



Appellant filed a second claim on March 7, 2002 alleging that she injured her shoulders, legs, thigh, hip and her tailbone on February 25, 2002 when a chair slipped out from under her. The Office accepted this claim for fracture of the coccyx and authorized compensation benefits. Appellant returned to work four hours a day on May 2, 2002.

On October 1, 2003 the Office granted appellant a schedule award for 16 percent impairment to both legs. On July 21, 2004 it accepted lumbar, thoracic and cervical intervertebral disc disorders. Appellant underwent spinal fusion on July 14, 2004. The Office entered her on the periodic rolls on October 20, 2004. In this letter it stated,

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result. Also, advise us immediately of any change in address or of any change in the status of your dependents.”

Appellant returned to part-time work, four hours a day, on March 6, 2005.

On February 21, 2006 appellant worked two hours a day as a medical support assistant and two hours a day as a union official. She returned to full-time light duty on April 3, 2006. Appellant worked intermittently from April 7 to 20, 2006 and claimed a recurrence of total disability on April 20, 2006. This claim was denied on July 5, 2006. Appellant did not return to full-time work until May 14, 2007.

Appellant advised the Office that she did not receive compensation from April 20 through October 26, 2006. The Office noted that she received wage loss for four hours a day under her claim for fracture of the coccyx. The record establishes that appellant received compensation from February 20, 2005 through March 19, 2006 in the amount of \$1,054.00. From March 20 to April 15, 2006 she received compensation in the amount of \$1,114.79. Beginning April 16, 2006 appellant received compensation in the amount of \$1,091.00 every 28 days through March 17, 2007 at which point she received compensation in the amount of \$1,117.00 every 28 days through January 19, 2008. By letter dated November 19, 2007 the employing establishment advised that she began working full time beginning May 14, 2007. Appellant responded on February 5, 2008 and stated that after April 20, 2006 she was out of work for one year without insurance.

The Office issued a preliminary determination of overpayment on July 15, 2008 finding that appellant received an overpayment in the amount of \$25,939.00 for the period April 3, 2006 through January 19, 2008 because she was paid wage-loss compensation while working eight hours a day. It found that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to receive compensation benefits while receiving her full salary. The Office found that appellant was paid \$26,509.58 for the period March 19, 2006 through January 19, 2008 while she was entitled to receive \$570.00 from March 19 through April 2, 2006 resulting in an overpayment of \$25,939.04.

Appellant requested a preresoupment hearing on July 21, 2008 and disagreed that she received compensation while working eight hours a day. She completed an overpayment recovery questionnaire on July 29, 2008 and indicated that she did not have any of the incorrectly issued checks or payment in her possession. Appellant testified at the oral hearing on November 10, 2008 that she worked four hours a day rather than eight hours a day during the period. The employing establishment representative, Richard W. Meredith, testified that appellant returned to work on April 3, 2006 working four hours a day as a clerk and four hours as a union representative. He stated that appellant filed a claim for a recurrence of total disability which was denied and that, in early 2007, she returned to work eight hours a day. Appellant stated that she began working eight hours a day in May or June 2007. The hearing representative requested copies of documentation supporting appellant's overpayment recovery questionnaire.

Following the oral hearing, the employing establishment submitted a statement that appellant worked eight hours a day on April 3, 2006 and was paid for eight hours or used leave through April 19, 2008.

By decision dated March 5, 2009, the hearing representative found that appellant returned to work on April 3, 2006 working four hours and performing union duties for four hours a day. Appellant continued to receive wage-loss compensation for partial disability through January 19, 2008. The hearing representative found that appellant received an overpayment in the amount of \$25,939.04 for which she was at fault as she knew or should have known that the payments were incorrect.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period."<sup>2</sup> Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes that appellant returned to full-time work on April 3, 2006. She continued to work intermittently until April 20, 2006 at which point she filed a recurrence of disability claim which not accepted by the Office. Appellant did not work from April 20, 2006 through May 13, 2007. On May 14, 2007 she again returned to full-time work. The Office continued to pay appellant compensation for four hours of partial disability from April 3, 2006

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>2</sup> *Id.* at § 8116(a).

<sup>3</sup> *Danney E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

through January 19, 2008. The Board finds that appellant received an overpayment of compensation in the amount of \$25,939.04.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>4</sup> provides: 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.”

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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 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 (this provision applies only to the overpaid individual).<sup>5</sup>

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.<sup>6</sup>

### **ANALYSIS -- ISSUE 2**

Appellant, a nurse and union president, returned to full-time work on April 3, 2006 and continued to receive compensation for four hours of partial disability a day through January 19, 2008. The Office had informed her on October 20, 2004 of her obligation to return any checks received after she returned to work to avoid an overpayment of compensation. Appellant accepted payments from the Office for partial disability after returning to full-time work. The Board finds that she knew or should have known that she was not entitled to receive compensation benefits for approximately one half of her salary while she was earning her full salary. As appellant received compensation payments which she knew or should have known to be incorrect, she is at fault in the creation of the overpayment and it is not subject to waiver. The Board notes that it does not have jurisdiction to review the Office’s finding regarding how the overpayment should be recovered. The Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>7</sup>

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<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> *Id.* at § 10.433(b).

<sup>7</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

**CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$25,939.04 for the period April 3, 2006 to January 19, 2008 for which she was at fault and that therefore the overpayment is not subject to waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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