

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

S.D., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Little Rock, AR, Employer)

Docket No. 10-468
Issued: September 22, 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 December 8, 2009 appellant filed a timely appeal from the October 21, 2009 merit decision of the Office of Workers' Compensation Programs, which found her at fault in an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant was at fault in creating a \$28,424.00 overpayment of compensation from April 13, 2008 to February 14, 2009.

FACTUAL HISTORY

In March 2000 appellant, a 27-year-old clerk, filed a claim alleging that she developed a left hand injury in the performance of duty. Her left hand had been tingling and going numb and it was painful for her to type. The Office accepted her claim for left wrist enthesopathy and

organic writer's cramp.¹ She received compensation for temporary total disability on the periodic rolls. In September 2007 appellant elected to receive disability retirement benefits in lieu of workers' compensation. She cancelled her direct deposit.

On March 6, 2008 the Office issued a schedule award for a 31 percent impairment of appellant's left upper extremity. It informed her that the award would run through October 28, 2009 with regular payments each 28 days. The Office advised that she could instead receive a lump-sum payment of \$48,717.23 as of April 13, 2008. "Any lump[-]sum payment will represent full and final compensation payment for the period of the award." Appellant agreed to accept a lump-sum settlement. She indicated her understanding that "no further monetary compensation benefits will be extended to me for the duration of the schedule award."

The Office paid appellant the lump sum for her schedule award; however, it mistakenly continued to send her schedule award payments of \$2,584.00 every 28 days until February 14, 2009.

The Office made a preliminary determination that appellant received a \$28,424.00 overpayment of compensation from April 13, 2008 to February 14, 2009 because she received dual payments: both a lump-sum settlement and periodic payments covering the same period. It found her at fault because she accepted payments that she new or reasonably should have known were incorrect.

Appellant requested a prerecoupment hearing. She explained that a claims examiner told her the payments were for an increase in the award she received for her right upper extremity in another case. Given her geographical location, the issue involved in her case and the number of hearing requests in her area, the Office determined that appellant's oral hearing would be conducted by telephone conference. At the oral hearing, appellant testified that she did not have the payments in her possession because she spent them on past bills and medications.

In a decision dated October 21, 2009, the Office finalized its preliminary determination. It found appellant at fault in creating a \$28,424.00 overpayment of compensation from April 13, 2008 to February 14, 2009. The Office found that she was at fault because the settlement agreement put her reasonably on notice that once she received the lump-sum settlement she could not receive further schedule award payments. The hearing representatives found no evidence documenting appellant's contention that she was told the payments were for her right upper extremity under another claim. Because appellant was at fault, the hearing representative denied waiver.

Appellant maintains on appeal that the money she received was for her right upper extremity. She argues detrimental reliance. Appellant also noted that she requested an oral hearing, not a telephone conference.

¹ The Office combined appellant's case file with OWCP File No. xxxxxx228 (master file), which related to a traumatic injury on February 27, 1997 that the Office accepted for right wrist sprain, contusion and injury to the median nerve.

LEGAL PRECEDENT

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) describes the only exception to the Office's obligation to adjust later payments:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”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 she received 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 with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual).³

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 she is being overpaid.⁴

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁵ However, the Office may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because: (1) the individual relied on misinformation given in writing by the Office (or by another government agency which she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations; or (2) the Office erred in calculating cost-of-

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.433(a).

⁴ *Id.* at § 10.433(b).

⁵ *Id.* at § 10.433(a).

living increases, schedule award length or percentage of impairment, or loss of wage-earning capacity.⁶

At the discretion of the hearing representative, an oral hearing may be conducted by telephone or teleconference.⁷

ANALYSIS

An overpayment arose when the Office paid appellant a lump sum to settle her March 6, 2008 schedule award but neglected to stop her regular schedule award payments. So in addition to receiving a lump sum of \$48,717.23 for the period April 13, 2008 to October 28, 2009, appellant received 11 additional payments of \$2,584.00 each from April 13, 2008 through February 14, 2009. These additional payments total \$28,424.00 and constitute a dual payment of compensation to which she was not entitled. The Board will therefore affirm the Office's October 21, 2009 decision on the issues of fact and amount of overpayment.

The Office found that appellant was at fault in the matter because she accepted payments that she knew or should have known were incorrect. Appellant testified at the oral hearing that she spent the money and her case record shows that none of the 11 compensation checks in question was ever canceled. So acceptance is established. The question is whether appellant knew or should have known that these continuing payments were incorrect.

The lump-sum settlement agreement put appellant on notice that she would receive no further monetary compensation for the duration of the schedule award, or from April 13, 2008 through October 28, 2009. As she was entitled to no other compensation at the time, she should have questioned why the Office sent her a \$2,584.00 check dated May 10, 2008 for the period April 13 to May 10, 2008.⁸ Under the circumstances, she should have known that she would receive no further payment of compensation through October 28, 2009 and that the May 10, 2008 payment was incorrect but she accepted that payment and the next 10 incorrect payments of \$2,584.00 and she spent the money.

The Board finds that appellant was at fault in creating the overpayment because she accepted payments that she knew or should have known were incorrect. The Board will therefore affirm the Office's October 21, 2009 decision on the issue of fault.

Appellant argues that the claims examiner in her other case told her the payments were issued for her right upper extremity. The Board has reviewed the other case record, which the Office has doubled with this one, and can find no evidence to support appellant's assertion. None of the incoming or outgoing correspondence or telephone calls mentions the matter. The record shows that appellant received a schedule award for her right upper extremity from January 12, 1998 to March 24, 1999. She filed a claim for an increased schedule award on September 1, 2007 for her right upper extremity, but the Office has issued no decision on her

⁶ *Id.* at § 10.435.

⁷ *Id.* at §§ 10.439, 10.615.

⁸ Check No. 39323879.

claim. Without a schedule award decision notifying appellant that the Office accepted a specific percentage increase in her right upper extremity impairment, she had no reasonable basis to contend that the checks she received after April 13, 2008 were for her right upper extremity. The Board finds that appellant did not establish any misinformation given in writing by the Office.

Because appellant is at fault in creating this overpayment, she is not eligible for consideration of waiver. She argued detrimental reliance on appeal, but neither that nor her monthly income and expenses matter. The Office must recover the debt.

Appellant takes exception to the telephone conference she received from the Office hearing representative, but whether to conduct a telephone conference in lieu of an in-person oral hearing is left by regulation to the discretion of the hearing representative. The form of the hearing should have been no impediment to any witness willing to give testimony.

CONCLUSION

The Board finds that appellant was at fault in creating a \$28,424.00 overpayment of compensation from April 13, 2008 to February 14, 2009; therefore, waiver of the recovery of the overpayment was not warranted.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 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