U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH ROSS and DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, FIREARMS & TOBACCO, Phoenix, Ariz.

Docket No. 96-650; Submitted on the Record;
Issued January 22, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was not without fault in the creation of an overpayment in the amount of $17,323.11.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly found that appellant was not without fault in the creation of an overpayment in the amount of $17,323.11.

On November 19, 1993 appellant, a special agent, filed a traumatic injury claim (Form CA-1) alleging that on November 18, 1993 he hurt his back while lifting office furniture. Appellant underwent surgery on September 19, 1994. Appellant returned to light-duty work on March 20, 1995 and retired on April 3, 1995.[1]

The Office accepted appellant's claim for left sciatica and herniation at L5-S1.

By letter dated August 10, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred during the period March 20 through June 24, 1995 in the amount of $17,323.11[2] and that he was at fault in the creation of the overpayment because he was released for a return to light-duty work effective March 20, 1995. The Office also advised appellant that he had the right to submit any additional evidence or arguments if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own, and if he believed that recovery of the overpayment should be waived. The Office also advised appellant

[1] On appeal, appellant stated that after reporting to work on March 20, 1995, he soon realized that he was in too much pain to work an entire eight-hour day. Appellant stated that on March 22, 1995, he elected to retire from the employing establishment effective April 3, 1995.

[2] The record reveals compensation received by appellant during September 18, 1994 through March 4, 1995 was based on a weekly rate of $1,769.69.

that he could request a telephone conference, that he could request a final decision based on the written evidence only, or that he could request a hearing within 30 days of the date of its letter.

In an August 25, 1995 letter, appellant argued that he was not at fault in the creation of the overpayment and requested a review of the written record.

By decision dated October 26, 1995, the Office terminated appellant's compensation benefits effective March 20, 1995, the date appellant returned to work. In an accompanying memorandum, the Office found that the evidence of record failed to establish continued disability after March 19, 1995.

On November 15, 1995 the Office issued a final decision finding that appellant was at fault in the creation of the overpayment in the amount of $17,323.11 because he was released by his treating physician to light-duty work effective March 20, 1995.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.[3] The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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 not waive the overpayment of compensation in this case unless appellant was without fault.[5] In evaluation of whether appellant was without fault, the Office considered whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.[6]

In determining whether an individual is at fault, section 10.320(b) of the regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
>
> (2) Failed to furnish information which the individual knew or should have known to be material; or

[3] 5 U.S.C. § 8129.

[4] 5 U.S.C. § 8129(b)

[5] *Harold W. Steele*, 38 ECAB 245 (1986).

[6] 20 C.F.R. § 10.320(c)(1).

> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[7]

In this case, the Office applied the third standard – appellant accepted payments which he knew or should have known were incorrect -- in finding appellant to be at fault in the creation of the overpayment. In the present case, Dr. Marc A. Letellier, a Board-certified neurosurgeon and appellant's treating physician, indicated in a March 10, 1995 work restriction evaluation that appellant could return to light-duty work on March 19, 1995 with physical restrictions. Appellant returned to light-duty work on March 20, 1995. Prior to appellant's return to work, the Office advised appellant in a September 27, 1994 letter that he would be paid compensation every four weeks beginning on September 18, 1994. The Office also advised appellant that he was expected to return to work, including restricted duty or part-time employment if available, when he was no longer totally disabled due to the accepted employment condition. The Office then advised appellant "[t]o avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK." The Office's letter put appellant on notice that he would not be entitled to receive disability compensation benefits after he returned to work. Therefore, in accepting compensation following the Office's letter, appellant knew or should have known that he was receiving compensation to which he was not entitled.

Appellant contended that he was not at fault in the creation of the overpayment.[8] In an August 25, 1995 letter, appellant stated that Catherine Clarke, a compensation specialist for the employing establishment, told him to not contact the Office and that an employing establishment representative would make all the necessary contacts for him. In a telephone conference with the Office on October 18, 1995, Ms. Clarke stated that "this allegation was not true and that she made no such statement to [appellant]. She added that injured workers are advised that they can contact [the Office] but that they may have difficulty connecting with the claims examiner."

Appellant's argument that he relied on misinformation given by the employing establishment personnel is insufficient to excuse the acceptance of compensation benefits because he was properly advised by the Office's September 27, 1994 letter advising him to inform the Office when he returned to work and there is no evidence of record to substantiate his conversation with Ms. Clarke.

In further support of his contention that he was not at fault in the creation of the overpayment, appellant stated in his August 25, 1995 letter that three of the Office's representatives were aware of his return to work. Appellant stated that Vicki Latham, a registered nurse who was assigned to his case, notified Sheila Pacheco, an Office registered nurse, that Dr. Letellier stated that he could return to work on March 19, 1995. Appellant also stated that on or about March 23, 1993, Ms. Latham notified Pam Cooper Tippett, an Office claims examiner who was assigned to his case, that he was retiring from the employing

[7] 20 C.F.R. § 10.320(b).

[8] The Board notes that on appeal, appellant does not contest the fact that an overpayment occurred and the amount of the overpayment.

establishment on April 3, 1995. Additionally, appellant stated that on April 19, 1995, Ms. Latham notified Ms. Pacheco that he submitted paperwork on March 21, 1995 regarding his retirement effective April 3, 1995.

Even if appellant actually believed that the Office knew that he had returned to work, the Office's September 27, 1994 letter advised appellant that he was no longer entitled to compensation benefits when he returned to work. Therefore, the Board finds that the Office properly found that appellant was not without fault in the creation of the overpayment and it is not subject to waiver.

The November 15, 1995 decision of the Office of Workers' Compensation Programs is affirmed.[9]

Dated, Washington, D.C.
January 22, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[9] The Board notes that on appeal, appellant does not contest the Office's October 26, 1995 decision terminating his disability compensation benefits effective March 20, 1995.