

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

N.B., Appellant)

and)

U.S. POSTAL SERVICE, NORTH KENNER)
POST OFFICE, Kenner, LA, Employer)

**Docket No. 09-1015
Issued: March 8, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2009 appellant filed a timely appeal from a February 17, 2009 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$253.07 for the period January 13 to 17, 2009; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver.

On appeal, appellant does not contest the fact or amount of the overpayment but contends that she is not at fault in creating the overpayment. She had no authority to stop the Office's direct deposit of the compensation payment covering January 13 to 17, 2009.

FACTUAL HISTORY

The Office accepted that, on or before February 4, 1997, appellant, then a 38-year-old clerk, sustained bilateral carpal tunnel syndrome requiring left median nerve release.¹ It previously accepted that appellant dislocated her left patella on May 3, 1991, requiring surgery.² The Office also accepted that on August 23, 1999 appellant sustained cervical and lumbar strains, a right hip contusion and right knee contusion in the performance of duty.³

Appellant received wage-loss compensation for periods of intermittent disability. On October 1, 2006 the Office placed her case on the periodic rolls. It issued appellant's compensation payments by direct deposit (electronic funds transfer).

Appellant underwent a right median nerve release on October 16, 2008. As of October 16, 2008, appellant received \$1,417.28 every 28 days on the periodic rolls.

In a December 9, 2008 letter, the Office advised appellant that she would receive compensation for temporary total disability from October 16 to December 20, 2008. It noted that compensation benefits for total disability were payable only while she could not perform her regular job duties due to the accepted injury. A December 23, 2008 worksheet showed that the next scheduled compensation payment would be issued on January 17, 2009, covering the period December 21, 2008 to January 17, 2009.

On January 13, 2009 appellant returned to work for four hours a day and so advised the Office.⁴ In a January 13, 2009 letter, the Office acknowledged her return to work and her prompt notification. It noted that appellant would receive a final compensation check partially covering the period after her return to work. The Office advised her that to avoid an overpayment, she should return this payment and the Office would then issue "another check covering the appropriate period."

By notice dated January 15, 2009, the Office advised appellant of its preliminary determination that an overpayment was created in her case as she received temporary total disability compensation while working from January 13 to 17, 2009. The overpayment existed administratively as the Office was unable to stop or modify the electronic compensation payment to be issued on January 17, 2009. The Office divided appellant's net compensation of \$1,417.21 by 28, resulting in \$50.61. It then multiplied \$50.61 by 5, the number of days appellant received compensation after returning to work, resulting in an overpayment of \$253.07. The Office found appellant at fault as she knew or should have known she was not entitled to wage-loss

¹ The Office assigned the carpal tunnel syndrome claim File No. xxxxxx530.

² The Office assigned the left knee injury claim File No. xxxxxx814.

³ The Office assigned the August 23, 1999 injury claim File No. xxxxx853. In 2004, the Office designated File No. xxxxxx814 as the master file number in the case. The Office then doubled files xxxxx853 and xxxxxx530 under File No. xxxxxx814.

⁴ As of 1996, appellant's physicians restricted her to working four hours a day. As there was a wage-earning capacity determination in place under File No. xxxxxx814 based on appellant's actual earnings working four hours a day, the Office considered appellant's January 13, 2009 return to work as a resumption of full duty.

compensation benefits while working full time. It afforded her 30 days to submit additional evidence and argument.

On January 17, 2009 the Office issued an electronic compensation payment in the amount of \$1,417.21, covering the period December 21, 2008 to January 17, 2009.

In a January 20, 2009 overpayment recovery questionnaire (Form OWCP-20), appellant did not contest the fact or amount of the overpayment. She asserted that she was not at fault in the creation of the overpayment as she could not stop the Office from making the direct deposit after she returned to work.

By decision dated February 17, 2009, the Office finalized the January 15, 2009 notice, finding a \$253.07 overpayment of compensation for the period January 13 to 17, 2009. It found appellant at fault in creating the overpayment because she knew or should have known she was not entitled to receive total disability compensation while working. The Office further found that, as appellant was at fault, recovery of the overpayment could not be waived. It directed recovery of the overpayment by lump-sum check.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁵ 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.⁶ Section 8129(a) of the Act provides, in pertinent part, that 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."⁷ The Office's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives compensation for total disability after returning to work.⁸

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral carpal tunnel syndrome, disabling her for work for intermittent periods through January 12, 2009. Appellant returned to work on January 13, 2009 with no loss of wages.

The evidence reflects and appellant does not dispute that she received wage-loss compensation from the Office in the amount of \$253.07 for the period January 13 to 17, 2009. As she was not entitled to receive any disability compensation as of January 13, 2007, the Board

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2.a (May 2004).

finds that the Office correctly determined that appellant received an overpayment of compensation in the amount \$253.07 for the period in question.⁹

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered 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.¹⁰ Section 10.433 of the implementing regulations specifically provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ The regulations further provide that 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.¹² Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient on the issue of fault, section 10.433 of the Office's regulations, provide that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.¹³

Section 10.433(b) of the Office's regulations provide, in relevant part, that the determination of fault "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."¹⁴

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or should have known to be incorrect.

Appellant returned to work on January 13, 2009 and notified the Office the same day. The Office acknowledged appellant's return to work but noted that there was no means to stop the periodic rolls deposit scheduled for January 17, 2009 although it would include an overpayment. The record establishes that, on January 17, 2009, the Office made a direct deposit of \$1,417.21 into appellant's bank account. As noted, this disbursement included an overpayment of \$253.07.

⁹ *Alberto Pineiro*, 51 ECAB 310 (2000).

¹⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.*

¹³ *Id.* at § 10.433(a)(3).

¹⁴ *Id.* at § 10.433(b).

On January 15, 2009 the Office issued a preliminary determination of the overpayment. It found that appellant was aware or should have been aware that she was not entitled to the entire payment to be issued on January 17, 2009. The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁵

In this case, appellant knew that the January 17, 2009 deposit would contain an overpayment. However, the Office advised her that there was no way to stop or correct the scheduled deposit. On appeal, appellant contends that she should not be at fault for “accepting” a deposit which she knew would be in error but that the Office could not stop. Under the circumstances of this case, the Board concurs. Both appellant and the Office were aware of the administrative existence of the overpayment on January 13, 2009, four days before the actual deposit occurred. The creation of the overpayment was not appellant’s fault. It resulted from the automatic nature of the Office’s compensation payment system. The Office’s finding of fault was improper.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$253.07. The Board further finds that appellant was not at fault in creation of the overpayment.¹⁶

¹⁵ *W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008).

¹⁶ The Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act. *Desiderio Martinez*, 55 ECAB 245 (2004). As appellant is not in receipt of continuing compensation payments, the Board has no jurisdiction to review the recovery issue in this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2009 is affirmed with respect to fact and amount of the overpayment and reversed with respect to the finding of fault.

Issued: March 8, 2010
Washington, DC

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

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

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