U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KACY L. DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, MI

Docket No. 99-2140; Submitted on the Record;
Issued October 16, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation benefits in the amount of $2,795.78; (2) whether the Office properly determined that appellant was not without fault in the creation of the overpayment in the amount of $2,795.78; and (3) whether the Office properly suspended appellant's compensation benefits effective May 6, 1999 for obstruction of a medical examination.

This case has been before the Board on a prior appeal. In a decision dated April 21, 1998, the Board found that appellant established a factor of employment within the performance of duty and remanded the case to the Office for review and appropriate development.[1]

Following development of the case, the Office issued a July 9, 1998 decision wherein it accepted appellant's claim for a prolonged depressive reaction ceasing by September 30, 1995 when appellant recovered and was released for work. The Office noted that appellant was entitled to receive compensation benefits for the period February 9 through September 30, 1995. Appellant subsequently submitted a Form CA-7 for compensation for the period September 30, 1995 through June 21, 1996. By decision dated September 10, 1998, the Office denied appellant's claim for continued compensation benefits beyond September 1995 for the reason that appellant had been released to return to work by her attending physician and no remaining disability for work due to the accepted emotional condition remained after such period. In a subsequent decision of October 26, 1998, the Office, pursuant to section 8128 of the Federal

[1] Docket No. 96-1212 (issued April 21, 1998). The history of the case is contained in the prior decisions and is incorporated by reference.

Employees' Compensation Act,[2] vacated its decision of September 10, 1998 and reopened appellant's claim for further development.[3]

In a letter dated September 24, 1998, the Office informed appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of $2,795.78 as she was paid for 240 hours of leave/holiday time during the period May 1 through June 9, 1995 while receiving compensation. The Office further concluded that appellant was at fault as she should have known that she was not entitled to both compensation and leave pay at the same time. By decision dated October 28, 1998, the Office finalized its determination that an overpayment of $2,795.78 occurred and that appellant was at fault as she knew or should have known that she was not entitled to double pay for the same time period.

The Office prepared a November 3, 1998 statement of accepted facts which set forth factors accepted as arising in the performance of duty. The Office also listed factors which were not accepted as factors of employment. Appellant underwent a second opinion evaluation by Dr. Robert S. Burnstein, a Board-certified psychiatrist, whose reports the Office subsequently rejected as the physician failed to provide an adequate and clear response to the Office's questions after three attempts were made.

The Office prepared a November 3, 1998 revised statement of accepted facts along with a list of questions. By letter dated March 9, 1999, appellant was notified by the Office that she was being referred to Dr. Saul Z. Forman, a Board-certified psychiatrist, for a second opinion medical examination scheduled on March 17, 1999. She was advised that she could arrange to have a physician of her choosing present and to contact the Office if she had to cancel or reschedule the examination. Appellant was advised that if she refused or obstructed the examination, her right to compensation under the Act would be suspended until the refusal or obstruction stopped. In a subsequent letter of March 24, 1999, she was notified by the Office that her appointment with Dr. Forman was rescheduled for April 16, 1999 and that she could have the examination audio taped. Appellant was readvised of the parameters concerning second opinion examinations.

In an April 19, 1999 memorandum of telephone call, an Office claims examiner noted that a staff member for the physician referral service called to say that appellant failed to show up for her second opinion examination on April 16, 1999 and did not contact either the physician's office or the physician referral service Ricwel Corporation. Written verification of appellant's failure to attend the April 16, 1999 appointment was also received.

In an April 19, 1999 letter, the Office advised appellant that she did not attend her scheduled April 16, 1999 appointment at Dr. Forman's office and failed to contact either

[2] 5 U.S.C. § 8128.

[3] The record reflects that appellant requested a hearing from the Branch of Hearings and Review on September 14, 1998 following receipt of the September 10, 1998 decision. In a letter of December 16, 1998, the Branch of Hearings and Review noted that as the Office accepted appellant's claim on October 26, 1998, there was no basis for an appeal. The record further reflects that the Office had issued an overpayment decision of October 28, 1998. Inasmuch as appellant is not appealing this decision, the Board will not address it.

Dr. Forman's office, their Office or the Ricwel Corporation. She was provided 14 days within which to provide a written explanation for her failure to undergo the examination of April 16, 1999. No response was received.

By decision dated May 6, 1999, the Office found that appellant had obstructed an examination by Dr. Forman and failed to establish good cause for refusing to undergo the medical evaluation. She was advised that her eligibility for benefits under the Act was suspended for the period of the obstruction. However, appellant would be eligible for benefits once the obstruction ceased and she reported for the examination.[4]

The Board finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of $2,795.78 for the time period May 1 through June 9, 1995.

In this case, the Office's worksheet, official time records from the employing establishment and even appellant indicated that she received leave and holiday pay for 240 hours between May 1 through June 9, 1995. Inasmuch as the record is clear that appellant received compensation and pay for sick leave and holiday pay during the period May 1 through June 9, 1995, the Board finds that appellant received an overpayment of compensation for that period which totaled $2,795.78.

The Board further finds that the Office properly determined that appellant was not without fault in the creation of the overpayment in the amount of $2,795.78.

Section 8129(a) of the 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.[5] 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."[6] Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.[7] In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because she 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.[8]

[4] The record reflects that following her appeal before the Board, appellant underwent the second opinion evaluation with Dr. Forman on June 24, 1999. The record further reflects that appellant filed two new claims for stress which the Office filed under separate claim numbers.

[5] 5 U.S.C. § 8129.

[6] 5 U.S.C. § 8129(b).

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

[8] 20 C.F.R. § 10.320(c)(1).

In determining whether an individual is at fault, section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant part:

> "(a) Although the Office may have been at fault in making the overpayment that fact does not relieve the overpaid individual ... from liability for repayment if such individual is not without fault.
>
> "(b) *With fault*. In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:
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> > (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) [A]ccepted a payment which the individual knew or should have been expected to know was incorrect."[9]

In the instant case, the Office applied the third standard -- appellant accepted a payment which she knew or should have known was incorrect -- in finding appellant to be at fault in the creation of the overpayment. After consideration of all the particular circumstances surrounding the overpayment, the Board finds that the facts of this case establish that appellant knew or should have been expected to know that she accepted an incorrect compensation payment during the period May 1 through June 9, 1995. The Act provides that an employee who receives sick leave pay may not receive compensation for the same period.[10] In her October 8, 1998 letter disputing the charge of overpayment, appellant acknowledged that she received 232 hours of sick leave and 8 hours holiday pay during the time period in question.[11] Inasmuch as appellant was receiving sick leave pay for 232 hours and 8 hours holiday pay, appellant should have known that she could not receive compensation from the Office for the same period. The Board finds that the Office properly determined that appellant was not without fault in the acceptance of a payment that she knew or should have been expected to know was incorrect. As appellant was not without fault with respect to this overpayment, recovery of the overpayment may not be waived.

The Board also finds that the Office properly suspended appellant's eligibility to compensation on the grounds that she obstructed a medical examination.

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[9] 20 C.F.R. § 10.320(b).

[10] *See* 5 U.S.C. § 8116.

[11] Although appellant indicated that she wanted to buy back her leave, the record does not indicate that appellant did so.

Section 8123(a) of the Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary.[12] The determination of the need for an examination, the type of examination, the choice of the locale and the choice of medical examiners are matters within the discretion of the Office. The only limitation on this authority is that of reasonableness.[13] Section 8123(d) of the Act provides: "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation … is suspended until the refusal or obstruction stops."[14] If an employee fails to appear for an examination, the Office must request the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.[15]

The Board has reviewed the evidence of record and finds that appellant obstructed the April 16, 1999 examination scheduled with Dr. Forman. The record reflects that the Office further developed the claim after its decision of October 26, 1998 in which it vacated its prior decision denying appellant's claim for continued compensation benefits beyond September 1995. The Office properly prepared a November 3, 1998 revised statement of accepted facts and list of questions setting forth its findings on the allegations made by appellant and noting findings previously made by the Board. By letter dated March 24, 1999, appellant was notified by the Office that it had rescheduled a medical appointment with Dr. Forman on April 16, 1999 for a second opinion evaluation regarding her claimed emotional condition. In a telephone memorandum of April 19, 1999 and fascimile of April 19, 1999, the physician referral service, the Ricwel Corporation, advised that appellant failed to appear for the scheduled medical appointment. Appellant failed to respond to the Office's letter of April 19, 1999 advising that she had 14 days to provide a written explanation for her failure to undergo the scheduled examination.[16]

As noted, this claim has been developed by the Office, as instructed by the Board, through the gathering and review of additional evidence pertaining to appellant's claim of an employment-related emotional condition. As appellant's claim pertains to her eligibility for benefits under the Act, the Office has been delegated the statutory authority to require that she submit to an examination at such times as may be reasonably required. Her refusal to undergo an examination by Dr. Forman on April 16, 1999 effectively precludes the Office from further development of her claim as was instructed by the Board. For these reasons, the Office properly suspended her eligibility for compensation.

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[12] 5 U.S.C. § 8123(a).

[13] *See Eva M. Morgan*, 47 ECAB 400 (1996); *Dorine Jenkins*, 32 ECAB 1502 (1981).

[14] 5 U.S.C. § 8123(d).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

[16] The Board notes that appellant called the Office on May 26, 1999 advising that she would attend the second opinion examination if the Office rescheduled. However, as this evidence was not before the Office at the time of the May 6, 1999 decision, the Board is precluded from reviewing this evidence; *see* 20 C.F.R. § 501.2(c). Moreover, it is noted that the telephone call was not a written response from appellant and was past the 14-day response time.

The decisions of the Office of Workers' Compensation Programs dated May 6, 1999 and October 28, 1998 are hereby affirmed.

Dated, Washington, DC
October 16, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member