

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

P.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 09-1462
Issued: February 18, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal from the May 8, 2009 merit decision of the Office of Workers' Compensation Programs concerning an overpayment of compensation. Pursuant to 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 a \$1,491.45 overpayment of compensation; (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery; and (3) whether the Office properly required repayment of the overpayment.

FACTUAL HISTORY

The Office accepted that on January 25, 1996 appellant, then a 45-year-old distribution clerk, sustained neck and right shoulder injuries at work. He received compensation from the

Office for periods of disability. In a January 21, 2004 decision, the Office granted appellant a schedule award for an 11 percent permanent impairment of his right arm.

The record reflects payments to appellant as follows: a \$996.61 compensation check for the period November 15 to 28, 2008; a \$494.84 compensation check for the period November 29 to December 4, 2008 and a \$1,649.45 compensation check for the period November 15 to December 4, 2008. The checks are accompanied by statements which specifically identify the periods covered by the payments.¹

In a February 19, 2009 notice, the Office advised appellant of its preliminary determination that he received a \$1,491.45 overpayment of compensation because he received duplicate compensation payments for the period November 15 to December 4, 2008. It also made a preliminary determination that he was at fault in the creation of the overpayment, thereby precluding waiver of the overpayment. Regarding its fault finding, the Office stated that its compensation payments were deposited into appellant's bank account and that he was provided with benefit statements specifying the dates that the payments covered. It noted that he had sufficient time to review the benefit statements and deposits to his account to be aware that the additional payment was incorrect. Regarding the nature of the overpayment, the Office stated:

“Compensation for total disability was paid on the daily roll from December 20 through January 28, 2008 and periodic roll payments began December 21, 2008. Compensation was paid on December 5, 2008 for the period November 15 through December 4, 2008. Duplicate compensation payments, however, were also paid on November 28, 2008 for the period November 15 through November 28, 2008 and on December 5, 2008 for November 29 to December 4, 2008.”

The Office further advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the notice of the preliminary overpayment determination. The Office requested that appellant complete and return an enclosed financial information questionnaire within 30 days of the date of the notice.²

A precoupment conference was held on March 10, 2009. Appellant indicated that he felt that the extra monies he received constituted compensation for an increase in his pay rate from a 2/3 rate to a 3/4 rate. The Office representative indicated that, although one payment had been paid at the 2/3 rate it was part of the overpayment and that no additional compensation would have been due appellant. In a May 8, 2009 decision, the Office determined that appellant received a \$1,491.45 overpayment of compensation. It found he was at fault in the creation of the overpayment, thereby precluding waiver of the overpayment. The Office directed appellant to repay the \$1,491.45 overpayment.

¹ 5 C.F.R. § 10.430.

² It does not appear that appellant submitted the requested financial information.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ 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.⁴ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.”⁵

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶ Section 8105(a) of the Act provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”⁷

ANALYSIS -- ISSUE 1

The record reflects that appellant did receive a duplicate payment for the period November 15 to December 4, 2008. It does not reveal that he had any entitlement to these additional monies for the period November 15 to December 4, 2008. Therefore, the Board finds that appellant received a \$1,491.45 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the 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.⁸ 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 this

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

⁷ 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

⁸ 5 U.S.C. § 8129(a).

subchapter or would be against equity and good conscience.”⁹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁰

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she 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....”¹¹

Section 10.433(c) of the Office’s regulations provide:

“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 he or she is being overpaid.”¹²

ANALYSIS -- ISSUE 2

All checks from the Office are accompanied by statements which specifically identify the periods covered by the payments. When appellant received duplicate payment for the period November 15 to December 4, 2008, he had no reasonable basis to believe that he was entitled to such extra monies. He knew or should have known that he was not entitled to be paid compensation twice for the same period and that the payment was incorrect. On appeal, appellant argued that the extra monies he received constituted compensation for one payment being paid at a 2/3 rate rather than a 3/4 rate. The erroneous pay rate on one of the checks, though was a part of the overpayment and as such would not have warranted payment of additional compensation to appellant. The record does not otherwise support a finding that appellant should not have known that the extra monies represented an impermissible duplicate payment. Rather, it reflects many telephone calls to the Office on amounts of particular payments, reflecting that he was very aware of the amounts of payments and periods they

⁹ *Id.* at § 8129(b).

¹⁰ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(c).

covered. For these reasons, appellant is found at fault in the creation of the \$1,491.45 overpayment, thereby precluding waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the 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.”¹³

ANALYSIS -- ISSUE 3

The Board finds that the Office properly required repayment of the \$1,491.45 overpayment. Appellant did not submit any financial information within the time allotted by the Office, providing the Office had no basis upon which to find that appellant could not repay the overpayment.¹⁴ Therefore, the Office properly considered the appropriate factors in determining the method of recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$1,491.45 overpayment of compensation; that the Office properly determined that appellant was at fault in creating the overpayment of compensation and, therefore, the overpayment was not subject to waiver. The Board further finds that the Office properly required repayment of the overpayment in a \$1,491.45 payment.

¹³ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁴ Appellant continued to receive wage-loss compensation from the Office.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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