

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

M.J., Appellant

and

**DEPARTMENT OF DEFENSE, NATIONAL
GEOSPATIAL-INTELLIGENCE AGENCY,
Bethesda, MD, Employer**

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**Docket No. 10-1485
Issued: March 4, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2010 appellant filed a timely appeal from an April 27, 2010 overpayment 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 overpayment of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment from February 16 to March 13, 2010 in the amount of \$2,813.59; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver.

FACTUAL HISTORY

On April 25, 2007 appellant, then a 50-year-old administrative officer, injured her left leg as she was exiting a vehicle in the employer's parking lot. She stopped work on April 25, 2007.

On August 1, 2007 the Office accepted her claim for closed dislocation of her left knee.¹ Appellant was placed on the periodic compensation rolls on August 14, 2007.

In a letter dated January 11, 2008, the Office informed appellant regarding her entitlement to compensation benefits and her responsibility to return to work. Appellant was notified that compensation benefits were only payable when she could not perform her job duties due to her injury and notify the Office when she returned to work. It explained that she was to return any payments that she received for any portion of the period after she returned to work, even if she already advised the Office that she was working.

On January 4, 2010 the employing establishment offered appellant a job within her medical restrictions as an administrative officer, with a return to work date of February 15, 2010. Appellant's salary was at a rate equivalent to that earned at the time of injury.

On February 18, 2010 the Office noted that appellant returned to full-time, limited-duty work on February 16, 2010.

In a March 8, 2010 computer printout regarding appellant's compensation payment, the Office noted that she returned to full-time light duty on February 16, 2010 but received wage-loss compensation for 26 days afterwards resulting in an overpayment of \$2,813.59. It stated that, for a 28-day periodic rolls cycle, appellant was entitled to receive \$3,505.00 or \$1,129.79 per week.

On March 22, 2010 the Office made a preliminary finding that an overpayment of \$2,813.59 arose because appellant received wage-loss benefits for total disability from February 16 through March 13, 2010, after she returned to full-time light duty on February 16, 2010. It found that she was with fault in creating the overpayment because she was advised in a May 26, 2009 letter that she was not entitled to compensation for total disability when she returned to work. Appellant was informed of her options if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If she wished a waiver of the overpayment, she was advised to submit, within 30 days, financial information by completing an overpayment recovery questionnaire.

On April 9, 2010 appellant requested a decision based on the written evidence. She contended that the overpayment was not her fault and completed an overpayment recovery questionnaire. She did not think she was at fault for the overpayment because the Office was notified of her return to work date. Appellant also stated that the Office was six months late in making her first payment and she was unsure of the Office's payment schedule. She believed the last payment from the Office was a final payment to which she was entitled.

By decision dated April 27, 2010, the Office finalized the finding of overpayment in the amount of \$2,813.59. It found that appellant returned to full-time light duty on February 16, 2010 at her regular salary but received compensation until March 13, 2010. The Office further found that she was at fault in the creation of the overpayment because she was advised in a Form CA-1032 letter dated May 26, 2009 that she was not entitled to compensation for total disability

¹ On September 17, 2007 the Office upgraded appellant's claim to include other work-related injuries.

when she returned to work and earned her wages. Thus, appellant was not entitled to waiver of recovery. She was advised to either forward a check for the entire amount of the overpayment within 30 days or to contact the Office in order to arrange a repayment plan.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.² The Act, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ The Office regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁴ 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 at regular salary but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

On January 4, 2010 the employing establishment offered appellant a full-time job within her medical restrictions as an administrative officer. Appellant returned to work on February 16, 2010 at full salary. However, she continued to receive compensation benefits for wage loss until March 13, 2010 resulting in an overpayment of compensation. The Board will affirm the Office's April 27, 2010 decision on the issue of fact of overpayment.

In calculating the overpayment, the Office determined that appellant received total compensation in the amount of \$3,505.00 every 28 days, or \$125.18 in compensation per day. It multiplied this amount, \$125.18, by the 26 days for the period February 16 to March 13, 2010 to total \$2,813.59. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,813.59 from February 16 to March 13, 2010, when she returned to permanent light duty on February 16, 2010 at full salary. The Board will affirm the April 27, 2010 decision on the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

According to section 8129(a) of the Act, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.500(a).

⁵ *L.S.*, 59 ECAB 350 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010).

made because of an error of fact or law.⁶ The only exception is if the individual is without fault in the creation of the overpayment and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁷ A recipient is at fault in the creation or acceptance of an overpayment if he has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (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.⁸

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect and applied the third criterion listed above. To establish that appellant was at fault, the Office must establish that at the time she accepted the compensation check in question she knew or should have known that the payment was incorrect.

In this case, appellant returned to work on February 16, 2010 at her regular wages but continued to receive wage-loss compensation to March 13, 2010. The Office explained the basis of compensation payments in its August 1, 2007 acceptance letter and in the January 11, 2008 letter. In order to prevent an overpayment, she was asked to return any compensation check she received which covered a time period after she was working. Office regulations provide that each compensation check indicates the period for which payment is being made.⁹ By stating the period for which payment is being made, the Office puts the recipient on notice that a payment was made, the amount of the payment and for which period.¹⁰ Appellant was notified of the period covered by the compensation check and knew or should have known that she could not receive wage-loss compensation for the period after she returned to work on February 16, 2010 at her regular salary.

On appeal, appellant asserts the overpayment was not her fault because the Office knew of her return date to work. She further claimed that because her initial compensation benefits were six months late, she thought that the payment she received represented compensation to which she was entitled. Even if the Office was at fault for issuing compensation checks after appellant returned to full-time, light-duty work on February 16, 2010, this fact does not relieve her from liability for repayment of the debt if she was at fault for accepting the payment she knew to be incorrect.¹¹ Additionally, given the clear indication on each compensation check of the period covered, she knew or should have known that the checks she received after

⁶ 5 U.S.C. § 8129(a).

⁷ *Id.*

⁸ *B.H.*, 60 ECAB __ (Docket No. 09-292, issued September 1, 2009). 20 C.F.R. § 10.433(a).

⁹ 20 C.F.R. § 10.430(a).

¹⁰ *J.R.*, 60 ECAB __ (Docket No. 08-1107, issued June 15, 2009); *Id.* at § 10.430(b).

¹¹ *R.H.*, 61 ECAB __ (Docket No. 09-1981, issued June 11, 2010); *M.J.*, 60 ECAB __ (Docket No. 09-469, issued August 24, 2009).

February 16, 2010 was not a “late” payment for compensation due months earlier. The Board finds, therefore, that appellant accepted compensation she knew or should have known that she was not entitled to receive from February 16 to March 13, 2010 after she returned to work. Since appellant is at fault on the issue of overpayment, recovery cannot be waived.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$2,813.59 which occurred for the period February 16 to March 13, 2010. The Board further finds that she was at fault in the creation of the overpayment and thus not entitled to waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2010 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: March 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees’ Compensation Appeals Board

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

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