

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

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P.D., Appellant )

and )

DEPARTMENT OF THE AIR FORCE, )  
WARNER ROBINS AIR LOGISTICS CENTER, )  
ROBINS AIR FORCE BASE, GA, Employer )  
\_\_\_\_\_ )

**Docket No. 07-1457**  
**Issued: January 9, 2008**

*Appearances:*  
*Appellant, pro se*  
*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 March 31, 2007 appellant filed a timely appeal from the March 9, 2007 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the overpayment issue in this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$11,572.00; (2) whether the Office properly found that she was at fault in creation of the overpayment; and (3) whether the Office properly determined that the overpayment should be repaid at the rate of \$321.44 every month.

**FACTUAL HISTORY**

On May 28, 2003 appellant, then an air conditioning sheet metal mechanic, filed an occupational disease claim alleging that she injured her shoulder and arm while drilling glass and changing a corner fitting. By letter dated June 20, 2003, the Office accepted appellant's claim

for right shoulder rotator cuff syndrome. Appropriate compensation and medical benefits were paid.

By letter dated July 11, 2005, the employing establishment notified the Office that appellant had returned to work eight hours a day effective July 11, 2005.

On July 12, 2006 the Office made a preliminary determination that appellant was overpaid in the amount of \$11,572.00 because she received compensation for temporary total disability following her return to work full time on July 11, 2005. The Office noted that appellant was overpaid \$9,398.01 for the period July 10 through October 29, 2005 and \$2,173.99 for the period October 30 through November 26, 2005 for a total of \$11,572.00. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment.

On July 27, 2006 appellant completed the overpayment recovery questionnaire. She completed the financial portions of the form. Appellant contended that she did not believe that the overpayment was her fault as she did not know she was overpaid until she received the notice. She also noted that she received payment by direct deposit and that, when she became aware of the overpayment, she had already used the money to pay her bills.

By decision dated May 9, 2007, the Office finalized its determination that appellant was overpaid in the amount of \$11,572.00 and that she was at fault in the creation of the overpayment and therefore not entitled to waiver. The Office ordered appellant to pay back the overpayment by making monthly payments in the amount of \$321.44.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of the Federal Employees' Compensation Act 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.”<sup>1</sup>

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>2</sup> 20 C.F.R. § 10.500 provides that “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

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<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> 5 U.S.C. § 8116(a).

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that an overpayment was created and properly calculated the amount of the overpayment. The overpayment was paid for the period July 11 to October 29, 2005 in the amount of \$9,398.01. The Office properly noted that for this period appellant received checks in the net amount of \$9,482.68 (four checks at \$2,370.67 each). The Office determined that during that time period appellant should have only been paid for July 10, 2005 for \$84.67. Subtracting what appellant should have been paid for this period, \$84.67, from what appellant was paid, \$9,482.68, equals an overpayment of \$9,398.01 for the period July 11 through October, 29, 2005. With regard to the second period, October 30 to November 26, 2005, the Office noted that appellant was entitled to 12 hours of intermittent compensation for a total of \$196.68. However, appellant received a check for this period in the net amount of \$2,370.67. The difference between these two amounts is the amount of the overpayment for this period, \$2,173.99. Adding the overpayment for the two periods together, the Office properly determined that appellant received an overpayment of \$11,572.00.

### **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.<sup>3</sup> Section 10.433 of the implementing regulations provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepted or creating the overpayment.<sup>4</sup> The regulations further provide 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.<sup>5</sup> Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>6</sup>

Appellant is at fault in the creation of an overpayment that occurs when he or she receives compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

In finding appellant at fault in the creation of the \$11,572.00 overpayment, the Office stated that she should have known the payments she received for the period July 11 to November 26, 2005 were not proper because she had returned to work. Even though the Office

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<sup>3</sup> 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

<sup>4</sup> 20 C.F.R. § 10.433(a).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at § 10.433(b).

<sup>7</sup> *See Karen K. Dixon*, 56 ECAB \_\_\_\_ (Docket No. 03-2265, issued November 9, 2004).

may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments she should have known to be incorrect.<sup>8</sup> In this case, appellant returned to work on July 11, 2005. She had no reasonable basis to believe that she was entitled to continuing compensation payments from the Office at the same time that she was working full time. When the payments were directly deposited into her account, she should have known they were incorrect.<sup>9</sup> Appellant contends that she did not know of the overpayment until she received notice of the overpayment. However, this is contradicted by the fact that appellant received four separate checks over a period of more than three months that resulted in an overpayment of \$11,572.00. Certainly she should have noticed this amount in her account at some point during the period she received these checks.

The Board finds that, under section 10.433(3), appellant accepted payments she knew or should have known to be incorrect. Therefore, she is not without fault under 5 U.S.C. § 8129(b) in creating the overpayment and not entitled to waiver.

### **LEGAL PRECEDENT -- ISSUE 3**

With respect to the recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>10</sup> However, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains with the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.<sup>11</sup>

### **ANALYSIS -- ISSUE 3**

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>12</sup> Appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter. Therefore, the Board lacks jurisdiction to review recovery of the overpayment.

### **CONCLUSION**

The Office properly determined that appellant received an overpayment in the amount of \$11,572.00 and properly denied waiver of the overpayment.

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<sup>8</sup> *William E. McCarty*, 54 ECAB 525 (2003).

<sup>9</sup> *Karen K. Dixon*, *supra* note 7.

<sup>10</sup> 5 U.S.C. § 8129(a).

<sup>11</sup> *See Terry A. Keister*, 56 ECAB \_\_\_ (Docket No. 04-1136; issued May 23, 2005); *see also Albert Pineiro*, 51 ECAB 310 (2000).

<sup>12</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 9, 2007 is affirmed.

Issued: January 9, 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