

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

A.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
St. Petersburg, FL, Employer

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**Docket No. 07-2010
Issued: May 23, 2008**

Appearances:
Dean Albrecht, for the appellant
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 26, 2007 appellant filed a timely appeal from a May 3, 2007 decision of the Office of Workers' Compensation Programs' hearing representative affirming an overpayment determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$5,245.26 for the period September 4 to November 26, 2005 because he accepted wage-loss compensation following the termination of his compensation benefits; and (2) whether appellant was at fault in the creation of the overpayment, thus precluding waiver of the recovery of the overpayment.

FACTUAL HISTORY

This is the fourth appeal in this case.¹ The Board issued a decision on April 1, 1998 in which it found that the Office improperly terminated appellant's compensation.² In a decision dated July 15, 2003, the Board again reversed Office decisions terminating appellant's compensation. On September 6, 2002 the Office terminated appellant's compensation on the grounds that he no longer had any continuing disability due to his accepted September 7, 1989 employment injury.³ In reversing the termination of benefits, the Board found the record contained an unresolved conflict in medical opinion evidence. In the fourth appeal, the Board affirmed an August 31, 2005 decision in which the Office terminated appellant's compensation effective September 4, 2005 on the grounds that he refused an offer of suitable work.⁴ The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.⁵

Subsequent to the Board's August 17, 2006 decision, the employing establishment notified the Office that appellant was paid compensation for the period September 4 to November 26, 2005 after his compensation had been terminated based on his refusal of suitable work. The record contains computer forms showing appellant was paid \$5,245.26 for the period September 4 through November 26, 2005.

By letter dated July 24, 2006, the Office advised appellant of its preliminary determination that there was a \$5,245.26 overpayment of compensation. It found that he accepted compensation for wage loss for the period September 4 to November 26, 2005 following the termination of his wage-loss benefits for refusing suitable employment. The Office found that appellant was at fault in the creation of the overpayment because he accepted payments which he knew or should have known to be incorrect. Appellant was aware or reasonably should have been aware that he was not entitled to compensation following the August 31, 2005 termination decision. The August 31, 2005 decision stated that compensation

¹ On September 7, 1989 appellant, then a 43-year-old mail processor clerk, filed a traumatic injury claim alleging that he injured his back that date while breaking down mail. The Office accepted the claim for a low back strain. This was assigned claim number A06-0469808. On February 23, 1990 appellant filed an occupational disease claim alleging that on September 7, 1989 he first realized his lower back, left lumbar and left hip conditions were employment related. This was assigned claim number 06-485173, which was deleted on May 31, 1990 as the Office determined appellant's February 23, 1990 claim was actually a claim for a recurrence of disability. The Office of Personnel Management approved appellant's application for disability retirement on October 2, 1990. Appellant retired from the employing establishment effective October 1, 1990. On July 22, 1991 the Office accepted appellant's recurrence claim and expanded his claim to include the condition of herniated nucleus pulposus. On October 2, 1991 appellant filed an election form opting to receive benefits under the Federal Employees' Compensation Act effective September 11, 1990. By letter dated September 27, 1991, appellant was placed on the periodic rolls for temporary total disability.

² Docket No. 98-75 (issued April 1, 1998).

³ Docket No. 03-1009 (issued July 15, 2003).

⁴ Docket No, 06-73 (issued April 17, 2006).

⁵ On July 3, 1998 and October 17, 2003 appellant filed election forms opting to receive compensation benefits under the Act.

would cease effective September 4, 2005. Appellant was given 30 days in which to request a telephone conference, a prerecoupment hearing before the Branch of Hearings and Review or a final decision. If he agreed that he had received an overpayment, he was instructed to send a check or money order for the full amount to the Office. If appellant was unable to pay the full amount, he was instructed to send a completed Form OWCP-20, overpayment recovery questionnaire, so that the Office could determine a fair repayment method.

On August 21, 2006 appellant contested the preliminary finding of an overpayment and fault, stating that he had received the August 31, 2005 decision and had advised the Office that he continued to receive payments. He asserted that he was not at fault in the creation of the overpayment and requested waiver of the recovery of the overpayment and submitted a completed overpayment recovery questionnaire. Appellant also requested a prerecoupment hearing before an Office hearing representative, which was held on February 28, 2007.

By decision dated May 3, 2007, the Office hearing representative found that there was a \$5,245.28⁶ overpayment of compensation for the period September 4 through November 26, 2005 and that appellant was at fault in the creation of the overpayment, thus, precluding waiver of the overpayment. The hearing representative found the overpayment was due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

The Act⁷ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁸ Section 8129(a) of the Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.⁹

ANALYSIS -- ISSUE 1

The Board finds that an overpayment occurred in this case for the period September 4 to November 26, 2005. The record establishes that appellant received wage-loss compensation from the Office in the amount of \$5,245.26 for the period September 4 to November 26, 2005. However, he was not entitled to any compensation from the Office following the termination of his compensation benefits as of September 4, 2005. Thus, appellant received an overpayment of compensation for the period September 4 to November 26, 2005.

⁶ This appears to be a typographical error as the record shows appellant received three payments of \$1,748.42. When multiplied by the three payments the total is \$5,245.26. The preliminary determination also reflected this amount.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8102(a).

⁹ 5 U.S.C. § 8129. *See also D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007) (the Office found that appellant received an overpayment of compensation as she received wage-loss compensation after the Office had issued a decision terminating her entitlement to compensation benefits).

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulation, 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.¹⁰ Section 10.433 of the implementing regulation provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ 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.¹² Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she [a]ccepted a payment which he or she knew or should have known to be incorrect.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Office determined that appellant accepted compensation payments he knew or should have known were incorrect because he accepted the payments following termination of his compensation benefits by the Office in its August 31, 2005 decision. When the Office finds a claimant at fault in creating the overpayment on the grounds that he accepted a payment which the individual knew or should have been expected to know was incorrect, it must establish that, at the time the claimant received the compensation payment, the claimant knew or should have known the payment was incorrect.¹⁵

The Board finds that appellant was at fault in creating the overpayment for the period September 4 to November 26, 2005. The record establishes that the Office issued compensation checks to appellant for the period September 4 to November 26, 2005. The evidence establishes that he was aware that the Office had previously terminated his compensation benefits by decision dated August 31, 2005. The Board finds that appellant is with fault in the creation of the overpayment from September 4 to November 26, 2005 on the grounds that he accepted a payment that he knew or should have known to be incorrect. That the Office may have been negligent in issuing the payments does not mitigate this finding.¹⁶ As appellant is with fault in the creation of the overpayment from June 13, 2004 to November 25, 2006, he is not eligible for

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

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.*

¹³ 20 C.F.R. § 10.433(a)(3).

¹⁴ 20 C.F.R. § 10.433(b).

¹⁵ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ See 20 C.F.R. § 10.435(a); *D.R.*, *supra* note 9; *William E. McCarty*, 54 ECAB 525 (2003).

waiver of the recovery of the overpayment. The Office is required by law to recover this overpayment.¹⁷

CONCLUSION

The Board finds that an overpayment of compensation of \$5,245.26 was created during the period September 4 to November 26, 2005 because appellant received compensation for that period following the termination of his compensation as of September 4, 2005. The Board further finds that, under the circumstances of this case, appellant is at fault in the creation of the overpayment and is not entitled to waiver of recovery of the overpayment

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2005 be affirmed.

Issued: May 23, 2008
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

¹⁷ The repayment of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); *see also Joan Ross*, 57 ECAB 694 (2006). *Bob R. Gilley*, 51 ECAB 377 (2000).