

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pearland, TX, Employer**

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**Docket No. 10-261
Issued: September 7, 2010**

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 4, 2009 appellant filed a timely appeal from an October 6, 2009 merit decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,229.30 from August 18 to 29, 2009; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On October 24, 2002 appellant, then a 36-year-old distribution clerk, filed an occupational disease claim alleging that he sustained a right shoulder condition as a result of the lifting he performs in his job. The Office accepted the claim for right shoulder impingement

syndrome and right rotator cuff rupture and authorized right shoulder surgeries, which he underwent on July 20, 2006, May 31, 2007 and May 28, 2009.¹ Following appellant's most recent surgery, the Office placed him on the periodic rolls.

By letter dated June 17, 2009, the Office informed appellant that he would receive \$2,868.36 in net compensation every 28 days. Appellant was advised that compensation for total disability was only payable while he could not perform work because of his injury. He was advised to inform the Office if he returned to work and to return any payment to minimize the possibility of an overpayment. To minimize the possibility of an overpayment of compensation, appellant was advised to notify it immediately when he returned to work. The Office advised that each compensation payment showed the period for which payment is made and, if he worked "for any portion of this period, return the payment to this [O]ffice, even if you have already advised the [Office] that you are working."

On August 18, 2009 appellant returned to full-time limited-duty work. The record indicates that, on August 29, 2009, the Office issued appellant a \$2,868.36 compensation check covering the period August 2 to 29, 2009. It determined that he received an overpayment for 12 days from August 18 to 29, 2009 in the amount of \$1,229.30.

A computer printout of the Office's compensation payment history reflects that appellant received \$2,868.36 every 28 days. For the 28-day periodic rolls cycle, he received \$102.44 per day. The Office determined that appellant was overpaid compensation for the 12-day period from August 18 to 29, 2009. It multiplied the daily rate of \$102.44 by 12 days and determined that he received an overpayment in the amount of \$1,229.30.

On September 2, 2009 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,229.30 because he returned to full-time duty on August 18, 2009 but received wage-loss compensation for temporary total disability through August 28, 2009. It found that he was at fault in creating the overpayment because there was no entitlement to wage-loss benefits after returning to full-time work and he knew or should have known that he was not entitled to wage-loss benefits after returning to full-time work. The Office informed appellant that, if he disagreed with the decision, he could submit evidence or argument or request a precoupment hearing.

On September 23, 2009 appellant requested waiver of the overpayment. He contended that he was not at fault in creating the overpayment because a nurse case manager and injury compensation specialist were aware when he returned to work. Appellant also argued that he was entitled to most of the check. He was still playing "catch-up" with his expenses as the Office's pay schedule was later than his usual bill cycle and he had to get a personal loan to compensate for the unusual timing to ensure his bills could be paid on time. Appellant completed an overpayment recovery questionnaire listing his monthly income and an itemization of his monthly expenses.

¹ In a January 15, 2009 decision, the Office determined that appellant's position as a modified clerk effective September 24, 2007 fairly and reasonably represented his wage-earning capacity and he had no loss in wage-earning capacity.

In an October 6, 2009 decision, the Office found that appellant received a \$1,229.30 overpayment from August 18 through 29, 2009 for which he was at fault. It requested that he repay the overpayment in full or to contact it to make arrangements for repayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation 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.² A claimant is not entitled to receive temporary total disability and actual earnings from employment 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.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,229.30 for the period August 18 through 29, 2009. The record reflects that he returned to work on August 18, 2009 but continued to receive wage-loss payments for total disability through August 29, 2009. As noted, appellant is not entitled to receive compensation for total disability after his return to full-time work. Accordingly, an overpayment of compensation has been created.

The Office found that appellant received net compensation in the amount of \$2,868.36 every 28 days. It divided the net payment of \$2,868.36 by the 28-day payment cycle to find daily entitlement of \$102.44 which, when multiplied by 12 days of the overpayment, totals \$1,229.30. Consequently, the record establishes that appellant received an overpayment of compensation from August 18 through 29, 2009 in the amount of \$1,229.30.

Appellant has not submitted any evidence to establish that he did not receive an overpayment of compensation or to negate the existence and amount of the overpayment. As noted, any compensation paid for total wage loss subsequent to the date of return to work should be declared an overpayment.⁴ The Board will affirm the Office's finding on the fact and the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

The Office may 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

² 5 U.S.C. § 8116(a).

³ *Danny E. Haley*, 56 ECAB 393 (2005). See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁴ *Id.*

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 with respect to 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).⁵

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.⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that he accepted a payment which he knew or should have known to be incorrect. In order for it to establish that he was at fault in creating the overpayment, it must show that, at the time he accepted the compensation checks in question, he knew or should have known that the payment was incorrect.⁷

The Board finds that, at the time appellant received the compensation in question, he knew or should have known that the payments were incorrect. The record reflects that he returned to work on August 18, 2009. On June 17, 2009 the Office had informed appellant that he must return checks received after he returned to work in order to avoid an overpayment of compensation and that, if he worked "for any portion" of the period covered by a check, he must return the payment to the Office. As each compensation check contains a clear indication of the period for which payment is being made, he should have been reasonably aware that he could not receive wage-loss compensation for a period after he returned to work.⁸

On appeal, appellant contended that he was not at fault and that he was entitled to the majority of the compensation contained in the check in question. He argued an unreasonable financial hardship would have resulted in having to wait for the "proper amount" check to be issued. As noted, each check contains a clear indication of the period covered by the compensation check. Also, the Office informed appellant about two months before the overpayment that he must return any compensation check if he worked for any portion of the period covered by the check. The Board has found that the fact that the Office may have erred in

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.430(a) provides 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. 20 C.F.R. § 10.430(b) notes that, by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment. *See J.R.*, 60 ECAB ___ (Docket No. 08-1107, issued June 15, 2009).

⁸ *See id.*; *B.H.*, 60 ECAB ___ (Docket No. 09-292, September 1, 2009).

making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was at fault in accepting the overpayment.⁹ Appellant knew or should have known that he received an incorrect payment when he accepted the check in question. As he is at fault in the matter of the overpayment, it cannot be waived.¹⁰

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period August 18 through 29, 2009 in the amount of \$1,229.30. The Board further finds that he was at fault in the creation of the overpayment and thus not entitled to waiver of the recovery.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 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

⁹ *M.J.*, 60 ECAB ___ (Docket No. 09-469, issued August 24, 2009).

¹⁰ *See supra* note 5. With respect to recovery of the overpayment, the Board's jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act. *See Terry A. Keister*, 56 ECAB 559 (2005); *Albert Pineiro*, 51 ECAB 310 (2000). As the Office instructed appellant to submit a check for the entire amount to repay the overpayment, the Board lacks jurisdiction to review the recovery of the overpayment.