

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

TAMMY CRAVEN, Appellant)	
)	
and)	Docket No. 05-249
)	Issued: June 20, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Oklahoma City, OK, Employer)	
)	

Appearances:
Tammy Craven, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 2, 2004 appellant filed a timely appeal from the August 3, 2004 merit decision of the Office of Workers' Compensation Programs, which found her at fault in creating a \$14,282.66 overpayment after she returned to work. Pursuant to 20 C.F.R §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.¹

ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$14,282.66 for the period February 1 to November 28, 2003; and (2) whether the Office properly determined

¹ The Board notes that, subsequent to appellant's November 2, 2004 appeal to the Board, the Office issued a decision dated November 4, 2004 regarding her recurrence claim for the period commencing November 29, 2003. The Office is not prohibited from adjudicating issues which are unrelated to the issues on appeal before the Board. *Douglas E. Billings*, 41 ECAB 880 (1990). The Board, however, cannot consider the November 4, 2004 Office decision as its jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. 5 U.S.C. § 501.2(c); *Algimantas Bumelis*, 48 ECAB 679 (1997); *Jimmy L. Day*, 48 ECAB 654 (1997). As the November 4, 2004 decision was issued after appellant filed her appeal to the Board on November 2, 2004, the Board does not have jurisdiction to review it.

that appellant was at fault in the creation of the overpayment, thus, precluding waiver of recovery.

FACTUAL HISTORY

On October 3, 2002 appellant, then a 34-year-old modified letter carrier, filed an occupational disease claim for injuries to her feet sustained as a result of her federal employment. The Office accepted her claim for aggravation of bilateral tarsal tunnel syndrome and paid appropriate benefits. On January 28, 2003 appellant's treating physician, Dr. Steven B. Smith, a podiatrist, released her to permanent light-duty status with restrictions if working five days a week and without restrictions if working three days a week. The employing establishment indicated that she returned to her permanent light-duty position working three days a week on March 6, 2003.

On December 9, 2003 appellant filed a Form CA-7 claim for compensation for the period February 1 to November 28, 2003. On February 26, 2004 the Office issued her a check in the amount of \$20,830.58 for the period February 1 to November 28, 2003. On an ACPS Daily Roll Payment worksheet of February 26, 2004, the Office noted that, for the period February 1 to November 28, 2003, appellant was scheduled for 40 hours a week but worked limited duty for three days a week. The total hours lost for the stated period was calculated as 664.²

By letter dated March 9, 2004, the Office advised appellant that a check in the amount of \$20,830.58 was directly deposited to her checking account on March 5, 2004, but that the amount should have been \$6,547.92. The Office stated that the difference of \$14,282.66 between the two checks should immediately be sent to the Office to avoid an overpayment. The Office received no response from appellant.

By letter dated April 28, 2004, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$14,282.66, because she was paid compensation for total temporary disability for the period February 1 to November 28, 2003, but she was only entitled to compensation for 664 hours during that period. The Office found that she was with fault in creating the overpayment because she knew or should have known that the amount was incorrect. The Office requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment. The Office further advised her of her right to request a precoupment hearing or a telephone conference.

On June 1, 2004 the Office received a completed Form OWCP-20 dated May 26, 2004. In a separate letter and also on her Form OWCP-20 form, appellant stated that she was never notified of the money being placed in her bank account and, when she called the bank and was informed her of her substantial balance, she was overjoyed and immediately began paying her bills, financial obligations and buying what her family needed and wanted.

² The Office calculated that the 664 hours lost for the period February 1 to November 28, 2003 amounted to \$6,547.92.

By decision dated August 3, 2004, the Office finalized the overpayment determination in the amount of \$14,282.66 and the finding of fault. The Office asked appellant to submit a check in the amount of \$14,282.66 within 30 days or contact the Office regarding installment payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act³ provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.⁴

ANALYSIS -- ISSUE 1

The record reveals that appellant returned to work on March 6, 2003 and worked three days a week in a limited-duty position. She was entitled to compensation for two days a week. During the claimed period of compensation, the Office determined that appellant was only entitled to 664 hours or \$6,547.92 in compensation. However, the Office paid her for total temporary disability during that period or five days a week, which amounted to \$20,830.58. Because appellant received regular full-time wages for working three days a week at the employing establishment during the period February 1 to November 28, 2003, she was not entitled to total temporary disability compensation from the Office for the same period. The record establishes that she received an overpayment of compensation in the amount of \$14,282.66.

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 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; 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 (this provision applies only to the overpaid individual).⁵

³ 5 U.S.C § 8129(a).

⁴ 5 U.S.C § 8116(a).

⁵ 20 C.F.R § 10.433(a).

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 she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that she was at fault in creating the overpayment the Office must show that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.⁷

The record establishes that the March 5, 2004 payment from the Office was deposited directly into appellant's bank account. The Board has distinguished such a situation from one in which a claimant receives a check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation but decides nonetheless to cash or deposit the check.⁸ The Board has found that the mere direct deposit by the Office is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the check before it was deposited to her account. The Office made the payment on March 5, 2004 and four days later, on March 9, 2004, advised her that an incorrect amount had been released to her checking account. Although appellant was on notice of the Office's incorrect payment four days after the check was deposited to her account, appellant had no reason to suspect at the time such check was deposited on March 5, 2004 that the Office issued an incorrect payment. Furthermore, because the funds were deposited directly into her bank account, appellant was not in a position to immediately decline acceptance of the amounts paid by the Office. Thus, given the circumstances of this particular case, the Board finds that appellant was not at fault in either creating or accepting the overpayment.⁹ Accordingly, the Office's August 3, 2004 finding of fault is reversed. The case is remanded to the Office to determine whether appellant is eligible for waiver of recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation of \$14,282.66 during the period February 1 to November 28, 2003. The Board also finds that appellant was without fault in either the creation or acceptance of overpayment.

⁶ 20 C.F.R § 10.433(b).

⁷ *Lorenca Rodriguez*, 51 ECAB 295, 298 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

⁸ *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002); *Leotis Hall*, Docket No. 02-2140 (issued February 5, 2004).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 3, 2004 is affirmed in part and reversed in part and the case is remanded for further action consistent with this decision.

Issued: June 20, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member