

The issues are: (1) whether the Office properly denied modification of appellant's May 15, 1979 wage-earning capacity determination; (2) whether the Office properly calculated the amount of the overpayment due to forfeiture to be \$51,828.22; (3) whether the Office properly determined to recover the overpayment from appellant's continuing compensation in the amount of \$200.00 every 28 days; and (4) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

This is the sixth appeal in this case.¹ On August 12, 1974 appellant, then an electrician, sustained back and neck strains as well as aggravation of degenerative disc disease after the truck he was riding in hit a pothole and he was thrown against the truck bed. The Office entered appellant on the periodic rolls on January 26, 1976. By decision dated May 15, 1979, it reduced his compensation benefits based on a finding that he could work as a television service and repairman. Appellant completed CA-1032 forms reporting his earnings for the previous 15 months to the Office on December 12, 1986, February 5, 1987 and September 24, 1988 indicating that he was neither employed nor self-employed during these periods.

By decision dated May 27, 1994, the Office found an overpayment of compensation in the amount of \$131,710.51 occurred because appellant failed to report or underreported his earnings on CA-1032 forms for the periods May 8, 1978 to November 5, 1984 and from July 5, 1986 through September 24, 1988. It stated that appellant was at fault in the creation of the overpayment because he failed to report or knowingly underreported his earnings from his employment. Further, the Office stated that the sum of \$1,000.00 would be withheld from appellant's continuing compensation effective May 29, 1994. By order remanding case dated October 23, 1996, the Board set aside the Office's February 18, 1994 decision and remanded the case for further action because the record was incomplete.² The Board remanded the case to the Office for reconstruction and proper assemblage of the record, to be followed by an appropriate decision.

By decision dated July 29, 1997, the Branch of Hearings and Review finalized a preliminary determination of an overpayment in the amount of \$152,887.41. The Office stated that, due to the new finding of overpayment, the continuing offset to appellant's regular compensation would be stopped. Further, it considered appellant's request that he should be repaid the money already withheld but stated that, in view of the Office issuing a preliminary determination of an even larger debt than had initially been determined, it would be inappropriate to repay funds to him which had already been withheld. The Office stated, "Should our findings that you forfeited your right to compensation and therefore received an overpayment be reversed on appeal, the Office will repay the funds already withheld."

Appellant appealed the July 29, 1997 decision of the Branch of Hearings and Review, which made findings regarding forfeiture, overpayment and recovery. The Board reviewed this decision in its November 29, 1999 decision³ and affirmed the finding that appellant had forfeited his compensation during 1986 and 1987 based on his testimony at his September 24, 1991 oral hearing. Appellant had testified that he had earnings totaling \$17,000.00 during the years 1986

¹ The Board set forth the entire extensive procedural history of this case in the most recent merit decision dated November 29, 1999. Docket No. 97-2760 (issued November 29, 1999). The prior Board decisions include: Docket No. 92-1298 (issued August 24, 1992); Docket No. 93-1551 (issued August 30, 1993); Docket No. 94-1787 (issued October 23, 1986); Docket No. 97-2369 (issued June 23, 1999); and Docket No. 97-2760 (issued November 29, 1999).

² Docket No. 94-1787 *see supra* note 1.

³ Docket No. 97-2760 *see supra* note 1.

and 1987 which he failed to report. The Board found that appellant had received an overpayment during the years 1986 and 1987 due to forfeiture, that he was at fault in the creation of this overpayment and that this overpayment was not subject to waiver. The Board remanded the case for the Office to determine the amount of the overpayment for 1986 and 1987. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

In a letter dated March 18, 1999, appellant requested full disability compensation noting that his attending physician found that he was totally disabled. His attending physician, Dr. Grafton H. Thurman, a Board-certified internist, opined beginning in 1993 that appellant was totally disabled due to degenerative disc disease and severe rheumatoid arthritis due to his accepted employment injuries. The Office informed appellant of the requirements for modifying an existing wage-earning capacity determination on April 2, 1999. In a April 12, 1999 note, Dr. Thurman stated that appellant's condition had not changed since 1999. He reported on April 27, 1999 that, due to active inflammatory rheumatoid arthritis in the knees and low back degenerative disc disease, appellant was totally disabled as an electrician and television service and repairman. Dr. Thurman noted that appellant sustained a severe injury to his left knee on October 30, 1998. He completed a report on June 23, 1999 and stated that appellant's rheumatoid arthritis had severely aggravated his cervical spine degenerative arthritis and his lumbar disc disease. Dr. Thurman opined that appellant's conditions prohibited him from performing the lifting and walking required from a television repairman or electrician technician. By decision dated August 6, 1999, the Office denied modification of appellant's wage-earning capacity decision. Appellant requested an oral hearing addressing this issue on September 7, 1999. He testified at the oral hearing on June 28, 2006, that he worked full time in 1977 and 1978. Appellant noted that he also worked as an electrician wiring houses, but that he was currently totally disabled. Following the oral hearing, he submitted a report dated July 24, 2006 from Dr. Thurman, who noted that appellant exhibited paraspinous muscle spasm and decreased range of motion in his cervical and lumbar spine. Dr. Thurman stated, "[Appellant's] rheumatoid arthritis has severely aggravated his preexisting whiplash induced cervical spine degenerative arthritis and his preexisting lumbar disc disease with low back pain. The aggravation has worsened his neck and low back disease on a permanent basis to the degree that he can no longer do the lifting and ambulation required to be a TV repairman or electrical technician."

By decision dated September 15, 2006, the hearing representative found that appellant's rheumatoid arthritis was not an accepted employment-related condition, that he had not argued that the original determination was wrong and that he had not established a material change in the nature and extent of his injury-related condition.

The record contains the documentation of the payments made by the Office to appellant from September 12, 1985 through September 24, 1988 in the amount of \$51,828.22.

In a preliminary determination of overpayment dated September 26, 2006, the Office found that appellant had received an overpayment in the amount of \$51,828.22 as he knowingly failed to report his earnings on CA-1032 forms covering the period September 12, 1985 through September 24, 1988. It determined that appellant received \$51,828.22 in compensation benefits from the period September 12, 1985 through September 24, 1988 and that due to the finding of

forfeiture this entire amount was an overpayment. The Office allowed appellant 30 days for a response or to request a prerecoupment hearing. Appellant did not respond. By decision dated November 14, 2006, the Office finalized the preliminary determination of overpayment in the amount of \$51,828.22. It stated:

“The sum of \$200.00 will be withheld from your continuing compensation payments effective December 23, 2006. \$107.70 was deducted from your compensation checks in error for the period October 2 through November 25, 2005. The total compensation withheld in error in the amount of \$1,650.50 has been applied towards the balance of your outstanding debt. Therefore, your outstanding overpayment debt is \$50,177.72.”

Appellant requested an oral hearing on December 7, 2006 and indicated that he disagreed with the overpayment decision. By decision dated January 9, 2007, the Branch of Hearings and Review denied appellant’s request for an oral hearing noting that he did not request a prerecoupment hearing and that a final decision concerning an overpayment was not subject to review except by the Board.

On appeal, before the Board, appellant noted that the Office had withheld \$1,000.00 per month from his continuing compensation payments beginning in May 1994 and that his overpayment amount had not been reduced by this recovery nor had he been repaid this amount.

LEGAL PRECEDENT -- ISSUE 1

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant’s claim for back and neck strains as well as aggravation of degenerative disc disease. On May 15, 1979 it reduced appellant’s compensation benefits based on his ability to earn wages as a television service and repairman. Appellant alleged that he was totally disabled on March 18, 1999 and requested modification of his wage-earning capacity determination. He did not argue that the original determination was in error or that he had been vocationally rehabilitated. Instead appellant alleged that his work-related condition had worsened. In support of his claim, he submitted a series of reports from his physician, Dr. Thurman, a Board-certified internist, who stated that appellant became totally disabled in 1993 due to his severe rheumatoid arthritis. Dr. Thurman stated that this condition aggravated appellant’s cervical spine degenerative arthritis and his lumbar disc disease and that he was not capable of performing the lifting and walking required by either his date-of-injury position or the selected wage-earning capacity position.

⁴ *Harley Sims, Jr.*, 56 ECAB 320, 323-24 (2005).

Appellant has not demonstrated a material change in the nature and extent of his accepted employment-related condition. In support of his claim of total disability commencing March 18, 1999, he asserted that there had been a change in the nature and extent of the injury-related condition from one of partial disability to total disability. The medical evidence submitted by appellant, however, establishes that his total disability is related to his rheumatoid arthritis and not due to his federal employment.

The Board finds that the medical evidence from Dr. Thurman establishes that appellant's physical worsening from partial to total disability was due his condition of rheumatoid arthritis. The fact that appellant's condition worsened to total disability, however, is not sufficient for him to meet his burden of proof to establish entitlement to additional compensation from the Office for total disability. He must show that the material change in his condition constituted a natural consequence arising from his former federal employment.

It is an accepted principle of workers' compensation law and the Board has so recognized that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁵ As is noted by Professor Larson in his treatise: "[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."⁶

The reports of Dr. Thurman state that appellant's change in his back condition was not due to the natural progression of his accepted employment-related injury for which he had been found to be partially disabled with a wage-earning capacity based on his ability to perform work as a television service and repairman. Rather, the medical reports establish that his back condition worsened due to his nonemployment-related rheumatoid arthritis. This evidence clearly establishes that appellant's progression from partial disability to a total disability for work had no relationship to residuals of his accepted employment-related injury. The Board finds that appellant's rheumatoid arthritis constitute an independent intervening cause for his increased disability and worsening back condition. Therefore, appellant's total disability for work as of March 1999 was due to a subsequent nonemployment injury and is not compensable beyond his wage-earning capacity as established in 1979.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office's implementing regulation provides as follows:

"(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement,

⁵ A. Larson, *The Law of Workers' Compensation* § 13.00 (2000); Dana Bruce, 44 ECAB 132, 145 (1992).

⁶ *Id.* at § 13.11(a).

omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”⁷

If a Form CA-1032 is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.⁸

ANALYSIS -- ISSUE 2

In the November 29, 1999 decision,⁹ the Board found that appellant received an overpayment of compensation for the years 1986 and 1987 because he forfeited his compensation during this period. The Board further found that appellant was at fault in the creation of the overpayment and that therefore this overpayment was not subject to waiver. The issue before the Office on remand from the Board’s November 29, 1999 decision was the amount of the overpayment for the years 1986 and 1987.

The Office properly found that appellant signed CA-1032 forms on December 12, 1986, February 5, 1987 and September 24, 1988, which failed to report his earnings in 1986 and 1987. As noted above, appellant is responsible for repaying the compensation received during the entire 15-month period covered by each of these forms, from September 12, 1985 through September 24, 1988. The Office calculated the amount of compensation received by appellant during this period to be \$51,828.22. As the entire amount of compensation received from September 12, 1985 through September 24, 1988 is an overpayment, the Board finds that the Office adequately calculated and explained the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The method by which the Office may recover overpayments is defined by regulation. The applicable regulations, 20 C.F.R. § 10.441(a) provides as follows:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or attention is called to the same. If no refund is made [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”

⁷ 20 C.F.R. § 10.529.

⁸ *Ronald E. Ogden*, 56 ECAB 278, 285 (2005).

⁹ Docket No. 97-2760 *see supra* note 1.

ANALYSIS -- ISSUE 3

The Board finds that the Office has not properly considered the facts of this case in determining appellant's repayment schedule in order to minimize hardship. The Office has previously recovered from appellant's compensation benefits \$1,000.00 per month beginning in May 1994 as noted in the May 27, 1994 and July 29, 1997 decisions of the Office. In the November 14, 2006 decision, it did not consider this sum which had already been collected from appellant in calculating the rate of his recovery, but did include a much lesser sum erroneously collected of \$1,650.50. On remand, the Office should determine the exact amount previously collected from appellant beginning in 1994 and reduce his current overpayment by this amount before determining an appropriate recovery schedule in order to minimize any hardship on him in repaying his remaining overpayment of \$50, 177.72.

LEGAL PRECEDENT -- ISSUE 4

Section 10.440(b) of the Office's regulations provides that the only review of a final decision concerning an overpayment is to the Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such a decision.¹⁰ The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.¹¹

ANALYSIS -- ISSUE 4

The Office issued a final overpayment decision in this case on November 14, 2006. Appellant requested an oral hearing regarding his overpayment on December 7, 2006. By decision dated January 9, 2007, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that the only review of the November 14, 2006 decision was by the Board. As noted above, this decision is in accordance with the Office's regulations and the findings of the Board. As appellant was not entitled to an oral hearing following the final overpayment decision of November 14, 2006, the Branch of Hearings and Review properly denied his request on January 9, 2007.

CONCLUSION

The Board finds that the Office properly denied appellant's request for modification of his 1979 wage-earning capacity determination. The Board further finds that the Office properly calculated the amount of the overpayment for the years 1986 and 1987 as \$51,828.22. The Board further finds that the Office must consider amounts previously collected from appellant in determining his recovery schedule in order to reduce hardship on appellant. Additionally, the Board finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

¹⁰ 20 C.F.R. § 10.440(b). *See also Jan K. Fitzgerald*, 51 ECAB 659 (2000).

¹¹ *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2007 and September 15, 2006 decision of the Office of Workers' Compensation Programs are affirmed. The November 14, 2006 decision is affirmed in part and remanded for further action consistent with this decision of the Board.

Issued: August 8, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board