

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

E.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Cincinnati, OH, Employer)

**Docket No. 09-1708
Issued: May 17, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 25, 2009 appellant filed a timely appeal from a May 28, 2009 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and that she was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,827.44 for the period February 18 through April 11, 2009; and (2) whether she was at fault in the creation of the overpayment.

FACTUAL HISTORY

On May 21, 2008 appellant, then a 56-year-old mail handler, filed a traumatic injury claim alleging that she injured her right shoulder in the performance of duty on May 18, 2008. The Office accepted her claim for right shoulder sprain and placed her on the periodic rolls effective November 23, 2008.

On June 25, 2008 appellant was notified that, in order to avoid an overpayment of compensation, she was to immediately notify the Office of her return to work. She was advised that she was required to return any check to the Office which included a period during which she worked.

Appellant returned to full-time employment on February 18, 2009, with no loss of earnings, but she did not inform the Office of her return to work.¹ Using direct deposit, the Office paid her the net amount of \$5,127.76 in compensation for total disability from February 15 through April 11, 2009 as follows: check dated March 14, 2009 in the net amount of \$2,563.88 for the period February 15 through March 14, 2009; check dated April 11, 2009 in the net amount of \$2,563.88 for the period March 15 through April 11, 2009. In each instance, it deducted the following amounts from the gross amount of \$2,802.96: health benefits -- \$92.78; basic life insurance -- \$14.70; and optional life insurance -- \$131.60.

Upon notification by the employing establishment of her return to work, the Office terminated appellant's wage-loss compensation. The record contains calculations showing that appellant should have been paid the amount of \$300.32 for the period February 15 through 17, 2009, the date prior to her return to work. The Office calculated that the difference between the amount paid for the entire period and the amount to which appellant was entitled, resulted in a total overpayment of \$4,827.44 ($\$5,305.60 - \$478.16 = \$4,827.44$).

On April 22, 2009 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$4,827.44 for the period February 18 through April 11, 2009 because she received compensation for total disability after she returned to work, and that she was at fault in the creation of the overpayment, as she knew or should have known that she was not entitled to receive compensation for the described period. It further informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence, or a precoupment hearing on the issues of fault and a possible waiver.

On May 4, 2009 appellant requested a decision based on the written record. In an April 28, 2009 overpayment recovery questionnaire, she did not contest the fact or amount of the overpayment, but she contended that she was not at fault in its creation. Appellant alleged that the injury compensation office at the employing establishment assured her it would notify the Office that she had returned to work, and that she did not intentionally do anything wrong. She also stated that she never understood the dates for which she was being paid. Appellant stated that, since she stopped working due to her April 2, 2009 injury, the compensation payments were her primary source of income. She submitted supporting financial information reflecting monthly expenses of \$2,757.41 and total monthly income of \$539.00.

By decision dated March 28, 2009, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$4,827.44 for the period February 18 through April 11, 2009, based on her receipt of compensation for disability after her return to work. It

¹ On March 25, 2009 appellant filed an occupational disease claim alleging that she developed carpal tunnel syndrome due to employment activities (File No. xxxxxx430). On April 10, 2009 she filed a traumatic injury claim alleging that she sustained disabling injuries to her back, right hip and knees when she fell out of a chair at work on April 2, 2009 (File No. xxxxxx613).

further found that she was at fault in the creation of the overpayment, as she accepted a payment which she knew or should have known was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act² provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ The Office's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$4,827.44. The record supports, and appellant has not disputed, that she continued to receive compensation from the date that she returned to full-time employment on February 18 through April 11, 2009 in the amount of \$4,827.44. When an employee returns to work and ceases to have any loss of wages, she is no longer entitled to compensation for wage loss.⁶ As appellant was not entitled to compensation after her return to work, the Office properly found an overpayment of compensation in the amount of \$4,827.44.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its 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.⁷ Section 10.433 of the implementing regulations 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.⁸ The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See Kenneth E. Rush*, 51 ECAB 116 (1999).

⁷ 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁸ *Id.* at § 10.433(a).

he or she receives from the Office are proper.⁹ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if she accepted a payment which she knew or should have known to be incorrect.¹⁰ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹¹

The Board has found the claimant to be at fault in cases where she is receiving compensation checks through direct deposit involving a series of payments over several months with clear knowledge that the payments were incorrect.¹² It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹³

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. The Board finds that appellant was without fault with regard to the Office's first direct deposit following her return to work; however, she was at fault in the creation of the overpayment resulting from the second such deposit.

The record establishes that, on March 14, 2009 the Office made a direct deposit in the amount of \$2,563.88 into appellant's bank account for the period February 15 through March 14, 2009, when she was entitled to receive only \$300.32. Accordingly, the March 14, 2009 direct deposit resulted in an overpayment of \$2,263.56. On April 11, 2009 the Office made another direct deposit in the amount of \$2,563.88 for the period March 15 through April 11, 2009, resulting in an overpayment of \$2,563.88 for that period. On April 20, 2009 it discovered the overpayment and terminated appellant's wage-loss compensation. On April 22, 2009 the Office issued a preliminary determination of the overpayment, finding that appellant was aware or should have been aware that she was not entitled to the entire payment because she had been informed that an overpayment might occur if she did not report her return to work.

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 account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁴ Previous cases

⁹ *Id.*

¹⁰ *Id.* at § 10.433(a)(3).

¹¹ *Id.* at § 10.433(b).

¹² See *Karen K. Dixon*, 56 ECAB 145 (2004).

¹³ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁴ *Tammy Craven*, 57 ECAB 689 (2006).

have held that receiving an erroneous direct deposit payment immediately following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁵ However, the Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.¹⁶ The Board has noted that an employee's failure to return an overpayment is immaterial to the issue of whether she was at fault in its creation.¹⁷

The Board finds that appellant was without fault regarding the deposit of \$2,563.88 into her account on March 14, 2009. While appellant accepted the overpayment by gaining control of the funds deposited into her account pursuant to his authorization, she did not know that she would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account.¹⁸ The Board finds that the Office improperly determined that appellant was at fault in the creation of the March 14, 2009 overpayment. The Office has not presented sufficient evidence to establish that appellant accepted a payment which she knew or should have known to be incorrect. The Board will, therefore, reverse the Office's finding of fault regarding the March 14, 2009 payment and remand the case for further development and a final decision on the issue of waiver of this portion of the overpayment.

The Board finds that appellant was at fault in the creation of the overpayment resulting from the April 11, 2009 direct deposit. On June 25, 2008 appellant was notified that, in order to avoid an overpayment of compensation, she was to immediately notify the Office of her return to work, and that she was required to return any check to the Office which included a period during which she worked. After her receipt of the first direct deposit following her return to work, she was on notice that the Office was making payments to her in error. Appellant knew or should have known that she was not entitled to the benefit of subsequent direct deposits. When she received the second deposit on April 11, 2009, in the amount of \$2,503.88 for the period March 15 through April 11, 2009, she had worked for approximately seven weeks. In light of the Office's clear mandate to provide notification of a return to work and to return any check received which included a period during which appellant worked, a reasonable person would have been aware that an overpayment had occurred. Appellant had the benefit of reviewing bank statements reflecting her receipt of these two compensation payments. Furthermore, logic would dictate that a claimant ought not be entitled to compensation for a disabling injury when she is not disabled, but rather is receiving full wages for time worked.

Appellant has not argued that these payments for temporary total disability were correct. Rather, she contends that she believed she was entitled to receive these payments due to a subsequent injury, which allegedly rendered her disabled. The Board notes, however, that

¹⁵ *Supra* note 6.

¹⁶ *Supra* note 7.

¹⁷ *Id.* (That appellant spent the money or had more than ample opportunity to return it before the preliminary finding of fault is immaterial to whether he was at fault in creating the overpayment.)

¹⁸ *W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008); *see also id.*

appellant continued to work from February 18 to April 2, 2009, when she allegedly sustained a new injury. A reasonable person would have known that she was not entitled to receive those benefits during that time period. Moreover, appellant's possible entitlement to compensation under her traumatic injury claim is not relevant to an overpayment under the instant claim. The Board finds that appellant knew or should have known that the April 11, 2009 deposit covering the period March 15 through April 11, 2009 was in error. Therefore, appellant was at fault in creating this portion of the overpayment and is not entitled to waiver.¹⁹

CONCLUSION

The Board finds that an overpayment of compensation in the amount of \$4,827.44 was created during the period February 18 to April 11, 2008 because appellant had returned to work but continued to receive compensation for total disability. Appellant is found not to be at fault with respect to payments deposited on March 15, 2009 because there is no evidence that she should have known the payments were incorrect; however, she is at fault with respect to the April 11, 2009 payment.

¹⁹ The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *See* 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008), n.24, *citing Ronald E. Ogden*, 56 ECAB 278 (2005). On appeal, appellant contends that she is entitled to compensation for an April 2, 2009 injury and that she is unable to repay the overpayment amount until she is paid. Her entitlement to compensation under her traumatic injury claim is not relevant to the finding of overpayment and fault in this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 28, 2009 is affirmed in part and set aside in part, and the case is remanded for action consistent with this decision.

Issued: May 17, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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