

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

M.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Berkeley Heights, NJ, Employer**

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**Docket No. 10-554
Issued: November 3, 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 December 23, 2009 appellant filed a timely appeal from a November 24, 2009 merit 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 merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that an overpayment in compensation of \$993.07 was created for the period January 8 to 17, 2009 because he concurrently received wages from the employing establishment and wage-loss compensation; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and it was not subject to waiver.

On appeal, appellant asserts that he is not at fault because the Office forced him to return to work in error and that he is financially unable to repay the overpayment.

FACTUAL HISTORY

On September 17, 2007 appellant, then a 43-year-old letter carrier, sustained lumbosacral spondylosis without myelopathy, sprain of the medial collateral ligament of the right knee and a left ankle sprain when he stepped in a hole and fell while delivering mail. He began limited duty, but later that year stopped work.¹ On March 7, 2008 appellant underwent a partial medial meniscectomy of the right knee and returned to part-time modified duty on March 31, 2008. The Office accepted that he sustained a recurrence of total disability on April 22, 2008. Appellant was paid wage-loss compensation by check and was placed on the periodic compensation rolls.

In July 2008 appellant was referred to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Rubinfeld's reports dated August 7 and September 6, 2008 the employing establishment offered appellant a full-time modified carrier position. On January 8, 2009 appellant returned to work. He worked approximately six hours and filed a recurrence claim. On March 11, 2009 the Office accepted the January 9, 2009 recurrence.

By letter dated March 26, 2009, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$993.07 for the period January 8 through 17, 2009 because he received disability compensation during a period in which he had returned to work. It found him at fault in the creation of the overpayment because he should have known he was not entitled to wage-loss compensation after his return to work. Appellant was provided an overpayment action request form and an overpayment questionnaire. Computer printouts and an overpayment worksheet indicated that appellant was paid wage-loss compensation of \$1,706.12 for the period December 21, 2008 through January 17, 2009 and should have received compensation for the period December 21, 2008 through January 7, 2009 of \$713.05, yielding an overpayment in compensation of \$993.07.² The employing establishment advised on a leave form that appellant worked six hours on January 8, 2009 and received eight hours of annual leave a day through January 17, 2009.

Appellant requested a prerecoupment hearing, stating that he used sick and annual leave after he stopped work.³ He did not appear at a hearing scheduled for July 16, 2009. By letter dated September 4, 2009, the Office notified him that a review of the written record would be conducted. It also provided a second overpayment questionnaire, as none had been received.

In a November 24, 2009 decision, an Office hearing representative found that appellant was at fault in creating the \$993.07 overpayment because he received wage-loss compensation after his return to work, when he had earnings and used leave. The Office hearing representative noted that, as appellant was paid compensation by check that clearly advised the period the check

¹ It is unclear from the record when appellant stopped work.

² The Office explained that for the period December 21, 2008 through January 17, 2009 appellant received compensation of \$985.62 a week at the three quarters rate less health and life insurance, yielding compensation of \$1,706.12 and that for this period, with the same deductions, he should have received \$713.05, yielding an overpayment in compensation of \$993.07.

³ Appellant again received wage-loss compensation, beginning January 26, 2009.

covered, he should have known he was not entitled to wage-loss compensation and wages from salary or use of leave for the same period. The hearing representative found that appellant had not provided an overpayment questionnaire or other financial information and a repayment schedule was not possible. The overpayment was due in full.

LEGAL PRECEDENT -- ISSUE1

Section 8102(a) of the Federal Employees' Compensation Act⁴ 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.⁵ 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, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁶ Section 10.500 of 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 him or her from earning the wages earned before the work-related injury."⁷ Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.⁸

ANALYSIS -- ISSUE1

The Board finds that appellant received an overpayment in compensation in the amount of \$993.07. The record supports that he returned to work on January 8, 2009 and received wage-loss compensation through January 17, 2009. The employing establishment advised that appellant received wages and annual leave during this period. As noted, both the Act and Office regulations provide that a claimant may not receive wage-loss compensation concurrently with a federal salary.⁹ Computer printouts and an overpayment worksheet in the record support that appellant received compensation in the amount of \$993.07 for the period January 8 through 17, 2009. He therefore received an overpayment in compensation in that amount.

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

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.*

⁶ *Id.*; see *Danny E. Haley*, 56 ECAB 393 (2005).

⁷ 20 C.F.R. § 10.500.

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁹ *Id.*

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”¹⁰

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).”¹¹

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.¹²

ANALYSIS -- ISSUE2

The Office found that appellant was at fault in creating the overpayment because he knew or should have known he was not entitled to wage-loss compensation for the period January 8 through 17, 2009 when he also received wages from the employing establishment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper¹³ 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.¹⁴

In this case, appellant received compensation by check which indicated the date of compensation entitlement and also received wages from the employing establishment for the period January 8 through 17, 2009. In a January 8, 2008 letter, in which the Office notified appellant that his claim was accepted and in an August 19, 2008 letter when it notified him that he was placed on the periodic rolls, the Office clearly advised him that he was to immediately

¹⁰ 5 U.S.C. § 8129; see *Joan Ross*, 57 ECAB 694 (2006).

¹¹ 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also *id.* at § 10.430.

¹² *Id.* at § 10.433(b); see *Neill D. Dewald*, 57 ECAB 451 (2006).

¹³ *Danny E. Haley*, *supra* note 6.

¹⁴ *Sinclair L. Taylor*, *supra* note 11.

inform the Office upon his return to work to avoid an overpayment in compensation and that, if he worked during any period covered by a compensation payment, he had to return the payment to the Office. Under these circumstances, appellant knew or should have known that he could not receive wage-loss compensation during any period that he worked or continued to receive wages from the employing establishment.¹⁵ The Office was notified that he returned to work on January 8, 2009. Appellant, however, did not return the compensation he received by check dated January 17, 2009, for the period January 9 through 17, 2009. The Board finds that he should have known at the time he returned to work on January 8, 2009 and began to receive wages from the employing establishment, that he was not entitled to concurrently receive wage-loss compensation for the same period and had an obligation to return a payment that he knew or should have known was incorrect.¹⁶ Under section 10.433(a) of the Office's regulations, appellant is at fault and is not entitled to waiver of the overpayment in compensation.¹⁷

CONCLUSION

The Board finds that appellant was at fault in the creation of an overpayment in compensation in the amount of \$993.07 for the period January 8 through 17, 2009 because he received wage-loss compensation after his return to work and was thus not entitled to waiver.

¹⁵ *Neill D. Dewald, supra* note 12.

¹⁶ *Id.*

¹⁷ *Id.* The Board also notes that had appellant been found without fault, he would not be entitled to waiver because he did not submit requested financial information, even though provided overpayment questionnaires on two occasions. His argument on appeal that he was forced to return to work in error is not relevant to the issue of whether he knew or should have known that he was not entitled to both wage-loss compensation and earned wages for the same period.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 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