

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

M.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Roanoke, VA, Employer**

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**Docket No. 08-489
Issued: July 22, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 10, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' November 19, 2007 decision, which found an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this appeal.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of compensation was created in the amount of \$1,536.39; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

Appellant has an accepted occupational disease claim for left shoulder impingement and other affections of the shoulder. She filed claims for compensation for consecutive time periods from August 17 to December 29, 2006. Appellant was paid for the claimed periods.

On March 23, 2007 the Office issued a preliminary determination finding that appellant was overpaid benefits as two checks, dated September 22 and October 6, 2006, were issued for

\$1,536.39 for the period August 7 to September 1, 2006. It found that appellant was without fault in creating the overpayment and informed her that she could submit evidence if she disagreed with the fact or amount of the overpayment.

On April 20, 2007 appellant requested a prerecoupment hearing on the issues of fault and possible waiver.

In an April 25, 2007 decision, the Office informed appellant that the overpayment would not be waived.

On July 10, 2007 the Office informed appellant that a telephone hearing was scheduled for August 10, 2007.

In an August 14, 2007 letter, the Office explained that appellant had missed the hearing therefore the case would be reviewed on the record. It noted that the issue on appeal was the no fault overpayment decision and that there was no reason to change the previous finding of no fault.

In a September 12, 2007 letter, appellant stated that she did not dispute the fact or amount of the overpayment and explained that there was some confusion about the number of checks being sent to her for the claimed time periods. She submitted an overpayment recovery questionnaire and financial documents.

In a November 19, 2007 decision, the Office found that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act¹ provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.

The Act further provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.² Section 8129(a) of the Act provides that, when an overpayment has been made to an employee because of an error of fact or law, adjustment shall be made by decreasing later payments to which he is entitled.³

ANALYSIS -- ISSUE 1

The record establishes that an overpayment was created when appellant received and deposited two checks for \$1,536.39 for the same August 7 to September 1, 2006 time period. Therefore, she received two wage-loss compensation payments for the same amount covering the

¹ 5 U.S.C. §§ 8101-8193, 8102(a).

² 5 U.S.C. § 8116(a). *See Danny E. Haley*, 56 ECAB 393 (2005).

³ 5 U.S.C. § 8129(a); *see C.M. & J.M., (J.M.)*, 58 ECAB ____ (Docket No. 06-1597 issued May 8, 2007).

same time period. Appellant does not dispute the fact or amount of overpayment. The Board will affirm the Office's November 19, 2007 decision on the issue of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act⁴ 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.⁵

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, the Office will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁶ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁷ Additionally, the Office is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.⁸ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable and the right to request a waiver of recovery of the overpayment.⁹ The recipient of the alleged overpayment may present evidence in response to the Office's preliminary notice either in writing or at a precoupment hearing.¹⁰ The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.¹¹ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹²

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part that a claimant is with fault in the creation of an overpayment when he or she: (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

⁴ 5 U.S.C. §§ 8101-8193

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

⁶ 20 C.F.R. § 10.431(a).

⁷ *Id.* at § 10.431(b).

⁸ *Id.* at § 10.431(c).

⁹ *Id.* at § 10.431(d).

¹⁰ *Id.* at § 10.432

¹¹ *Id.*

¹² *Id.*

knew should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.¹³

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for a decision on the issue of whether appellant was at fault in the creation of the overpayment.

The Office failed to properly follow its procedures in issuing the November 19, 2007 decision. Its regulations provide that, before seeking to recover an overpayment or adjust the benefits, it will advise the individual in writing that the overpayment exists and the amount of the overpayment.¹⁴ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.¹⁵ The Office must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable and the right to request a waiver of recovery of the overpayment.¹⁶ Its procedure manual further provides that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.¹⁷

In the March 23, 2007 preliminary determination, the Office informed appellant that she was without fault in the creation of the overpayment. Appellant requested a precoupment hearing and submitted an overpayment recovery questionnaire and financial documents. She did not attend the hearing and the case was subsequently reviewed on the record. However, the November 19, 2007 decision changed the Office's determination to a finding of fault. It finalized the overpayment determination without providing appellant an opportunity to respond.

Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.¹⁸ In *Califano v. Yamasaki*,¹⁹ the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act. The Director of the Office has determined that the

¹³ *Id.* at § 10.433(a)

¹⁴ *Id.* at § 10.431(a).

¹⁵ *Id.* at § 10.431(b).

¹⁶ *Id.* at § 10.431(d).

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

¹⁸ See generally FECA Circular No. 82-48, "Overpayments and Waiver" (issued December 1, 1982).

¹⁹ 442 U.S.A. 682 (1979).

holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Federal Employees' Compensation Act.²⁰

After the Office informed appellant that it had made a preliminary determination that she was without fault, it erred when it subsequently changed the preliminary determination to a finding of fault without providing her the opportunity to respond. Appellant was not given the opportunity to request a hearing on the issue of fault to submit written evidence on the issue of fault.²¹ Her earlier request for a written review of the record was based on a preliminary determination that she was without fault. Therefore, the evidence appellant had the opportunity to submit was not directed toward that issue. The case will be remanded for further consideration. On remand, the Office should make a preliminary determination on the issue of fault and afford appellant a proper opportunity to submit evidence and request a hearing on the issued of fault.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,536.39. The case shall be remanded for further develop on the issue of fault.

²⁰ This policy was announced in FECA Bulletin No. 80-35, issued October 20, 1989 and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994). See *Kathleen D. Abbott*, 53 ECAB 270 (2001); *Earl D. Long*, 50 ECAB 464, 469 (1999).

²¹ Section 20 C.F.R. § 10.431(b) and (d) provides that in the preliminary determination the Office will advise an individual in writing whether or not she is at fault in the creation of the overpayment and that appellant has the right to present evidence, which challenges a preliminary finding that she was at fault. Section 20 C.F.R. § 10.432 provides that the individual may present the evidence challenging a finding of fault to the Office in writing or at a prercoupment hearing, but he must present the evidence or request the hearing within 30 days of the date of the written notice of overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2007 decision of the Office of Workers' Compensation Programs be affirmed as to fact and amount of overpayment. The decision is set aside on the issue of fault and remanded for further development consistent with this decision.

Issued: July 22, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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