U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRETCHEN THARAN and DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, Englewood, CO

Docket No. 00-1528; Submitted on the Record;
Issued February 8, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM,

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 4, 1999; (2) whether the Office properly determined that an overpayment of $9,239.46 was created; and (3) whether the Office properly denied waiver of the overpayment on the grounds that appellant was at fault in creating the overpayment.

The Office accepted that appellant sustained bilateral wrist tendinitis causally related to her federal employment as a secretary.[1] Appellant returned to work intermittently on a part-time basis in private employment. By decision dated August 12, 1994, the Office reduced appellant's compensation to reflect her wage-earning capacity.

By letter dated November 12, 1998, the Office advised appellant that it proposed to terminate her compensation based on the weight of the medical evidence. In a decision dated December 14, 1998, the Office terminated compensation for wage loss and medical benefits effective January 2, 1999.

By decision dated September 24, 1999, an Office hearing representative affirmed the termination decision.

In a letter dated October 22, 1999, the Office advised appellant that a preliminary determination had been made that an overpayment of $9,239.46 was created during the period January 3 to October 10, 1999. The Office indicated that compensation should have been terminated January 2, 1999, but payment had continued until October 10, 1999. With regard to fault, the Office made a preliminary finding that appellant was at fault because she knew or should have known that she was not entitled to compensation after January 2, 1999.

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[1] Appellant filed a traumatic injury claim (Form CA-1) on November 26, 1990; she indicated that on the claim form that she attributed her injury to extensive typing duties at a conference from October 8 to 12, 1990.

By decision dated March 3, 2000, the Office finalized its findings as to the amount of overpayment and fault. In a separate decision dated March 3, 2000, the Office denied modification of the September 24, 1999 decision.

The Board finds that the Office properly terminated appellant's compensation effective January 2, 1999.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[2]

The Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Philip Heyman, a Board-certified orthopedic surgeon. In a report dated September 2, 1998, Dr. Heyman provided a history and results on examination. He stated that there were no positive findings on examination, and x-rays failed to show any bone or joint abnormalities. Dr. Heyman noted that appellant attributed her condition to a one-week period of typing in 1990 and he was at a loss to explain how this would leave someone with major restrictions and justification for being out of work. He concluded that appellant had no objective findings and therefore he could not recommend continuing work restrictions or additional treatment.

The Board finds that Dr. Heyman provided a reasoned medical opinion, based on a complete background, that appellant did not have a continuing employment-related condition. This constitutes probative medical evidence supporting a termination of compensation benefits. On the other hand, appellant did not submit probative medical evidence supporting a continuing employment-related disabling condition. In a brief report dated June 30, 1998, Dr. Lewis Oster, Jr., a Board-certified orthopedic surgeon, stated that appellant had maintained her current condition since last seen and continued to have forearm tendinitis that precluded her from performing repetitive activities. It is not clear when Dr. Oster last saw appellant; he did not provide a factual or medical history, results on examination, nor did he discuss causal relationship with employment. The Board finds that Dr. Oster's report lacks sufficient detail and medical rationale to constitute probative medical evidence in support of her claim. The weight of the medical opinion evidence, therefore, rests with Dr. Heyman. The Board accordingly finds that the Office met its burden of proof in terminating compensation effective January 2, 1999.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.[3]

[2] *Patricia A. Keller*, 45 ECAB 278 (1993).

[3] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

Appellant submitted a July 29, 1999 report from Robert C. Hays, a rheumatologist, opining that appellant has a chronic repetitive motion injury syndrome as well as early osteoarthritis of the thumbs. Dr. Hays stated that "the above conditions have been related to her work injury and not to other medical conditions," finding that appellant was permanently and partially disabled. This report is of limited probative value in that it does not provide a factual and medical history, or any medical rationale to support the opinion on causal relationship with employment. The Board finds that the medical evidence submitted after the December 14, 1998 Office decision is not sufficient to meet appellant's burden of proof in this case.

The Board further finds that the Office properly found that an overpayment of $9,239.46 was created.

Appellant's compensation was, for the reasons noted above, properly terminated effective January 2, 1999. The record indicates that appellant continued to receive compensation through October 10, 1999. The compensation paid after January 2, 1999 represents an overpayment of compensation. The Office determined that the compensation paid from January 3 to October 9, 1999 totaled $9,239.46.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act[4] provides: "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."[5] Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.[6]

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(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 knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect."

In the present case, the Office notified appellant, by decision dated December 14, 1998, that her compensation would be terminated effective January 2, 1999. The Office, however, continued to issue compensation payments. On January 30, 1999 for example, the Office issued a compensation payment for the period January 3 to 30, 1999. Appellant continued to receive payments every 28 days through October 9, 1999. Appellant stated that she believed she was entitled to those payments because she had requested a hearing and she thought she was entitled to compensation until a decision from the hearing representative was issued. She did not identify

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8129(b).

[6] *Norman F. Bligh*, 41 ECAB 230 (1989).

any information or authority on which she based her belief. The December 14, 1998 Office decision clearly stated that compensation benefits would be terminated as of January 2, 1999.[7] In view of the December 14, 1998 decision, appellant knew or should have known that continuing payments were incorrect.[8]

Since appellant accepted payments she should have known were incorrect, she is not "without fault" under section 10.433 in creating the overpayment. Accordingly, the Office properly denied waiver of the overpayment.

With respect to recovery of the overpayment, the Board's jurisdiction is limited to recovery from continuing compensation benefits.[9] In this case, the recovery is not from continuing compensation benefits and the Board lacks jurisdiction over the issue.

The decisions of the Office of Workers' Compensation Programs dated March 3, 2000 and September 24, 1999 are affirmed.

Dated, Washington, DC
February 8, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

[7] Although the Office may have been negligent in continuing to issue appellant checks for continuing compensation, this does not excuse her acceptance of such checks which she knew or should have known were incorrect. *See Larry D. Strickland*, 48 ECAB 669 (1997).

[8] *See Frank Monti*, 40 ECAB 669 (1989) (where the claimant continued to receive compensation after an Office decision terminating compensation). The claimant had been advised by the Office of Personnel Management (OPM) that his retirement annuity could not be paid until compensation had ceased; he argued that he believed he was entitled to compensation until the Office and OPM resolved the issue, and therefore he was not at fault in accepting compensation payments after termination. The Board found that the claimant was at fault as he had the responsibility to inquire as to the reason for the continuing compensation payments, in view of the clear language of the termination decision.

[9] *See Levon H. Knight*, 40 ECAB 658, 665 (1989).