United States Department of Labor
Employees' Compensation Appeals Board

GEORGE A. RODRIGUEZ, Appellant	)	
and	)	**Docket No. 05-490**
	)	**Issued: November 18, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, North Chicago, IL, Employer	)	

Appearances:
George A. Rodriguez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 21, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs of a September 20, 2004 decision affirming a November 4, 2003 decision rescinding acceptance of May 19, 2003 injuries and finalizing a preliminary determination of overpayment, finding that he was not at fault in its creation but that it was not subject to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the performance of duty and overpayment issues in the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in rescinding acceptance of appellant's March 19, 2003 injuries on the grounds that he was not in the performance of duty; (2) whether the Office properly found a $1,055.26 overpayment of compensation; and (3) whether the Office properly found that appellant was without fault in creation of the overpayment and that the overpayment was not subject to waiver. On appeal, appellant contends that the overpayment should be waived.

FACTUAL HISTORY

On March 25, 2003 appellant, then a 45-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that while speaking with Captain Edward Gember in his office on March 19, 2003, he was attacked by Officer Timothy Sneed, a coworker, who struck him in the left eye, head and chest. He experienced back pain after being struck in the chest.[1] Appellant explained that at 10:00 p.m. on March 18, 2003, Sergeant John Howard telephoned him at home to advise him that as of March 19, 2003, he would be working 12-hour shifts. Appellant went to the employing establishment the next morning to pick up his new work schedule and discuss it with Captain Gember, the patrol chief. From 10:30 to 11:00 a.m., appellant spoke with Captain Gember in his office about the new schedule. He alleged that at approximately 11:00 a.m., Captain Gember accused him of "talking about other officers' personal problems." Officer Sneed then came into Captain Gember's office and said he "would like to say something about it." Officer Sneed began to yell at appellant that he tried to "pick up" Officer's Sneed's wife's best friend by giving her his telephone number. Officer Sneed then moved closer to him, blocking the office door. Appellant told Officer Sneed that he did not know what he was talking about. Officer Sneed then struck appellant in the head, chest and left eye. Captain Gember intervened to stop the assault.

In an April 22, 2003 letter, the employing establishment asserted that at the time of the March 19, 2003 assault, appellant was on his day off and had picked up his new work schedule on his own time. The employing establishment noted that Officer Sneed was also "off the clock" at the time of the March 19, 2003 assault.

By letter dated May 5, 2003, the Office accepted appellant's claim for a lumbar strain and facial contusion. The Office paid appellant wage-loss compensation in the amount of $1,055.26 for the period May 15 to 31, 2003.

By decision dated November 4, 2003, the Office rescinded acceptance of appellant's claim on the grounds that the March 19, 2003 assault was not sustained while in the performance of duty. The Office determined that the altercation with Officer Sneed resulted from "a personal relationship which existed outside of employment and was imported into the workplace."[2]

By notice dated November 4, 2003, the Office made a preliminary determination that an overpayment of $1,055.26 in wage-loss compensation had occurred as the acceptance of appellant's claim was erroneous. The Office also made the preliminary finding that appellant was without fault in creation of the overpayment as there was no evidence that appellant was aware that the acceptance of his claim was erroneous.

[1] Appellant submitted contemporaneous medical evidence, including emergency room records, noting the assault and diagnosing contusions of the head, face and back.

[2] On October 15, 2003 appellant filed a notice of recurrence of disability (Form CA-2a) beginning September 7, 2003, related to his March 19, 2003 injuries. In a December 2, 2003 letter, the Office advised appellant that his claim for recurrence of disability could not be processed as his claim had been rescinded.

In a December 4, 2003 letter, appellant requested an oral hearing before a hearing representative regarding the Office's November 4, 2003 decision rescinding acceptance of his claim. He also requested a review of the written record regarding the Office's November 4, 2003 preliminary overpayment determination. He asserted that the rescission was erroneous, that repaying the overpayment would cause financial hardship and that he still experienced symptoms related to the March 19, 2003 injuries. Appellant submitted additional evidence.

In a November 12, 2003 letter, appellant related that, when Sergeant Howard telephoned him on March 18, 2003, appellant explained that the change from 8- to 12-hour shifts would adversely affect his college class schedule. Sergeant Howard told appellant to "come in and pick up the new schedule." In the same telephone call, Captain Gember spoke to appellant and also "said just come in" and Captain Gember talked to appellant about his schedule.

An oral hearing was held in appellant's case on July 20, 2004. At the hearing, appellant asserted that he came to the employing establishment on March 19, 2003 at the direction of both Sergeant Howard and Captain Gember. He alleged that on March 19, 2003 he discussed his work schedule with Captain Gember for approximately 30 minutes, asking to remain on the day shift for 2 more weeks as the 12-hour shifts would adversely impact his college class schedule. Officer Sneed then attacked him in Captain Gember's office. Appellant surmised that Officer Sneed was angry at him after appellant gave his pager number to Petty Officer Rawls, a female veteran he met while in the performance of duty on March 14, 2003. Appellant was assigned to escort her to a building on the employing establishment campus. During the assault, Officer Sneed stated that Petty Officer Rawls was his wife's best friend. Appellant asserted that he had no nonwork relationship with Officer Sneed.

Appellant also submitted information regarding his income and expenses. He submitted a monthly budget sheet and supporting documentation showing $5,679.00 in expenses, including $2,157.00 for a mortgage, $345.00 in utilities, $47.71 for cable television, $500.00 in credit card payments including payments above the minimum payment, $250.00 in medical expenses, approximately $500.00 in insurance payments, $600.00 for groceries and $250.00 for "meals and entertainment." Appellant listed $5,745.00 in monthly household income, comprised of his salary of $2,548.00, his disability payment from the Department of Veterans Affairs of $948.00 and his wife's pension and salary of $2,249.00 and income. Regarding his assets, appellant listed $300.00 in a checking account, $7.22 in a savings account and $2,000.00 in a money market account.

In an August 13, 2004 letter, the employing establishment asserted that neither Sergeant Howard nor Captain Gember directed appellant to report to the employing establishment on March 19, 2003 before the start of his work shift at 6:00 p.m. that evening. Also, appellant did not make an appointment to speak with Captain Gember. However, Captain Gember agreed to meet with appellant when he appeared at his office during the morning of March 19, 2003. The employing establishment asserted that the March 19, 2003 altercation occurred because appellant disclosed personal information about Officer Sneed and his wife to a female patient appellant was escorting to another building on March 14, 2003.

By decision dated and finalized September 20, 2004, the Office hearing representative affirmed the November 4, 2003 decision rescinding acceptance of the March 19, 2003 injury.

The hearing representative found that appellant was not in the performance of duty when he was injured on March 19, 2003. The Office hearing representative finalized the overpayment regarding the fact and amount. The Office hearing representative further found that appellant was not at fault in creation of the overpayment as he was not expected to have known that the Office's acceptance of his claim was erroneous. The hearing representative found that the overpayment was not subject to waiver as appellant did not need substantially all of his monthly income to meet ordinary and necessary living expenses. The Office directed recovery of the overpayment in full as appellant had sufficient monies in his bank accounts to cover the entire amount.[3]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.[4] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[5] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[6] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[7]

The Office may rescind a claim if it determines that an accepted injury did not occur in the performance of duty.[8] The fact that an injury occurred on the premises of the employing establishment is not sufficient to establish entitlement to benefits.[9] Section 8102(a) of the Act provides for payment of compensation for disability or death of an employee resulting from personal injury "sustained while in the performance of his duty."[10] The claimant must also show

[3] The Board notes that it does not have jurisdiction over the issue of recovery of the overpayment, as appellant is no longer receiving continuing compensation payments. The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Federal Employees' Compensation Act. *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

[4] *See* 20 C.F.R. § 10.610.

[5] *Eli Jacobs*, 32 ECAB 1147 (1981).

[6] *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[7] *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004); *Paul L. Stewart*, 54 ECAB ___ (Docket No. 03-1107, issued September 23, 2003); *Alice M. Roberts*, 42 ECAB 747 (1991).

[8] *Belinda R. Darville*, 54 ECAB ___ (Docket No. 02-1182, issued June 26, 2003).

[9] As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or coming from work, before or after working hours, or at lunch time or other such breaks are compensable; *see Timothy K. Burns*, 44 ECAB 125 (1992).

[10] 5 U.S.C. § 8102(a).

that the injury "arose out of the employment" and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[11] To arise in the course of employment, the injury must occur at a time when the employee may be reasonably said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, whether by precipitation, acceleration or aggravation.[12]

Generally, the Board has held that personal disputes between coworkers are not compensable if they arise outside the scope of employment and are then imported into the workplace.[13] However, Larson, in his treatise on workers' compensation, states that, even if the subject of a dispute is unrelated to the work, an ensuing assault is compensable if the work of the participants brought them together and created the relations and conditions which resulted in the clash.[14]

ANALYSIS -- ISSUE 1

The Office rescinded its acceptance of appellant's claim on the grounds that appellant was not in the performance of duty when assaulted on March 19, 2003 and that the incident was the product of a personal relationship "imported into the workplace." The Board finds, however, that there is sufficient evidence to establish that there was no personal relationship outside of employment between appellant and Officer Sneed. Appellant testified at the July 20, 2004 hearing that he had no relationship with Officer Sneed outside of employment. The employing establishment did not dispute this. Thus, there is no evidence that these two employees had any relationship outside the one at work.[15] Nevertheless, the Board finds that the March 19, 2003 injuries were not compensable as they did not occur when appellant was engaged in the performance of duty.

The March 19, 2003 employment incident involving appellant and Officer Sneed occurred at approximately 11:00 a.m., a time when appellant was not on his duty shift. Appellant went to the worksite that morning to discuss a new work schedule with Captain Gember from approximately 10:30 to 11:00 am. The employing establishment asserted that appellant was not required to be on the employing establishment premises at that time, seven to eight hours prior to the start of his shift at 6:00 p.m. Also, appellant did not have a

[11] *Narbik A. Karamian*, 40 ECAB 617 (1989).

[12] *Annie L. Ivey*, 55 ECAB ___ (Docket No. 02-1855, issued April 29, 2004).

[13] *James P. Schilling*, 54 ECAB ___ (Docket No. 03-914, issued June 20, 2003).

[14] A. Larson, *The Law of Workers' Compensation* § 8.01(6)(a) (2000) (quoting *Hartford Acc. & Indem. Co. v. Cardillo*, 72 D.C. App. 52, 112 F.2d 11, 17 (1940).

[15] *Cf. Janet Hudson-Dailey*, 45 ECAB 435 (1994) (when animosity or dispute culminating in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment).

scheduled appointment with Captain Gember. Thus, his presence on the premises was a personal errand and not a requirement of his employment.[16] The voluntary nature of appellant's errand distinguishes his conversation with Captain Gember from a meeting required by the employing establishment at which his presence was mandatory.[17]

The Board finds that the Office properly rescinded its acceptance of appellant's claim, as the evidence establishes that the March 19, 2003 assault was incidental to a self-personal errand not arising in the performance of appellant's duties.[18]

LEGAL PRECEDENT -- ISSUE 2

The Federal Employee's Compensation Act provides that the United States shall pay compensation as specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[19] If the Office later rescinds a claim, the amount of any compensation paid is considered an overpayment of compensation.[20]

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for a lumbar strain and facial contusion sustained in a March 19, 2003 assault. The Office paid appellant wage-loss compensation in the amount of $1,055.26 for the period May 15 to 31, 2003. As set forth above, the Office properly rescinded its finding that appellant was entitled to compensation during this period. Consequently, he received an overpayment of compensation in the amount of $1,055.26.

LEGAL PRECEDENT -- ISSUE 3

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436, provides:

> "(a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income, (including compensation benefits) to meet current ordinary and necessary living expenses; and

[16] *Cf. Paula G. Johnson*, 53 ECAB 722 (2002) (the claimant was injured while at the employing establishment on her scheduled day off to remove plants from her office, a personal errand unrelated to her work duties).

[17] *James Gray Jr.*, 44 ECAB 652 (1993) (the Board held that if the employing establishment required an employee to report to its premises for a meeting related to work matters, an injury occurring on the premises incidental to that meeting is compensable).

[18] On appeal, appellant submitted new evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[19] 5 U.S.C. § 8102(a).

[20] *Miguel A. Muniz*, 54 ECAB ___ (Docket No. 02-58, issued December 9, 2002).

"(b) The beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents."[21]

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

"(a) Recovery of an overpayment is considered against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

"(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment."

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.[22] The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.[23]

ANALYSIS -- ISSUE 3

On appeal, appellant asserts that the Office improperly refused to waive recovery of the overpayment.

In the decision dated and finalized September 20, 2004, the Office hearing representative found that the $1,055.26 overpayment of compensation was not subject to waiver as appellant did not need substantially all of his monthly income to meet ordinary and necessary living expenses. The hearing representative based this finding on a review of the financial information submitted by appellant in support of his request for waiver. Appellant submitted his household budget and supporting documentation in which he listed household income of $5,745.00 per month. He listed monthly expenses totaling $5,679.00 including $2,157.00 for housing, $600.00 for food, $345.00 for utilities, $500.00 in credit card payments above the minimum payment level, $250.00 in medical expenses, $47.71 for cable television and $500.00 in insurance payments. Appellant also listed assets of $300.00 in a checking account, $7.22 in a savings account and $2,000.00 in a money market account.

The Board finds that as appellant's monthly income of $5,745.00 exceeds his monthly expenses of $5,679.00 by $66.00, he is not entitled to waiver as he does not need substantially all

[21] 20 C.F.R. § 10.436.

[22] *Linda Hilton*, 52 ECAB 476 (2001).

[23] *Rudolph A. Geci*, 51 ECAB 423 (2000).

his income to meet current ordinary and necessary expenses.[24] The Board finds that the hearing representative's analysis of the financial information and supporting documentation submitted by appellant is reasonable and his determination that appellant is not entitled to waiver of the overpayment under the "defeat the purpose of the Act" standard is proper under the law and facts of this case.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.[25]

In this case, appellant has neither alleged, nor submitted evidence demonstrating that he relinquished a valuable right or changed his position for the worse in reliance on the compensation payments he received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

CONCLUSION

The Board finds that the Office properly rescinded appellant's compensation claim on the grounds that the accepted March 19, 2003 injuries did not occur in the performance of duty. The Board further finds that the Office properly found that an overpayment of $1,055.26 occurred in appellant's case due to the erroneous acceptance of his claim. The Board further finds that the Office properly found that appellant was without fault in creation of the overpayment but that the overpayment was not subject to waiver.

[24] An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (May 2004).

[25] 20 C.F.R. § 10.437.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 20, 2004 is affirmed.

Issued: November 18, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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