

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

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<b>T.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 10-305</b>
	)	<b>Issued: October 18, 2010</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Owensboro, KY, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 13, 2009 appellant filed a timely appeal of the May 22, 2009 decision of the Office of Workers' Compensation Programs which found that appellant received 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 case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received a \$2,408.56 overpayment of compensation for the period March 17 to April 11, 2009; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

**FACTUAL HISTORY**

On January 22, 2009 appellant, then a 49-year-old letter carrier, developed a right shoulder condition while in the performance of duty. The Office accepted right shoulder sprain. Appellant stopped work on January 22, 2009 and was paid continuation of pay through March 8, 2009. She filed claims for wage-loss compensation beginning March 9, 2009. On March 14, 2009 appellant was placed on the periodic rolls.

By letter dated March 24, 2009, the Office advised appellant of her diagnosed conditions and her eligibility for benefits. In an attached Form CA-1008, it notified her of certain conditions under which she could receive compensation. The Office advised:

“Once you return to work, or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

In a letter dated March 30, 2009, the Office outlined appellant’s entitlement to compensation benefits and her responsibility to return to work in connection with the accepted injury. In an attached EN1049, it provided:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result. Also, advise us immediately of any change in address or of any change in the status of your dependents.”

On March 30, 2009 appellant submitted a CA-7, claim for compensation, requesting leave without pay for 8 hours on March 14 and 16, 2009; 1.86 hours on March 17, 2009, 1.41 hours on March 23, 2009 and 1.20 hours on March 25, 2009 for a total of 20.47 hours for the period March 14 to 25, 2009. The employing establishment noted that appellant returned to work and verified leave without pay for 20.47 hours.

In a telephone log dated April 9, 2009, the employing establishment advised the Office that appellant returned to full-time light-duty work on March 17, 2009 and to full duty on April 7, 2009, without wage loss. On April 9, 2009 the Office stopped appellant’s continuing wage-loss compensation due to her return to work on March 17, 2009.

In a report dated April 9, 2009, the Office noted that, for the period March 15 to April 11, 2009, appellant was paid net compensation of \$2,678.45 in a check issued on April 11, 2009. In a supplemental roll payment worksheet dated April 9, 2009, it noted that appellant was entitled to disability compensation for March 15 and 16, 2009 in the amount of \$191.32. On April 21, 2009 the Office noted that appellant was entitled to 4.47 hours of intermittent wage loss for physical therapy appointments from March 17 to 25, 2009 in the amount of \$78.57. It determined that appellant returned to work full-time light duty on March 17, 2009 and had approximately 20 hours of intermittent wage loss for the period March 17 to 25, 2009, or a total of \$269.89.<sup>1</sup> For the period March 17 to 25, 2009, appellant was paid disability compensation of \$2,678.45; however, she was only entitled to \$269.89. Therefore an overpayment of compensation was created in the amount of \$2,408.56.

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<sup>1</sup> The Office calculated that appellant was entitled to disability compensation for 16 hours from March 15 and 16, 2009 in the amount of \$191.32 and for 4.47 hours intermittently from March 17 to 25, 2009 in the amount of \$78.57 for a total of \$268.89.

In an April 21, 2009 letter, the Office informed appellant that it made a preliminary determination that she had received a \$2,408.56 overpayment of compensation from March 17 to April 11, 2009 because she received compensation benefits for temporary total disability from March 17 to April 11, 2009 after she returned to work full time on March 17, 2009 and received salary. It explained that she was paid \$2,678.45 in compensation from March 15 to April 11, 2009. The Office noted that appellant was entitled to only \$269.89, and subtracted this amount to total an overpayment of \$2,408.56. It found that she was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect. The Office informed appellant that she had the right to submit evidence or argument if she disagreed with the its finding. It also informed appellant that she had a right to a prerecoupment hearing before an Office hearing representative. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

On April 28, 2009 appellant submitted an overpayment questionnaire. She submitted some financial information and asserted that she was not at fault in creating the overpayment. Appellant stated that she thought the compensation amount “might be a little high but not ... that high.” She asserted that the payment process was never explained to her.

In a May 22, 2009 decision, the Office found that appellant received a \$2,408.56 overpayment of compensation from March 17 to April 11, 2009 for which she was at fault. The overpayment occurred because appellant returned to work full time, eight hours a day, on March 17, 2009 and continued to receive compensation for total disability until April 11, 2009 while earning her regular salary. The Office found that appellant was at fault in creating the overpayment because she reasonably knew or should have been aware that she was not entitled to compensation benefits for total disability while working full time. It stated that appellant should forward a check for \$100.00 per month.

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

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>2</sup>

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

The record establishes that appellant returned to work full time, eight hours a day, at the employing establishment on March 17, 2009. She continued to receive wage-loss compensation for total disability through April 11, 2009. As noted, appellant is not entitled to receive compensation for total disability after she has returned to work at her full salary. Thus, an overpayment occurred.

The evidence establishes that appellant returned to full-time work without wage loss on March 17, 2009 and was not entitled to wage-loss compensation after that date. The record shows that the Office calculated that, from March 15 to April 11, 2009, appellant received \$2,678.45 in total disability compensation but should have only received \$269.89. The Office subtracted \$269.89 from \$2,678.45 in calculating the amount of the overpayment of \$2,408.56.

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<sup>2</sup> *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

It explained how the overpayment occurred and provided this information to appellant with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,408.56 for the period March 17 to April 11, 2009.

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

Section 8129(b) of the Act provides as follows:

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>3</sup>

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>4</sup>

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>5</sup>

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provide that 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>6</sup>

Section 10.430(a) of the Office regulations advise that the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes, by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>6</sup> *Id.* at § 10.433(b).

<sup>7</sup> *J.R.*, 60 ECAB \_\_\_\_ (Docket No. 08-1107, issued June 15, 2009). 20 C.F.R. § 10.430.

compensation, the Office must establish that, at the time appellant accepted the compensation checks in question, she knew or should have known the payments were incorrect.<sup>8</sup>

The Office erroneously paid wage-loss compensation for total disability from March 17 to April 11, 2009 while appellant was only entitled to 20.47 hours of intermittent disability compensation in the amount of \$269.89. However, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment to which she knew or should have known that she was not entitled.<sup>9</sup> On March 24, 2009 the Office advised appellant: “If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.” In a letter dated March 30, 2009, the Office similarly advised appellant: “In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Although appellant asserted that she was not familiar with the payment system, she received these cautionary notices from the Office shortly before the check in question was issued on April 11, 2009. In her overpayment recovery questionnaire, appellant acknowledged that she thought that the amount of the check was high. The Board notes that the Office includes on each periodic check a clear designation of the period for which payment is being made. By doing this, the Office puts the recipient on notice that a payment was made and the amount of the payment.<sup>10</sup> All of this evidence establishes that appellant should have been aware that, when she accepted the compensation for the period in question, she was not entitled to receive wage-loss compensation for total disability for a period when she worked.

For these reasons, the Office properly found that appellant accepted wage-loss compensation from March 17 to April 11, 2009 which she knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$2,408.56 overpayment of compensation may not be waived.<sup>11</sup>

On appeal, appellant asserts that she was not at fault in creating the overpayment because she did not realize she was overpaid and the Office’s instructions were unclear. She submitted checking account statements and cancelled checks.<sup>12</sup> As noted, the record establishes that appellant accepted payment to which she knew or should have known that she was not entitled.<sup>13</sup> After appellant started full-time work she did not return the compensation check as the Office

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<sup>8</sup> See *Claude T. Green*, 42 ECAB 174, 278 (1990).

<sup>9</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>10</sup> See *J.R.*, *supra* note 7.

<sup>11</sup> As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

<sup>12</sup> The Board’s jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review evidence submitted by appellant on appeal. See 20 C.F.R. § 501.2(c)(1).

<sup>13</sup> See *Russell E. Wageneck*, *supra* note 9.

had instructed. The evidence supports that appellant knew or should have known that she accepted an incorrect amount.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation from March 17 to April 11, 2009 and that she was at fault in creating the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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