

**United States Department of Labor
Employees' Compensation Appeals Board**

GARY D. BOTTOMS, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Little Rock, AR, Employer**

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**Docket No. 05-247
Issued: April 6, 2005**

Appearances:

Gary D. Bottoms, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 2, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 3, 2004 merit decision finding that he received a \$190.24 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$190.24 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 19, 2000 appellant, then a 51-year-old linen worker, filed an occupational disease claim alleging that he sustained injury to his knees due to pushing and pulling carts at

work. The Office accepted appellant's claim for aggravation of bilateral patellofemoral syndrome and paid appellant compensation.¹

The record contains a remittance voucher which shows that on September 21, 2003 the Office paid a pharmacy claim for drugs in the amount of \$190.24. It appears that a copy of the voucher was sent to appellant.

In a letter dated May 24, 2004, the Office advised appellant of its preliminary determination that he received a \$190.24 overpayment of compensation when he was reimbursed for pharmacy services in error. The Office also made a preliminary determination that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. It indicated that appellant accepted a payment which he knew or should have known was incorrect.²

In a letter dated November 3, 2003, appellant stated that he received a letter from the Office in late September 2003 "issuing me a check in the amount of \$190.24." He asserted that he thought the check "was what was coming back to me when I had lived in Waldron, AK and was being treated for my medical problems that I still am having...." Appellant noted that he received the October 21, 2003 letter from the Office which explained that an error had been made. Appellant asserted that he was not able to pay back the money.

By decision dated August 3, 2004, the Office finalized its preliminary determination that appellant received a \$190.24 overpayment of compensation and that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.³

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."⁴ In order to be entitled to

¹ The record reveals that appellant had several claims for employment injuries alleged to have occurred between 1993 and 2000, but it is unclear from the record if any of these claims were accepted by the Office or currently active.

² The record contains an October 21, 2003 letter in which the Office stated that on September 19, 2003 appellant was incorrectly sent a \$190.24 check for pharmacy services rendered at Kroger Pharmacy in Maumelle, AK. The Office requested that appellant return the check to the Office or, if it had already been deposited, send another check in an equal amount to the Office.

³ The Office also indicated that appellant should send a \$190.24 check to the Office within 30 days or, if he was unable to refund the entire overpayment, to contact the Office within 30 days to make arrangements to effectuate the recovery, such as through installment payments. The Office did not, however, make any final determination regarding the method of recovery of the overpayment and, therefore, this matter is not presently before the Board. See 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8103.

reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.⁵

ANALYSIS -- ISSUE 1

The record reveals that in late September 2003 the Office paid the Kroger Pharmacy in Maumelle, AK for \$190.24 of pharmacy services properly rendered as a benefit in connection with appellant's accepted knee injury. The record further reveals that appellant received and retained a check for \$190.24 as compensation for these same pharmacy services.⁶ There is no indication that appellant paid any out-of-pocket expenses for these particular pharmacy services. Under these circumstances, both Kroger Pharmacy and appellant would not be able to receive payment for the \$190.24 in same pharmacy services and the Office properly found that appellant received a \$190.24 overpayment of compensation as a result.

LEGAL PRECEDENT -- ISSUE 2

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.⁷ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."⁸ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal 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 he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

⁵ *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

⁶ Although the actual check does not appear in the record, appellant explicitly indicated that he received the check.

⁷ 5 U.S.C. § 8129(a).

⁸ 5 U.S.C. § 8129(b).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”⁹

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant accepted a payment which he knew or should have known to be incorrect in making its determination that he was at fault in creating the \$190.24 overpayment. The record contains evidence that appellant should have known he received an improper payment in that a remittance voucher was sent to him which shows that on September 21, 2003 the Office paid a pharmacy claim for drugs in the amount of \$190.24. Appellant admitted to receiving a \$190.24 check but asserted that he thought the check “was what was coming back to me when I had lived in Waldron, AK and was being treated for my medical problems that I still am having....” However, he did not provide any further explanation of what particular allowable payments he felt that the \$190.24 check was intended to cover. A review of the record reveals that medical facilities which provided services in connection with appellant’s accepted knee condition were directly paid by the Office and there is no evidence that appellant paid out-of-pocket expenses and later sought reimbursement. Under these circumstances, the Office properly found that appellant was at fault in the creation of the overpayment and therefore it was not subject to waiver.¹¹

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$190.24 overpayment of compensation. The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

⁹ 20 C.F.R. § 10.433(a).

¹⁰ 20 C.F.R. § 10.433(c).

¹¹ See *supra* note 8 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 3, 2004 decision is affirmed.

Issued: April 6, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member