

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

T.G., Appellant)

and)

**PEACE CORPS, OFFICE OF MEDICAL
SERVICES, Washington, DC, Employer**)

**Docket No. 06-1621
Issued: February 7, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On July 4, 2006 appellant filed a timely appeal of an April 27, 2006 decision of the Office of Workers' Compensation Programs with respect to an overpayment of compensation and a finding that she abandoned her request for a prerecoupmment hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that appellant abandoned a hearing scheduled for April 13, 2006; (2) whether the Office properly found that an overpayment of \$6,358.71 was created for the period May 7 through October 2, 2004; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation.

FACTUAL HISTORY

On July 1, 1999 appellant, then a 46-year-old Peace Corps volunteer, filed several occupational disease claims alleging injury as a result of her duties in Ecuador. The Office accepted the following conditions as work related: asthma, bilateral bunions with right

bunionectomy in June 1999 and left bunionectomy in November 2001; ganglion of right foot with ganglionectomy in June 1999; headaches; benign thyroid nodule; and aggravation of cervical degenerative disc disease. Appellant was medically separated from the employing establishment on July 1, 1999.

In a February 16, 2000 letter, the Office advised appellant that she was being placed on the periodic rolls and noted her responsibility to return to work. In the attached EN1049-1196 form, the Office advised appellant: "When you return to work or obtain new employment, notify this Office right away. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation even if you already notified us of your return to work." By signature dated February 19, 2000, appellant certified that she understood the conditions outlined in the EN1049 form, which entitled her to compensation. She further certified her understanding that failure on her part to comply with such conditions could result in termination of benefits and liability for resulting overpayments. Appellant began receiving compensation on the periodic rolls. She submitted completed EN1032-0494 forms for entitlement to compensation. In 2004, appellant received total disability compensation in the amount of \$1,424.00 every 28 days through direct deposit.

On August 2, 2002 the Office authorized vocational rehabilitation services. Appellant participated in and completed a training program for the positions of substance abuse counselor and forensic addition corrections treatment specialist. On May 7, 2004 she obtained part-time employment at Genesis Programs as a drug and alcohol counselor earning \$15.00 per hour. Appellant eventually obtained full-time employment at Genesis Programs.¹

In a letter dated October 20, 2004, the Office advised appellant that her monetary compensation would be reduced effective September 7, 2004 as her weekly actual earnings of \$600.00 exceeded the weekly earnings of her date-of-injury job, \$573.48. The Office advised appellant that an overpayment existed for the period from her return to work through October 2, 2004 as she was paid total disability compensation through October 2, 2004. It stated that appellant would be advised of the fact and amount of the overpayment once the exact dates of her return to part-time and full-time work were confirmed.

In a November 10, 2004 annual Form EN1032-0494, appellant certified that she did not work for any employer during the prior 15 months. She advised the Office that her new address was 2285 Cherry Avenue, San Jose, California. In a letter dated December 7, 2004, the Office advised appellant that both she and her rehabilitation counselor had reported her return to work at Genesis Program. It further advised her of the penalties, as stated on the Form EN1032, for failure to report all work activities and requested additional factual information.²

In an undated letter received by the Office on December 27, 2004, appellant advised that she started work at Genesis Program part time on May 7, 2004 and full time on July 16, 2004. She indicated that she stopped work on October 29, 2004 and began work at Baker Places on

¹ The record reflects that on July 6, 2004 the Office approved \$5,000.00 for rehabilitation maintenance for the period January 1 through December 31, 2004.

² The Office's letter was addressed to appellant at her San Jose, California address.

November 30, 2004. Appellant provided a list of the hours, dates and earnings received at each place of employment. She additionally indicated that she had relocated on November 1, 2004 and her new address was 2185 O'Farrell Street, Apt. #6, San Francisco, CA.

By decision dated January 12, 2005, the Office reduced appellant's entitlement to monetary compensation, effective May 7, 2004, on the grounds that her actual wages as a drug and alcohol counselor for Genesis Programs fairly and reasonably represented her wage-earning capacity.³

In a letter dated January 25, 2005, the Office advised appellant of a preliminary determination that an overpayment of compensation totaling \$6,358.71 was created during the period May 7 through October 2, 2004. The Office explained that appellant received \$7,577.71 for total disability compensation for the period May 16 through October 2, 2004,⁴ which encompassed five payment cycles of \$1,424.00 for a total of \$7,120.00 and \$457.71 for the period May 7 through 15, 2004 (\$1,424.00 divided by 28 days times 9 days). The Office noted that since appellant initially returned to part-time work, she was due \$1,219.00 based on the *Shadrick* formula and deducted that amount from the \$7,577.71 total disability compensation received to find a total overpayment amount of \$6,358.71.⁵ The Office made the preliminary finding that appellant was at fault in the creation of the overpayment as she accepted payments she knew or should have known she was not entitled to.

On January 31, 2005 appellant submitted an overpayment recovery questionnaire and requested a prerecoumpment hearing before the Office's Branch of Hearings and Review, which the Office received February 7, 2005. In a letter dated March 8, 2006, the Office advised appellant that the hearing was scheduled for April 13, 2006 at 8:45 a.m. in San Francisco, California.⁶

By decision dated April 27, 2006, the Office found that appellant received written notification of the hearing 30 days in advance, that she did not appear for the scheduled April 13, 2006 hearing and there was no record that appellant contacted the Office either prior to or subsequent to the scheduled hearing to explain her failure to appear. The Office determined that appellant had abandoned her request for a prerecoumpment hearing. It finalized its determination

³ The decision was addressed to appellant's new San Francisco address of record.

⁴ This was comprised of five compensation checks issued on May 15, June 12, July 10, August 7, September 4 and October 2, 2004 in the amount of \$1,424.00.

⁵ The *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) is used to calculate a claimant's wage-earning capacity. The calculation involves obtaining figures for adjusted weekly pay rate (per 5 U.S.C. § 8101(4)); current rate of pay for the job held when injured and current actual earnings. The wage-earning capacity percentage is obtained by dividing current actual earnings by the current rate of pay for the job held when injured. The wage-earning capacity amount is calculated by multiplying the current rate of pay for the job held when injured times the wage-earning capacity percentage. The loss of wage-earning capacity figure is then obtained by subtracting the wage-earning capacity amount from the current rate of pay for the job held when injured. Finally, the compensation rate is obtained by multiplying the loss of wage-earning capacity figure times either 2/3 (no dependents) or 3/4 (one or more dependents) per 5 U.S.C. §§ 8105, 8110.

⁶ The notice was sent to appellant's San Francisco, California address.

of a \$6,358.71 overpayment for the period May 7 through October 2, 2004 and denied waiver on the basis that appellant was at fault in creating the overpayment.⁷

LEGAL PRECEDENT -- ISSUE 1

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

"e. Abandonment of Hearing Requests.

(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district office]. In cases involving prerecoumment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO."⁸

ANALYSIS -- ISSUE 1

In this case, appellant made a timely request for a prerecoumment hearing. In finding that appellant abandoned her request for a prerecoumment hearing, the Office noted that appellant was notified that the prerecoumment hearing was to be held on April 13, 2006 in San Francisco, California, that she received a written notification of the hearing 30 days in advance, that she failed to appear for the scheduled April 13, 2006 hearing and that the record contained no evidence that appellant contacted at the Office to explain her failure to attend hearing. On appeal, appellant contends that she did not receive prior notification that a hearing had been scheduled for April 13, 2006 as her address had changed. The record shows that the Office mailed appropriate notice to her at her last known address in San Francisco, California. It is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁹ The record also establishes that appellant did not request postponement of the hearing date, failed to appear at the scheduled

⁷ The Office referenced its letter of February 16, 2000 regarding a return to work and entitlement to compensation and found that appellant should have been aware that once she returned to part-time work, she would not be entitled to compensation for total disability.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). See also *Claudia J. Whitten*, 52 ECAB 483 (2001).

⁹ *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

hearing and failed to provide any notification of such failure within 10 days of the scheduled date of the hearing. As this meets the criteria for abandonment specified in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that the Office properly found that appellant abandoned her request for a prerecoupment hearing before an Office hearing representative.¹⁰

LEGAL PRECEDENT -- ISSUE 2

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.¹¹ When a claimant receives a duplicative compensation payment for a period that she has already received compensation for wage loss, an overpayment of compensation is created.¹²

ANALYSIS -- ISSUE 2

Appellant started working for Genesis Program part time on May 7, 2004 and full time on July 16, 2004. She received compensation for temporary total disability from April 18 through October 2, 2004 in the amount of \$7,577.71, which included \$1,424.00 for five payment cycles from May 16 through October 2, 2004 and \$457.71 for May 7 through 15, 2004. Appellant is not entitled to receive compensation for temporary total disability during a period that she worked and received wages.¹³ The record establishes that because appellant worked part time when she first returned to work, she was due some compensation based on her actual earnings. In appellant's undated letter received by the Office on December 27, 2004, appellant advised that she earned \$10,777.50 from May 7 through October 1, 2004, approximately 21 weeks, which amounted to \$513.21 a week. Using the *Shadrick* formula, the amount due is \$1,219.00. Accordingly, the amount appellant received \$7,577.71 minus the \$1,219.00 amount due represents a \$6,358.71 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and

¹⁰ See *Claudia J. Whitten*, 52 ECAB 483, 485 (2001).

¹¹ 5 U.S.C. § 8116(a).

¹² See *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

¹³ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.¹⁴ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁵

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”¹⁶

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“(b) 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.”¹⁷

ANALYSIS -- ISSUE 3

The Office determined that appellant was at fault because she accepted payments she knew or should have known were incorrect. The record reflects that on February 16, 2000, the Office advised appellant of her responsibility to return to work and that she could not keep any compensation paid for any period that she worked and earned wages, even if she had notified the Office of her return to work. Appellant agreed to the Office’s conditions and subsequently notified the Office of her return to work. However, after she returned to work on May 7, 2004, appellant accepted a compensation payment for 28 days of total disability on May 15, 2004 as well as subsequent payments for temporary total disability through October 2, 2004 in set amounts of \$1,424.00.

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit, which involve a series of payments over several months, with clear knowledge that the payments are incorrect.¹⁸ However, the Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁶ See *Kenneth E. Rush*, *supra* note 13.

¹⁷ 20 C.F.R. § 10.433(b).

¹⁸ See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002).

deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.

In the instant case, the first direct deposit payment on May 15, 2004 for the period April 18 to May 15, 2004 after appellant's return to work May 7, 2004 occurred without appellant's knowledge that the direct deposit had been made. However, after her receipt of the May 15, 2004 deposit, for which fault cannot be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled. By the time appellant accepted the June 12, 2004 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for appellant to become aware of the fact that the June 12, 2004 check and all subsequent checks issued in the amount \$1,424.00 contained an overpayment. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have known she was not entitled.¹⁹ Appellant was informed by the Office in its February 16, 2000 letter that she was required to notify the Office as soon as she returned to work and to return any payment of compensation to the Office even if she had already advised the Office that she was already working in order to avoid an overpayment of compensation. After her receipt of the first direct deposit, for which fault may not be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled.²⁰

On appeal, appellant's explanation appears to be that she believed the monies were from her \$5,000.00 approved maintenance payment. The Board finds no probative evidence to support that appellant could reasonably believe the total disability compensation payments were made pursuant to her maintenance check. The record contains no evidence supporting that appellant was owed monies for any other services beyond those for which the Office paid.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the direct deposits issued by the Office which covered the period commencing May 16, 2004 were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation may not be waived for this time period. Thus, the Office decision dated April 27, 2006 is affirmed in this respect. The evidence of record does not establish that

¹⁹ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

²⁰ As noted above, the Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *supra* note 18. The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment. In the instant case, by the time appellant accepted the June 12, 2004 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for appellant to become aware of the fact that the checks contained an overpayment.

appellant was at fault for any of the overpayments made prior to May 16, 2004, the Office's finding of fault is, therefore, modified in this regard.

CONCLUSION

The Board finds that the Office properly determined that appellant abandoned her request for a prerecoupment hearing and that an overpayment of \$6,358.71 was created. Also the Board finds that appellant is at fault for the overpayment for the period commencing May 16, 2004, but is not at fault for the prior period of overpayment which occurred during the period April 18 through May 15, 2004. The case is remanded to the Office for determination of waiver for the period May 7 to 15, 2004.²¹

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part, modified in part and remanded in part for further adjudication in compliance with this decision of the Board.

Issued: February 7, 2007
Washington, DC

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

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

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

²¹ The Board notes that it does not have jurisdiction to review the Office's recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348 (2004).