

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

R.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newark, OH, Employer**

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**Docket No. 07-472
Issued: January 3, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 11, 2006 appellant filed a timely appeal of a November 8, 2006 merit decision of a hearing representative of the Office of Workers' Compensation Programs finalizing an overpayment determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$1,751.44 overpayment of compensation for the period May 18 to June 11, 2005; (2) whether the Office properly determined that appellant was at fault in creating the overpayment; and (3) whether the Office properly directed recovery of the overpayment.

FACTUAL HISTORY

On July 21, 1999 appellant, then a 31-year-old letter carrier, filed an occupational disease claim alleging that the severe pain in her feet was caused by walking at work. The Office accepted the claim for temporary aggravation of bilateral plantar fasciitis and subsequent

conditions of bilateral tarsal tunnel syndrome. Appellant underwent a left distal tarsal tunnel release with partial plantar fasciotomy on October 31, 2000 and a right distal tarsal tunnel release with partial plantar fasciotomy on June 16, 2001. She returned to limited duty following each surgery and the Office paid appropriate compensation benefits. Following a recurrence of disability on April 14, 2003, appellant was placed in a vocational rehabilitation program as the employing establishment was unable to accommodate her restrictions. On March 9, 2005 she began a brief trial work program at the United Way. Appellant's treating physician subsequently found her totally disabled. Her rehabilitation file was closed on March 31, 2005.

In a letter dated May 12, 2005, the Office noted that appellant was receiving compensation payable each four weeks, in the amount of \$589.55 weekly or \$2,358.20 monthly. It was informed that she was also receiving or may be entitled to receive benefits provided by the Office of Personnel Management (OPM) under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS). It advised appellant that annuity benefits paid by OPM (including any lump-sum payment made as part of an alternative annuity under the CSRS) and benefits for wage loss paid by the Office were not payable for the same period of time and employees entitled to receive such benefits must elect which benefit to receive. Copies of the election Form CA-1105 were enclosed. On May 18, 2005 appellant elected OPM retirement annuity benefits effective May 18, 2005. On June 11, 2005 the Office directly deposited the amount of \$2,117.14 for wage loss for the period May 18 to June 11, 2005 into appellant's account. In a letter dated June 23, 2005, the Office notified OPM of appellant's election to receive a retirement annuity effective May 18, 2005.

By decision dated July 25, 2005, the Office determined that appellant was no longer temporarily totally disabled. It noted that appellant was no longer entitled to compensation benefits as she had elected OPM retirement benefits in lieu of Federal Employees' Compensation Act benefits.

On September 9, 2005 the Office made a preliminary determination that appellant had been overpaid benefits in the amount of \$1,751.44 during the period May 18 to June 11, 2005. She elected to receive OPM benefits effective May 18, 2005, but the Office did not stop compensation benefits until June 11, 2005. The Office found that appellant was at fault in the overpayment matter as she had accepted payment that she knew or should have known to be incorrect. The Office advised that, if she disagreed with the fact or amount of overpayment, she had a right to submit any evidence or arguments and the right to request a precoupment hearing within 30 days.

Appellant requested a waiver of overpayment and a hearing. She also submitted an overpayment recovery questionnaire dated September 15, 2005. Appellant indicated that her monthly income was \$1,294.00. She listed her expenses as: rent \$300.00; food \$400.00; clothing \$100.00; utilities \$50.00; other expenses \$271.00; and debts being paid by monthly installments as \$69.00 for Honda and \$100.00 for Bank Court, for a total of \$1,290.00. No documentation was provided for the expenses. Appellant also noted that she had additional funds of \$103.00. She explained that her claims examiner told her last payment would be June 11, 2005 after which OPM would start paying her. Appellant indicated, however, that she did not receive a full check from OPM until August 1, 2005. She acknowledged that she had received payment from the Office for the period May 18 to June 11, 2005 and stated that she

believed the payment was a result of OPM not having processed her claim yet. Appellant further indicated that her claims examiner told her that the Office and OPM would straighten out the mix-up so there would be no overpayment.

A prerecoumpment hearing was held on August 24, 2006. At the hearing, appellant acknowledged that she was aware that the payment for the period May 18 to June 11, 2005 was from the Office as she received a benefit statement from the Office following this payment on the first of July. She also received two partial payments from OPM in July for the month June. Appellant also provided a statement concerning her income. She indicated that her income totaled \$1,409.40 per month plus occasional loans from her husband's mother. Appellant also discussed expenses totaling \$1,541.50 to \$1,801.50 depending on the season. She indicated that she had other debts, such as car loans and personal loans, which had been accrued to pay monthly bills and were not included in the monthly expenses. Appellant's attorney requested waiver based on financial hardship due to her limited resources. The Office hearing representative held the record open for 30 days to allow for the submission of appellant's OPM retirement statement as well as additional information pertaining to her income and expenses. Appellant submitted a lease agreement showing her monthly rent was \$534.00 but would be \$545.00 in November 2006. No other documentation verifying expenses or income was provided.

In a decision dated November 8, 2006, the Office hearing representative found that appellant received an overpayment in the amount of \$1,751.44 for which she was at fault in the acceptance of the overpayment. The Office hearing representative found that appellant should have known that she was not entitled to the compensation payment as she had elected to stop receiving compensation. The hearing representative noted that since appellant did not provide substantiating evidence to clarify her income and expenses, a repayment plan that would not be a financial hardship for the claimant could not be determined. Therefore, the Office hearing representative found that the overpayment was due and payable in full.¹

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act states that while an employee is receiving workers' compensation, he or she "may not receive salary, pay or remuneration of any type from the United States," except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under the Act.² The implementing regulations provide that a "beneficiary may not receive

¹ The record additionally reflects that on May 2, 2006, the Office granted appellant a schedule award for seven percent permanent impairment to both her left and right feet. Appellant disagreed with this decision and, by decision dated June 23, 2006, an Office hearing representative remanded the case to the Office for further medical development. The record also reflects that in a June 15, 2006 decision, the Office denied that appellant's conditions of reflex sympathetic dystrophy and periodontal disease were a consequence of the accepted work-related conditions. Appellant disagreed with this decision and requested an oral hearing, which was held January 9, 2007. As these matters are in an interlocutory posture, they are not before the Board on the present appeal. See 20 C.F.R. § 501.2(c).

² 5 U.S.C. § 8116(a).

wage-loss compensation concurrently with a federal retirement or survivor annuity.”³ The beneficiary must elect the benefit that he or she wishes to receive.⁴

ANALYSIS -- ISSUE 1

On May 18, 2005 appellant elected to receive an OPM retirement disability annuity in lieu of wage-loss compensation she had been receiving under the Act. In a letter dated June 23, 2005, the Office notified OPM of appellant’s election to receive a retirement annuity effective May 18, 2005.

The record reflects that, on June 11, 2005, appellant received wage-loss compensation from the Office in the amount of \$1,751.44 for the period May 18 to June 11, 2005. Because she elected to receive an OPM retirement disability annuity effective May 18, 2005, any wage-loss compensation she received from the Office for a period beginning on or after May 18, 2005 constitutes an overpayment of benefits. Appellant is not eligible to receive wage-loss compensation and FERS benefits from OPM for the same time period.⁵ Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$1,751.44 for the period May 18 to June 11, 2005.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has 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.⁶ Section 10.433 of the implementing regulations specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ The regulation further provides that 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.⁸ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient on the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she 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; (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 was incorrect.⁹

³ 20 C.F.R. § 10.421(a) (1999).

⁴ *Id.*

⁵ 20 C.F.R. § 10.421(a); *see Franklin L. Bryan*, 56 ECAB ___ (Docket No. 04-2179, February 4, 2005).

⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.*

⁹ 20 C.F.R. § 10.433(a)(3).

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment under the third standard, noted above, because she should have known that she accepted a payment which she knew or should have known was incorrect. It determined that, because appellant elected OPM annuity benefits effective May 18, 2005, she knew or should have known that she could not receive workers' compensation benefits for any period after May 18, 2005. The Office's May 12, 2005 letter informing appellant of annuity benefits paid by OPM and benefits for wage loss paid by the Office were not payable for the same period of time clearly put her on notice of the Act's prohibition against receiving dual benefits. However, the issue is not whether appellant was familiar with the Act's prohibition against receiving dual benefits, but whether she accepted a payment which she knew or should have known to be incorrect.¹¹

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The Board has found the claimant to be at fault in cases where he or she is receiving compensation payments through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹² It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by 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.¹³

In this case, appellant received compensation in the amount of \$2,117.14 by direct deposit for wage loss for the period May 15 to June 11, 2005, of which \$1,751.44 represented the overpayment for the period May 18 to June 11, 2005. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.¹⁴ Appellant had no reason to suspect at the time the \$2,117.14 payment was deposited

¹⁰ *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

¹¹ 20 C.F.R. § 10.433(a).

¹² *See Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

¹³ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁴ *See Karen K. Dixon*, *supra* note 12.

into her checking account that the Office had issued an incorrect payment in the amount of \$1,751.44 for the period May 18 through June 11, 2005, given that this was the first incorrect payment made by the Office.¹⁵ Because the funds were deposited directly into her bank account, appellant was not in a position to immediately decline acceptance of the amount paid by the Office. Appellant did not receive any benefit statement until July 2005. The Board finds that she was not at fault in creating the overpayment of \$1,751.44 for the period May 18 to June 11, 2005.¹⁶ Accordingly, the Office's finding that appellant was at fault in creating the overpayment will be set aside.¹⁷ The case will be remanded for a determination of whether appellant is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,751.44. The Board finds that appellant was without fault in accepting or creating the overpayment. The case is remanded to the Office for a determination of whether appellant is entitled to waiver of recovery of the overpayment.

¹⁵ See *Tammy Craven*, *supra* note 10.

¹⁶ *Id.*

¹⁷ In light of this finding, the issue regarding recovery is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated November 8, 2006 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision.

Issued: January 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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