Grant*, 57 ECAB 533 (2006).

LEGAL PRECEDENT -- ISSUE 3

The Board’s jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. Section 10.441(a) of the regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁹

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation. As noted, she failed to timely complete the financial documents. In cases where the claimant is being paid compensation on the periodic rolls and the claimant does not respond to the preliminary overpayment decision, a final decision should be issued without conducting a conference and the debt should be recovered from such benefits as quickly as possible.¹⁰ Furthermore, without the appropriate financial documentation or overpayment questionnaire as required by 20 C.F.R. § 10.441, the Office was unable to consider appellant’s financial circumstances.¹¹ The Board finds that the Office did not abuse its discretion in following its regulations and deducting \$200.00 every 28 days from her continuing compensation payments.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$1,144.52. The Board also finds that the Office properly denied wavier of recovery of the overpayment and properly set the rate of recovery of the overpayment at \$200.00 from continuing compensation payments.

⁹ 20 C.F.R. § 10.441.

¹⁰ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (June 2009).

¹¹ See also 20 C.F.R. § 10.438 (the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office; this information will be used to determine the repayment schedule).

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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