

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

DAVID A. EWING, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Boston, MA, Employer**

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**Docket No. 06-332
Issued: April 3, 2006**

Appearances:
David A. Ewing, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Program's decision dated October 20, 2005 which found an overpayment in the amount of \$841.98 and denied waiver of recovery. 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 in the amount of \$841.98; and (2) whether the Office properly denied waiver of recovery.

FACTUAL HISTORY

On April 22, 2001 appellant, then a 39-year-old clerk, injured his left knee while pushing a cart in the performance of duty. He stopped work on the date of injury. The Office accepted appellant's claim for left knee sprain and subsequently accepted a left medial meniscal tear. He received appropriate compensation. Appellant returned to limited duty on March 13, 2002.

On April 19, 2002 appellant filed a recurrence of disability claim and stopped work. The Office accepted the recurrence on July 24, 2002.

In a May 14, 2002 overpayment work sheet, the Office noted that appellant returned to work on March 13, 2002 and stopped work on April 19, 2002; however, he was paid compensation for total disability through April 18, 2002.

By letter dated May 22, 2002, appellant notified the Office that he had received compensation after returning to work and enclosed two checks that he had received. The checks covered the period March 24 to May 18, 2002.

The Office continued to develop appellant's claim and on January 7, 2004 authorized a lateral release of the left knee which was performed on February 13, 2004.¹

On June 14, 2004 the Office made a preliminary finding that an overpayment of \$2,842.39, arose because appellant accepted wage-loss payments for the periods March 13 to April 19, 2002, although he had returned to work effective March 13, 2002. The Office determined that he was with fault in creating the overpayment because he accepted payment for compensation to which he knew or should have reasonably known he was not entitled. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment. If he wished a waiver of the overpayment he was specifically directed to submit financial information by completing an overpayment recovery questionnaire.

By letter dated July 9, 2004, appellant requested a prerecoupment hearing, which was held on March 2, 2005. In a separate letter of the same date, he indicated that he returned the checks and referred to his May 22, 2004 letter. Subsequent to the hearing, appellant provided a March 8, 2005 letter and again provided copies of the returned checks which covered the period March 24 to May 18, 2002.

By letter dated March 23, 2005, the employing establishment indicated that, based upon the information provided by appellant, the overpayment should be reduced to \$700.00 dollars.

By decision dated July 19, 2005, the Office hearing representative set aside the June 14, 2004 preliminary determination and remanded the case as the Office did not consider appellant's return to work or that he returned his checks. The Office hearing representative directed the Office to prepare an updated file memorandum to include the method utilized to calculate the overpayment and an explanation regarding the finding of fault and issue a *de novo* preliminary finding.

By letter dated August 8, 2005, the Office made a preliminary finding that an overpayment of \$841.98, arose because appellant accepted payments covering the period March 13 to April 19, 2002, although he had returned to work effective March 13, 2002. The Office explained that the overpayment was for the period March 13 through 23, 2002, as the

¹ Appellant returned to full duty on June 26, 2004.

checks he returned began with the date of March 24, 2002. The Office found that for March 13 to 23, 2002, appellant was entitled to gross compensation in the amount of \$860.41, less his health benefits in the amount of \$18.43 for a total of \$841.98. The Office determined that he was without fault in creating the overpayment. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment and to submit financial information by completing an overpayment recovery questionnaire within 30 days. No response was received.

In a decision dated October 20, 2005, the Office found that appellant was without fault in creating the \$841.98 overpayment. The Office noted that no response was received from him in response to the August 8, 2005 letter and appellant had not requested a preresoupment hearing or completed an overpayment questionnaire with financial information. The Office determined that he had not submitted any information to support waiver of the overpayment. The Office advised appellant to contact it if he wished to repay the full amount immediately so as to avoid paying interest.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act² defines the limitations on the right to receive compensation benefits. This section provides that, while an employee is receiving compensation under the Act, he or she “may not receive salary, pay or remuneration of any type from the United States,” except in return for service actually performed or for certain payments connected with service in the Armed Forces.³

ANALYSIS -- ISSUE 1

Appellant returned to work effective March 13, 2002. The record reflects that he received payments for compensation through April 19, 2002.

Appellant returned two compensation checks to the Office after he returned to work. However, the check covering the period March 13 to 23, 2002 was not returned. Consequently, appellant received an overpayment of compensation, for this period. The Office calculated that he was entitled to gross compensation in the amount of \$860.41. The Office properly subtracted appellant’s health benefits,⁴ which were equal to \$18.43 and determined an overpayment in the amount of \$841.98. There is no contrary evidence regarding the fact of and the amount of the overpayment. The Board will affirm the Office’s finding on the fact and the amount of the overpayment. Accordingly, appellant received an overpayment as he returned to work and continued to receive compensation.

² 5 U.S.C. § 8116.

³ *Id.* See *Robert B. Hutchins*, 52 ECAB 344 (2001); see also *Neill D. DeWald*, 57 ECAB ____ (Docket No. 06-117, issued February 21, 2006).

⁴ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

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.⁵ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless; (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁷

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁸

ANALYSIS -- ISSUE 2

Although the Office found that appellant was without fault in the matter of the overpayment, he nonetheless bears responsibility for providing financial documentation to support any request for waiver. The Office explained the importance of this financial information and advised him that it would deny waiver if he failed to furnish the information within 30 days.

Appellant did not submit any response to the preliminary overpayment notice. As noted, failure to submit the requested information within 30 days of the request shall result in denial of waiver. Appellant did not submit any relevant financial evidence. There is no evidence to support either that he needs substantially all of his current monthly income to meet living expenses or that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation that he received. Therefore, appellant does not qualify for waiver under the “defeat the purpose of the Act” standard or the “against equity and good conscience” standard. The Board will affirm the Office’s decision on the issue of waiver.

On appeal, appellant requested that the overpayment be waived due to the stress that the Office caused him. However, the Office properly followed its implementing regulations to deny

⁵ 20 C.F.R. § 10.433(a) (1999).

⁶ *Id.*

⁷ *Id.* at § 10.438(a).

⁸ *Id.* at § 10.438(b).

waiver.⁹ The failure to submit the requested information results in the denial of waiver and no further request for wavier shall be considered until the requested information is furnished.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment in the amount of \$841.98 and denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁹ *Id.*