

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

C.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Islip, NY, Employer

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**Docket No. 09-1267
Issued: February 1, 2010**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 16, 2009 appellant filed a timely appeal of the March 27, 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 the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$789.51 overpayment of compensation for the period November 8 to 22, 2008; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On May 18, 2007 appellant, then a 37-year-old letter carrier, was injured while lifting a tray of flats onto a mail truck. The Office accepted that she sustained lumbosacral neuritis or radiculitis. Appellant stopped work on May 23, 2007 and was placed on the periodic rolls for temporary total disability on January 7, 2008.

In a letter dated January 7, 2008, the Office outlined appellant's entitlement to compensation benefits and her responsibility to return to work in connection with the injury

accepted by the Office. It also advised that appellant could not keep any compensation payment for a period in which she also worked.

On October 28, 2008 the employing establishment offered appellant a position as a part-time modified city letter carrier working four to six hours per day. Appellant returned to work part time, six hours per day on November 8, 2008.

On November 21, 2008 appellant submitted a CA-7, claim for compensation, requesting compensation for the additional hours each day for which she was not compensated from November 8 to 21, 2008. The Office advised appellant by letter dated December 2, 2008 that, since her total disability payments had already been paid through November 22, 2008, she would not be entitled to additional compensation.¹

In a February 19, 2009 letter, the Office informed appellant that it made a preliminary determination that she had received a \$789.51 overpayment of compensation from November 8 to 22, 2008 because she continued to receive compensation benefits for temporary total disability from November 8 to 22, 2008 after she had returned to work part time.² It noted that the net amount of compensation paid to appellant for the period October 26 to November 22, 2008 was \$1,974.50. The Office further calculated that the net amount that should have been paid for the period October 26 to November 7, 2008 prior to appellant returning to work was \$992.64. Likewise, the amount that should have been paid for the intermittent wage loss for the period in question was \$192.35. Thus, appellant was only entitled to \$1,184.99 for that period. As noted above, she was paid \$1,974.50 and therefore an overpayment of \$789.51 was created. The Office found that appellant was without fault in creating the overpayment. It informed her that she had the right to submit evidence or argument if she disagreed with its finding and the right to a precoupment hearing before an Office hearing representative. The Office allotted appellant 30 days to request a hearing and to submit financial information, by completing an attached overpayment recovery questionnaire (Form OWCP-20), to allow the Office to determine if it should waive recovery of the overpayment. The preliminary determination was mailed to her address of record. No response was received from appellant. In a decision dated March 27, 2009, the Office finalized the \$789.51 overpayment of compensation from November 8 to 22, 2008. It found that appellant was without fault in creating the overpayment but that she was not eligible for waiver of the overpayment as appellant had not responded to the preliminary notice of overpayment. The Office stated that she should forward a check for the entire amount of the overpayment or contact it and make payment arrangements.

¹ Appellant filed additional CA-7 claims for reimbursement of lost compensation after this date which are not before the Board at this time.

² In a previous January 6, 2009 letter, the Office had appellant informed of a \$940.45 overpayment of compensation from November 8 to 22, 2008; however, it later determined that the correct overpayment amount was \$789.51 and issued an amended preliminary notice of overpayment.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.³

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to part-time work, six hours per day at the employing establishment on November 8, 2008. Appellant continued to receive wage-loss compensation for total disability through November 22, 2008. As noted above, she is not entitled to receive compensation for total disability after she has returned to work. Thus, an overpayment occurred in the amount of \$789.51. Appellant did not dispute the calculation of the overpayment.

Appellant received \$1,974.50 in total disability compensation but should have received only \$1,184.99 for partial disability. The Office subtracted \$1,184.99 from \$1,974.50 and found that the difference between the amount of compensation appellant received and the amount she should have received was \$789.51. It explained how the overpayment occurred and provided this to her with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$789.51 for the period November 8 to 22, 2008.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁴ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] 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."⁵ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁶ provide that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed

³ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁴ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

⁵ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

⁶ 20 C.F.R. § 10.436.

a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.⁷ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁸

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁹

Section 10.438 of the regulations provides that “[t]he 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 on an overpayment would defeat the purpose of the Act or be against equity and good conscience.” Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁰

ANALYSIS -- ISSUE 2

On February 19, 2009 the Office requested that appellant provide necessary financial information by completing an overpayment recovery questionnaire, OWCP-20, if she desired waiver of the overpayment in question. Appellant did not submit the completed form or otherwise submit financial information supporting her income and expenses. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.¹¹ Consequently, the Office properly denied waiver of recovery of the overpayment.¹²

On appeal appellant asserts that she never received notice of an overpayment. The record supports that the Office’s February 19, 2009 preliminary determination as well as the March 27, 2009 final overpayment decision were sent to appellant at her address of record and does not indicate that it was returned as undeliverable. Under the “mailbox rule,” it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹³ The presumption arises after it appears from the record that

⁷ An individual’s assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual’s assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

⁸ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁹ 20 C.F.R. § 10.437.

¹⁰ *Id.* at § 10.438.

¹¹ *See id.* at § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹² *Id.* at § 10.438. *See T.S.*, 60 ECAB ____ (Docket No. 08-1604, issued March 13, 2009).

¹³ *A.C. Clyburn*, 47 ECAB 153 (1995).

the notice was duly mailed and the notice was properly addressed.¹⁴ Appellant further asserts that she is unable to pay her current bills and cannot afford to pay back the overpayment of compensation determined by the Office. As she did not submit the required financial information that is necessary for the Office to determine eligibility for waiver, there can be no determination of waiver.¹⁵

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$789.51 and that she was not entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁴ *Id.*

¹⁵ *See* 20 C.F.R. § 501.2(c). With her request for appeal, appellant submitted a completed overpayment questionnaire. The Board is without jurisdiction to review this evidence for the first time on appeal.