

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

M.J., Appellant)	
)	
and)	Docket No. 09-469
)	Issued: August 24, 2009
U.S. POSTAL SERVICE, POST OFFICE,)	
Cambridge, MA, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2008 appellant filed a timely appeal from the April 30, 2008 merit decision of the Office of Workers' Compensation Programs, which found her at fault in creating an overpayment of compensation, thereby precluding waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant was at fault in creating a \$4,896.04 overpayment of compensation from October 29 through December 29, 2001.

FACTUAL HISTORY

On February 16, 2001 appellant, then a 49-year-old clerk, sustained a right knee injury in the performance of duty when she slipped on a manhole cover and tried to stop a fall. On May 21, 2001 the Office notified her that it accepted her claim for right knee strain. Under the heading "Return to Work," the Office informed appellant: "When you return to work, or obtain new employment, notify this office right away. If you receive a compensation check which

includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.” It began paying compensation for temporary total disability on the periodic rolls.

Appellant accepted a limited-duty assignment as a modified distribution clerk. She returned to work with no wage loss beginning October 29, 2001, but she continued to receive periodic compensation checks every four weeks. The record indicates that she returned compensation checks to the Office for periods after December 29, 2001.

On September 6, 2002 the Office made a preliminary determination that appellant was at fault in creating a \$4,896.04 overpayment of compensation from October 29 through December 29, 2001. It found that appellant knew or should have reasonably been aware that she was not eligible to receive compensation for lost time from work for the same period in which she had already returned to work. The Office noted its May 21, 2001 correspondence to appellant explaining how to prevent an overpayment of compensation if she returned to work, but appellant continued to receive compensation through December 29, 2001 while working full time.

Appellant requested a decision based on the written evidence. On September 24, 2002 she completed an overpayment recovery questionnaire. She indicated that she did not have any of the incorrectly paid checks or payments in her possession and she argued that the overpayment was not her fault: “I thought the incorrect (which I thought was correct) payment was due me (because) I was out of work from May ‘01 to Oct ‘01 but I didn’t receive a check till June ‘01. I thought the two checks I cashed were for the time from May to June in which I didn’t receive any checks.”

In a decision dated April 30, 2008, the Office finalized its preliminary determination and found appellant at fault in creating a \$4,896.04 overpayment of compensation from October 29 through December 29, 2001, thereby precluding waiver of the recovery of the overpayment.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act places limitations on the right to receive compensation. While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.¹ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.² “Temporary total disability” is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.³

¹ 5 U.S.C. § 8116(a).

² *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

³ 20 C.F.R. § 10.400(b).

When an overpayment of compensation has been made 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. There is one exception:

“Adjustment or recovery by the United States may not be made when 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.”⁴

Thus, the Office may consider waiving recovery only if the recipient was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect.⁵

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that she is being overpaid.⁶

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁷

In addition to providing narrative descriptions to recipients of benefits paid or payable, the Office includes on each periodic check a clear indication of the period for which payment is being made.⁸

ANALYSIS

An overpayment of compensation occurred when appellant returned to limited duty at no wage loss on October 29, 2001 but continued to receive compensation for total disability through December 29, 2001. No employee is entitled to compensation for total disability after returning to work. The Office ran a computation worksheet showing that at appellant’s pay rate and

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.433(a).

⁸ *Id.* at § 10.430(a).

compensation rate, compensation for the period in question, less health and life insurance premiums, totaled \$4,896.04. Fact and amount of the overpayment are established.

The question that remains is whether appellant was at fault in creating this overpayment of compensation. She argues that she would not knowingly accept money that was not due her. But if she did, in error, she feels it was the Office's mistake because it received the same paperwork she did about her return to work and still sent the checks. It may be that the Office was at fault in continuing to send compensation checks when it knew that appellant had accepted an offer of modified duty. But that does not relieve appellant from liability for repayment of the debt if she was also at fault in accepting the overpayment.

Appellant knew she was receiving compensation for wage loss. The Office explained the basis of compensation payments in its May 21, 2001 acceptance letter. It also made clear that to prevent an overpayment of compensation once she returned to work, she was to immediately return any compensation check which included payment for a period she had worked. She returned to work with no wage loss on Monday, October 29, 2001, but she continued to receive compensation checks every four weeks. These checks provided a clear indication of the period for which payment was being made. So when she received a check covering the period through Saturday, November 3, 2001, she should have immediately returned it to the Office and she should have immediately returned the checks covering the period December 1 through December 29, 2001. The Board finds that she knew or should have known these payments were incorrect, so when she accepted them, she was at fault under the third standard noted above. Prior to depositing or negotiating a paper compensation check, a recipient knows or should know whether she is accepting payment for wage loss for a period during which she was employed and had no wage loss.

Appellant contends that she would not knowingly accept money that was not due her. The Board has no reason to doubt her. But under the circumstances, given the Office's May 21, 2001 instructions in the event she returned to work, and given the clear indication on each compensation check of the period covered by the check, she should have known. Appellant should have known the checks she received after October 29, 2001 were not for the period May to June 2001, as she argued on her overpayment recovery questionnaire, because the checks clearly indicated otherwise. She should have returned those checks instead of cashing them.

The Board will affirm the Office's April 30, 2008 final decision finding that appellant was at fault in creating a \$4,896.04 overpayment of compensation from October 29 through December 29, 2001. Because appellant is at fault, she is not eligible for waiver of the recovery of the overpayment. The Office must recover the debt. The Board's jurisdiction to review the collection of an overpayment, however, is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled.⁹ Because the Office cannot collect the overpayment in this case by adjusting later payments of compensation - - appellant is no longer receiving compensation for wage loss -- but must recover it by other means, the Board lacks jurisdiction to review the Office's collection of the debt.

⁹ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

CONCLUSION

The Board finds that appellant was at fault in creating a \$4,896.04 overpayment of compensation from October 29 through December 29, 2001, thereby precluding waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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