

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

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**S.H., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Marion, IL, Employer**

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**Docket No. 10-499  
Issued: November 29, 2010**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*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 December 16, 2009 appellant filed a timely appeal from a November 13, 2009 decision 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.

**ISSUES**

The issues are: (1) whether the Office properly found an overpayment in compensation in the amount of \$13,319.30 for the period October 27, 2008 through March 14, 2009 because she received wage-loss compensation after her return to work; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and it was therefore not subject to waiver.

On appeal, appellant asserts that the amount of the overpayment and fault determination are incorrect.

## **FACTUAL HISTORY**

On May 26, 2007 appellant, then a 48-year-old nurse, injured her back when she was hit by an agitated patient, causing her to fall. She stopped work that day. The Office accepted that appellant sustained an employment-related lumbar strain and aggravation of displacement of a lumbar intervertebral disc from L4 to S1. The acceptance letter advised her that she should immediately notify the Office upon her return to work. Appellant was paid wage-loss compensation on the supplemental rolls by direct deposit beginning July 14, 2007. On September 13, 2007 she underwent lumbar laminectomy, discectomy and fusion. Appellant returned to work on October 27, 2008. In a November 7, 2008 letter, the Office informed her that she would thereafter receive compensation on the periodic rolls, effective October 26, 2008, at a net amount of \$3,444.06.<sup>1</sup> Appellant was told to inform the Office immediately when she returned to work, in order to avoid an overpayment. She continued to receive wage-loss compensation through March 14, 2009.

By letter dated April 21, 2009, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$13,319.30 from October 27, 2008 to March 14, 2009 because she received wage-loss compensation during a period in which she had salary from employment. It explained the calculation of the overpayment and found her at fault because she knew or should have known that she was not entitled to wage-loss compensation after her return to work. Appellant was provided an overpayment action request form and an overpayment questionnaire. An overpayment worksheet determined that from October 27, 2008 through March 14, 2009 she received compensation of \$17,132.18 but was only entitled to \$3,812.88 for loss of premium pay, the difference representing an overpayment in compensation of \$13,319.30.

Appellant, through counsel, requested a prerecoument hearing that was held on August 11, 2009.<sup>2</sup> She testified that, when she returned to work, she was entitled to receive some compensation because she lost shift differential, holiday pay and weekend pay and at some point she notified someone at work that she was continuing to receive compensation benefits. Appellant stated that she did not understand banking procedures or the materials sent to her by the Office and that she had a depressive disorder for which she took medication on a daily basis. She acknowledged that she had three years of college and testified that she did not receive an overpayment recovery questionnaire and had stopped work in June 2007. Appellant briefly discussed her expenses and stated that her adult son, who was a heavy equipment operator, lived with her but contributed nothing to her household expenses. She stated that she paid bills with the wage-loss payments received after her return to work. The hearing representative noted that

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<sup>1</sup> Appellant received gross compensation of \$3,636.16 with deductions of \$24.30 for health benefits, \$17.40 for basic life insurance, and \$50.40 for optional life insurance, for a net compensation of \$3,444.06. She received this amount for the periods October 26 through November 22, 2008, November 23 through December 20, 2008, and December 21, 2008 through January 17, 2009. The net compensation rate was decreased to \$3,400.00 on January 18, 2009, due to increases in health benefit and optional life insurance deductions.

<sup>2</sup> On July 20, 2009 appellant filed a claim, stating that she sustained a recurrence of disability on June 30, 2009 because sitting for long periods and driving to and from work caused pain and because she felt that she was working beyond her restrictions. By letter dated July 30, 2009, the Office informed her that the claim was being adjudicated as a new claim and she would be assigned a new case number.

appellant would be provided with an overpayment questionnaire and to include her son's income on the form. On August 13, 2009 the Office forwarded appellant an additional overpayment questionnaire and the record was held open for an additional 30 days for her to complete the form. Appellant did not respond.

By decision dated November 13, 2009, the Office hearing representative finalized the overpayment of \$13,319.30 and that she was at fault in creating the overpayment because she received wage-loss compensation she knew or should have known to be incorrect.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>3</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 her duty.<sup>4</sup> Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.<sup>5</sup>

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

The Board finds that appellant received an overpayment in compensation in the amount of \$13,219.30. The record supports that she returned to work on October 27, 2008 and earned her regular salary, less shift differential, holiday pay and weekend pay. Appellant received wage-loss compensation through March 14, 2009. As noted, the Act and implementing federal regulations provide that a claimant may not receive wage-loss compensation concurrently with a federal salary.<sup>6</sup> An overpayment worksheet establishes that appellant received compensation of \$17,132.18 but was entitled to only \$3,812.88 for loss of premium pay. This created an overpayment in compensation of \$13,319.30 for the period in question. The Board will affirm the fact and amount of overpayment.

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

Section 8129 of the 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>7</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

<sup>6</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

<sup>7</sup> 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

Section 10.433(a) of the Office 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>8</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>9</sup>

### ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$13,319.30 overpayment, the Office relied on the third standard, finding that she knew or should have known the payments she received by direct deposit after her return to work on October 27, 2008 through March 14, 2009 were incorrect.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper<sup>10</sup> and the 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>11</sup> Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.<sup>12</sup> The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.<sup>13</sup> 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

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<sup>8</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>9</sup> *B.H.*, 60 ECAB \_\_\_\_ (Docket No. 09-292, issued September 1, 2009).

<sup>10</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>11</sup> *Sinclair L. Taylor*, *supra* note 8.

<sup>12</sup> *William E. McCarty*, 54 ECAB 525 (2003).

<sup>13</sup> *See Karen K. Dixon*, 56 ECAB 145 (2004).

occurred. This awareness may 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.<sup>14</sup>

Appellant received wage-loss compensation by direct deposit after her return to work from October 27, 2008 through March 14, 2009. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. The Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.<sup>15</sup> A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period. The record in this case shows that appellant received a compensation payment by direct deposit for the period October 26 through November 22, 2008. The case will therefore be remanded for the Office to determine whether she is entitled to waiver for that part of compensation paid after her return to work on October 27, 2008.

Regarding the remainder of the overpayment period, by a November 7, 2008 letter, the Office notified appellant that she was placed on the periodic compensation rolls and advised her that she was to immediately inform the Office of her return to work to avoid an overpayment in compensation. Further, if appellant worked during any period covered by a compensation payment, she had to return the payment to the Office. The record indicates that when she returned to work she was no longer entitled to premium pay. While appellant remained entitled to wage-loss compensation for the loss of premium pay, this totaled \$379.83 a week or \$1,519.32 every four weeks. Yet she received compensation at the rate of at least \$3,440.00 every four weeks for five compensation periods after her return to work. The November 7, 2008 letter clearly explained the basis for the compensation.

The Board finds that, under these circumstances, appellant should have known that she was accepting incorrect payments. She did not have a reasonable expectation that she would continue to receive compensation at the full compensation rate following her return to full duty on October 27, 2008.<sup>16</sup> Appellant had an obligation to return payments that she knew or should have known to be incorrect.<sup>17</sup> Under section 10.433(a) of the Office regulations, appellant is at fault and is not entitled to waiver of the overpayment in compensation for the period November 23, 2008 through March 14, 2009.<sup>18</sup>

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<sup>14</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>15</sup> See *Karen K. Dixon*, *supra* note 13.

<sup>16</sup> *J.R.*, 60 ECAB \_\_\_ (Docket No. 08-1107, issued June 15, 2009).

<sup>17</sup> *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>18</sup> *Id.*

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act.<sup>19</sup>

**CONCLUSION**

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$13,319.30 had been created. Appellant was not at fault for the overpayment by direct deposit after her return to work covering the period October 27 through November 22, 2008. She is at fault for the remaining period of the overpayment. The case is remanded for a determination of whether she is entitled to waiver for this period.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed, in part, set aside in part and the case remanded for further proceedings consistent with this decision.

Issued: November 29, 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

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<sup>19</sup> *L.D.*, 59 ECAB 673 (2008).