

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

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S.E., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
AUGUSTA VETERANS ADMINISTRATION )  
MEDICAL CENTER, Augusta, GA, Employer )

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**Docket No. 10-124**  
**Issued: July 21, 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  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 16, 2009 appellant filed a timely appeal from the April 24 and September 15, 2009 overpayment decisions 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 merit issues of this case.

**ISSUE**

The issue is whether the Office properly found that appellant was at fault in the creation of overpayments in compensation in the amounts of \$828.79 and \$1,424.71 and therefore they were not subject to waiver.

On appeal, appellant contends that she does not disagree with the amount owed but with the amount she can repay per month.

**FACTUAL HISTORY**

On May 31, 2006 appellant, then a 53-year-old registered nurse, injured her left knee when she was attacked by a patient and fell. She stopped work that day. The Office accepted

that appellant sustained an employment-related sprain of the medial collateral ligament and a tear of the medial meniscus. On July 28, 2006 appellant underwent arthroscopic repair of the left knee and received continuation of pay and monetary compensation by check. She returned to full-time modified duty on October 4, 2006.<sup>1</sup> Appellant had a second arthroscopic procedure on May 14, 2007 and was placed on the periodic compensation rolls.<sup>2</sup> She returned to a full-time light-duty position as a case manager on August 15, 2007. On November 16, 2007 appellant was granted a schedule award for a seven percent permanent impairment of the left lower extremity. She had a third arthroscopic procedure on her left knee of October 20, 2008, and was again placed on the periodic rolls. Appellant returned to modified duty for four hours a day on February 25, 2009.

By letter dated March 19, 2009, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$828.79 for the period February 15 to March 14, 2009 because she received wage-loss compensation for disability during a period in which she had returned to work for four hours daily. It found her at fault in the creation of the overpayment because she should have known she was not entitled to full wage-loss compensation after her return to part-time work. On April 24, 2009 the Office finalized the preliminary determination that appellant was at fault in creating the \$828.79 overpayment.

Appellant returned to full duty in her regular sedentary position without restrictions on March 25, 2009. She returned a check in the amount of \$1,801.31 for the period April 12 to May 9, 2009. By letter dated July 21, 2009, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$1,424.71 from March 25 to April 11, 2009 because she received disability compensation for a period in which she had returned to full-time work. It found her at fault in the creation of the overpayment because she knew or should have known she was not entitled to wage-loss compensation after her return to work.<sup>3</sup>

Appellant returned an overpayment questionnaire indicating that she had assets totaling \$35,000.00. During an overpayment telephone conference, held on August 21, 2009, she reported that she had income of \$6,202.00 per month and expenses of \$4,309.00, yielding a difference of \$1,893.00.

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<sup>1</sup> Appellant received intermittent wage-loss compensation thereafter for medical appointments and therapy visits. She returned to full duty on November 15, 2006.

<sup>2</sup> By decision dated August 8, 2007, the Office found that appellant was at fault for the creation of an overpayment in compensation in the amount of \$1,660.98 because she received duplicate compensation payments for the same period. Appellant did not file an appeal with the Board of that decision, and it was repaid in full.

<sup>3</sup> The Office initially issued a preliminary finding of a \$3,462.84 overpayment on May 27, 2009 but determined that the amount was incorrect and issued the July 21, 2008 preliminary overpayment finding.

In a September 15, 2009 decision, the Office finalized the overpayment determination in the amount of \$1,424.71. Appellant was found at fault because she received wage-loss compensation for total disability after her return to work on March 25, 2009.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment in compensation shall be recovered by the Office 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."<sup>5</sup>

Section 10.433(a) of the Office's regulations provide that the Office:

"[M]ay 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 receives 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 in 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;
- (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>6</sup>

In determining whether a claimant is at fault in creating an overpayment, the Office will consider the circumstances surrounding the overpayment. The degree of care expected by a recipient of compensation may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>7</sup>

### **ANALYSIS**

The Board notes that appellant has not challenged the fact or amount of the overpayments in question. The Office found that she was at fault in creating the \$828.79 overpayment because

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<sup>4</sup> By decision dated October 1, 2009, the Office denied appellant's claim for an additional schedule award. Appellant did not file for review of that decision.

<sup>5</sup> 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

<sup>6</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>7</sup> *Id.* at § 10.433(b); *see Neill D. Dewald*, 57 ECAB 451 (2006).

she knew or should have known the payment was incorrect for the period February 15 to March 14, 2009 as she had returned to part-time work. Similarly, appellant was at fault in creating the \$1,424.71 overpayment because she knew or should have known the payment was incorrect for the period March 25 to April 11, 2009 after she returned to full-time work.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.<sup>8</sup> A recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>9</sup> In letters dated July 18 and 20, 2006, the Office notified appellant that her claim was accepted. In letters dated June 5, 2007 and October 27, 2008, it notified appellant that she was placed on the periodic rolls and advised her that she was to immediately inform the Office upon her return to work in order to avoid an overpayment of compensation and that, if she worked during any period covered by a compensation payment, she was to return the payment to the Office. Under these circumstances, appellant knew or should have known that she could not receive wage-loss compensation for any period that she worked.<sup>10</sup> The Office found that, despite such notice, when appellant returned to part-time and then full-time work, she did not return the compensation payments she received by check for the periods listed on the checks. The Board finds that she knew or should have known that the checks she received after her return to work were incorrect. Appellant had an obligation to return payments that she knew or should have known were incorrect.<sup>11</sup> Under section 10.433(a) of the Office's regulations, she is at fault pursuant to section 8129 of the Act and is not entitled to waiver of the overpayments in compensation.<sup>12</sup>

With respect to appellant's contentions on appeal regarding the rate of recovery of the overpayment, the Board's jurisdiction over recovery is limited to reviewing those situations where the Office seeks recovery from continuing compensation under the Act.<sup>13</sup> As she returned to work in March 2009 and is no longer receiving monetary compensation, the Board has no jurisdiction over the repayment in this case.

### CONCLUSION

The Board finds that the Office properly found appellant at fault in the creation of overpayments in compensation in the amounts of \$828.79 and \$1,424.71 because she received wage-loss compensation after her return to work.

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<sup>8</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>9</sup> *Sinclair L. Taylor*, *supra* note 6.

<sup>10</sup> *Neill D. Dewald*, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The Board, however, notes that appellant would not be entitled to waiver as her monthly income exceeded her monthly expenses by \$1,893.00 and she declared assets totaling \$35,000.00 and has not argued that recovery would be against equity and good conscience. 20 C.F.R. §§ 10.436, 10.437.

<sup>13</sup> *L.D.*, 59 ECAB \_\_\_\_ (Docket No. 08-678, issued August 7, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 15, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 21, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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