

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

B.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Port Chester, NY, Employer**

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**Docket No. 10-771
Issued: October 15, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' overpayment decision dated December 23, 2009. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$4,037.85 for the period January 29 through March 14, 2009; and (2) whether the Office properly found appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 46-year-old mail baggage screener, filed a claim for benefits on February 15, 2006, alleging that he injured his right shoulder on February 14, 2006 when he slipped and fell while walking on wet stairs. The Office accepted the claim for sprain of the right shoulder, right upper arm and right rotator cuff.

In a November 9, 2006 letter, the Office advised appellant that he would be paid temporary total disability compensation, as follows:

“You are expected to return to work (including light-duty or part-time work, if available) as soon as you are able. 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.*” (Emphasis added.)

On November 16, 2007 appellant filed a claim for recurrence of disability as of November 6, 2007. The Office accepted his claim for recurrence of disability and accepted the condition of ruptured right rotator cuff. It commenced appellant’s wage-loss compensation for temporary total disability and placed him on the periodic rolls.

On January 29, 2009 appellant was released to full duty and returned to work.

On April 24, 2009 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$4,037.85 for the period January 29 through March 14, 2009. It found that appellant was at fault in creating the overpayment because he knew or should have known that he was not entitled to receive compensation payments after he returned to work. The Office calculated the amount of the overpayment by multiplying the amount of his monthly compensation payment, \$2,512.44, by two months which totaled \$5,024.88. From which it subtracted \$987.03, representing the 11 days of the first monthly period of overpayment, January 18 to 28, 2009 when he was not working. This created a total overpayment of \$4,037.85. It informed appellant that, if he disagreed with the decision he could submit evidence or argument to the Office within 30 days or request a preresoupment hearing with the Branch of Hearings and Review.

On May 24, 2009 appellant completed the overpayment questionnaire and requested a preresoupment hearing, which was held on September 9, 2009. He submitted documentation regarding his financial status and stated at the hearing that he accepted the checks because he believed he was entitled to them and because he needed money due to a dire financial situation.

In a decision dated December 23, 2009, an Office hearing representative finalized the overpayment of \$4,037.85. The Office found that appellant knew or should have been aware that he accepted incorrect compensation after he returned to work on January 29, 2009.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Federal Employees’ Compensation Act is payable when the employee starts to lose pay.¹ Compensation for wage loss due to disability is

¹ 20 C.F.R. § 10.401(a) (2003).

available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.²

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,037.85 for the period January 29 through March 14, 2009. The record shows that appellant received an overpayment during the period in question because he received wage loss for temporary total disability after returning to full-time work on January 29, 2009, at full salary. The Office calculated the \$4,037.85 overpayment by adding the amount of temporary total disability compensation appellant received in two checks for the period January 18 through March 14, 2009, which totaled \$5,024.88, covering two payments of \$2,512.44 each for January 18 through February 14, 2009 and February 15 through March 14, 2009, and then subtracting the prorated amount for January 18 through 28, 2009, \$987.03.³ The Board finds that appellant received an overpayment of compensation in the amount of \$4,037.85 during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁴ provides that 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁵

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provide in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide information which the individual knew or should have known to be material; or

² *Id.* at § 500(a) (2003).

³ The Office divided \$2,512.44 by 28 days to calculate that appellant was paid at a rate of \$89.73 per day. It then multiplied \$89.73 times 11, the number of days he did not work from January 18, 2009, the beginning of the pay period, through January 29, 2009, for a total of \$987.03. The Office stated that the difference between the net compensation paid of \$5,024.88 and the compensation that claimant was entitled to, \$987.03, was \$4,037.85.

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

(3) Accepted a payment which he or she knew or should have known to be incorrect.⁶

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. It found that appellant accepted a payment which he knew or should have known was incorrect. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have known he was not entitled.⁷ Appellant was informed in the November 9, 2006 letter that he was required to notify the Office as soon as he returned to work and to return any payment of compensation; otherwise an overpayment of compensation would be created. He returned to work on January 29, 2009 and received a check dated February 16, 2009 for compensation for the period January 20 through February 16, 2009. Appellant again received a compensation payment on March 15, 2009 for the period February 17 through March 15, 2009. He did not return any compensation received after his return to work, even though he knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to work. At the precoupment hearing, appellant acknowledged that he kept the payments due to his financial circumstances.

The Office includes on each periodic check a clear indication of the period for which payment is being made. By doing this, it puts the recipient on notice that a payment was made and the amount of payment.⁸ This is evidence that should have put appellant on notice that, when he accepted the compensation for the period in question, he was not entitled to receive wage-loss compensation for total disability for periods when he worked and received full salary. Appellant was at fault under the third standard as noted. The overpayment may not be considered for waiver. The Board will affirm the December 23, 2009 Office decision.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,037.85 from January 29 through March 14, 2009. The Board finds that the Office properly found appellant was at fault in the creation of the overpayment.

⁶ 20 C.F.R. § 10.433(a).

⁷ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ 20 C.F.R. § 10.430.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 15, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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