

overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$6,277.85; and (2) whether it properly found that she was at fault in the creation of the overpayment, thereby, precluding waiver of the overpayment.

FACTUAL HISTORY

On January 8, 2002 appellant, then a 47-year-old USDA grader, sustained injury when she slipped and fell during the course of her federal employment thereby sustaining an injury to her left knee, right hand, right shoulder and left foot. The Office accepted appellant's claim for avulsion fracture tarsal navicular of left foot with irritation of the tibial nerve and left tarsal tunnel syndrome. Appellant began receiving compensation every 28 days in November 2004. In a letter dated December 7, 2004, the Office outlined her responsibilities upon receiving compensation. These included notifying the Office when she returned to work and returning payments to it if she had worked for any portion of the period covered by it.

On June 29, 2005 the Office sent appellant a form letter requesting that she answer questions regarding her employment, dependents, other benefits or payments. She responded on July 11, 2005, indicating that she began part-time employment with Wal-Mart as a cashier on June 28, 2005, that she was to receive \$7.70 per hour but that she had not yet received her first paycheck.

By letter dated March 15, 2006, the Office advised appellant that she had been reemployed as a cashier for Wal-Mart effective June 28, 2005, 34 hours a week at a pay rate of \$7.70 per hour. It noted that that would reduce her compensation based upon her actual earnings. Pay slips were submitted.² On December 3, 2005 Wal-Mart and appellant indicated that she would work 16 hours a week. In response to the Office's March 15, 2006 letter,

¹ By decision May 15, 2006, the Office found that appellant was reemployed as an accounting office clerk for Wal-Mart effective June 26, 2006, with wages of \$225.00 per week and that her compensation was being reduced to reflect her actual earnings. It noted that the weekly pay rate when her disability recurred was \$677.92 (effective September 11, 2006); that the current pay rate for appellant's job and step when injured was \$569.31 (effective March 15, 2006); that she was capable of earning \$171.78 per week; that the percentage of new wage-earning capacity was 30 percent, (\$171.78 divided by \$569.31); that appellant's adjusted wage-earning capacity amount per week was \$203.38, (30 percent multiplied by \$677.92; and that this yielded a compensation rate of \$355.91, (\$474.54 multiplied by 75 percent). The Office determined that appellant's new compensation rate every four weeks would be \$1,524.00. Appellant did not appeal this decision.

In addition, in a decision dated May 24, 2007, the Office found that appellant received an overpayment of compensation benefits in the amount of \$2,066.85 for the period June 26, 2006 to March 17, 2007. However, the Office found that, as appellant's monthly expenses exceeded her monthly income, it would defeat the purpose of the Act and be against equity and good conscience to collect the overpayment and that waiver of the recovery was granted. Appellant did not appeal this decision.

² In the December 29, 2005 paycheck, Wal-Mart noted that appellant's earnings for the year were \$5,164.32.

appellant acknowledged that she was working for Wal-Mart. By letter received on April 17, 2006, Wal-Mart listed appellant's earnings from December 9, 2005 through March 31, 2006.³

On August 18, 2006 the Office made a preliminary finding that appellant had been overpaid in the amount of \$6,277.85, as she returned to work as a part-time cashier at Wal-Mart on June 25, 2005 but continued to receive wage-loss compensation for total disability through March 18, 2006. It made a preliminary finding that appellant was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to compensation for temporary total disability while working part time. The overpayment was calculated by taking the amount that appellant received for the period June 25, 2005 through March 18, 2006, \$16,422.43⁴ and subtracting the amount that she should have been paid, \$10,144.58,⁵ to total an overpayment of \$6,277.85.

On September 13, 2006 appellant requested a preresoupment hearing. She submitted financial information in support of her request for a waiver.

By decision dated March 1, 2007, the Office hearing representative found that appellant received an overpayment from June 25, 2005 through March 28, 2006. The Office hearing representative found that the overpayment occurred because appellant continued to receive compensation for total disability after she began working at Wal-Mart. The hearing representative noted that appellant did not return the incorrect checks and, therefore, she was at fault in the creation of the overpayment as she accepted a payment she knew or should have known to be incorrect. The Office hearing representative found that, as appellant's monthly living expenses exceeded her income, appellant was not capable of paying the overpayment. However, as the overpayment may not be waived, it found that it was due and payable upon return of the case file to the Office.

³ The paychecks were in the following amounts: January 6, 2006: \$269.51; January 20, 2006: \$199.90; February 3, 2006: \$276.84; February 17, 2006: \$138.13; March 3, 2006: \$276.50; March 17, 2006: \$261.30; and March 31, 2006: \$284.63.

⁴ Appellant had been paid \$16,422.43 based on a gross of \$20,101.18 minus \$3,417.85 for health benefits minus \$108.71 for basic life minus \$152.19 for optional life insurance.

⁵ The Office determined that appellant earned a total of \$6,586.50 for the period June 25, 2005 through March 18, 2006 for her employment at Wal-Mart which amounted to a weekly average of \$173.33. It then took this amount, \$177.33 and divided it by appellant's current weekly pay rate for her job and step when injured, \$550.38, to determined this figure to be 31 percent. The Office then took 31 percent of appellant's pay rate when compensable disability recurred on September 11, 2003, \$677.92 and determined that this amount was \$210.16. It then determined that appellant had a wage-earning capacity loss of \$467.76, by subtracting \$210.16 from \$677.92. By multiplying \$467.76 by her compensation pay rate of $\frac{3}{4}$ for a claimant with dependents, the Office determined that appellant was entitled to a weekly compensation amount of \$375.82. It then determined that she should have been paid \$13,869.10 gross for the period June 25, 2005 through March 18, 2006. After subtracting the deductions mentioned earlier, (\$3,417.85 for health, \$108.71 for basic life and \$1,979.71 for optional life the Office determined that appellant should have been paid \$10,144.98.

LEGAL PRECEDENT

Section 8129(a) of the Federal Employees' Compensation Act⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Office properly found that appellant was overpaid in the amount of \$6,586.50. Appellant began employment at Wal-Mart on June 26, 2005 as a cashier; however, she continued to receive compensation for total disability. Pursuant to her December 29, 2005 paycheck, Wal-Mart listed earnings in 2005 of \$5,164.32. During the period January 1 through March 18, 2006, appellant received gross earnings of \$1,422.18.⁸ Her earnings from June 26, 2005 to March 18, 2006 were \$6,586.50. This total was then divided by the amount of weeks worked to determine that appellant had average weekly wages of \$173.33. During this time period she received compensation in the amount of \$16,422.43. However, appellant should have received compensation in the amount of \$10,144.58. The Board finds that an overpayment was created in this amount as appellant received wage-loss compensation for total disability during the period she had actual earnings from her employment with Wal-Mart.

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.⁹ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to who it was made was not at fault in accepting or creating the overpayment.¹⁰ 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.¹¹ Under the regulations, a recipient

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8116(a).

⁸ This reflects appellant's gross earnings for 2006 as reported by Wal-Mart. Two hundred sixty-nine dollars and fifty-one cents plus \$199.90 plus \$276.84 plus \$138.13 plus \$276.50 plus \$261.30 equals \$1,422.18.

⁹ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁰ 20 C.F.R. § 10.433.

¹¹ *Id.*

will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.¹² Whether or not the Office determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹³

ANALYSIS

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that at the time appellant received the compensation in question, she knew or should have known that the payments were incorrect.¹⁴

Appellant did properly notify the Office of her return to work on June 25, 2005. She accepted compensation benefits for total disability during a period that she had actual earnings. The evidence established that she knew or should have known this to be incorrect. In a December 7, 2005 letter, the Office clearly advised that she was to return any checks if she returned to work. Appellant did not do so. For this reason, she is at fault in creating the overpayment. Waiver of an overpayment is not permitted unless a claimant is “without fault” in creating the overpayment.¹⁵ Accordingly, the Office properly denied waiver of the overpayment as appellant was not without fault in its creation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$6,277.85 and that the Office properly found that appellant was not without fault in the creation of the overpayment, thereby, precluding waiver of the overpayment.

¹² *Id.* at § 10.433(a)(3).

¹³ *Id.* at § 10.433(b).

¹⁴ *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁵ *Michael L. Leffingwell*, 53 ECAB 309, 314 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 1, 2007 is affirmed.

Issued: January 18, 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