

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

G.M., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, CLAREMORE INDIAN)
HOSPITAL, Claremore, OK, Employer)

**Docket No. 06-1892
Issued: January 18, 2007**

Appearances:
Appellant, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 16, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 23, 2006. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$2,352.05 for the period September 1 to October 1, 2005; and (2) whether the Office properly found that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 50-year-old ultrasonographer, injured his lower back while helping to move a patient off of an ultrasound examination table on February 22, 2005. By letter dated May 11, 2005, the Office accepted the claim for lumbar strain and commenced payment for appropriate compensation for temporary total disability. The May 11, 2005 Office letter informed appellant,

under the heading “RETURNING TO WORK,” that he had the responsibility to inform the Office immediately upon returning to work. This portion of the letter specifically stated:

“You are expected to return to work (including light-duty or part-time work, if available) as soon as you are able. Once you return to work or obtain new employment, notify this Office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

A statement of accepted facts dated May 18, 2006 indicates that appellant underwent discectomy and fusion at L5-S1 on June 21, 2005 and that he returned to work on October 7, 2005.

In a preliminary notice of overpayment dated May 22, 2006, the Office made a finding that appellant was overpaid in the amount of \$2,352.05 because he returned to work for four hours a day on September 1, 2005 and continued to work four hours a day until September 25, 2005. It found that appellant was at fault in the matter because he should have been aware that the payments he had been receiving were incorrect. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. It further advised appellant that, when he was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a preresumption hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the May 22, 2006 letter.

Appellant submitted a number of documents to the record including a bank statement indicating that he received a direct deposit payment on September 30, 2005 in the amount of \$3,226.60.

In a decision dated June 23, 2006, the Office finalized the preliminary determination regarding the overpayment of \$2,352.05. It further found that appellant was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees’ Compensation Act provides that an employee who receives continuing compensation, or has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, may not receive salary, pay or remuneration of any type from the United States.¹

¹ 20 C.F.R. § 10.400(b).

Office procedures state: “The reason that the overpayment occurred must be clearly stated in the preliminary decision and the [Office] should provide a clearly written explanation indicating how the overpayment was calculated.”²

ANALYSIS -- ISSUE 1

The Board finds that the Office did not follow its procedures when it released the May 22, 2006 letter notifying appellant of its preliminary findings and the final decision dated June 23, 2006. Specifically, the Office did not “provide a clearly written explanation indicating how the overpayment was calculated.” The May 22, 2006 letter informed appellant that he was overpaid \$2,352.05 because he continued to receive compensation for temporary total disability after he returned to work on September 1 to October 7, 2005. While the record indicates that appellant may have returned to work for four hours a day on September 1, 2005, the statement of accepted facts contains contradictory information that he did not return to work until October 7, 2005.

The Office did not submit documentation regarding the amount of compensation that was paid during this period and how the overpayment was calculated. It did not include the requisite worksheets demonstrating the formula by which it arrived at the total of \$2,352.05; *i.e.*, how the Office derived the exact amount of overpayment from temporary total disability compensation for the respective period of overpayment and how the Office calculated the total amount of appellant’s overpayment.³ The evidence of record submitted by appellant suggests that he received a direct deposit payment on September 30, 2005 of \$3,226.60. If in fact appellant was only entitled to payment for four hours of wage loss per day, the Office offered no findings to support an overpayment in the amount of \$2,352.05. The Office provided no documentation indicating the basis of the overpayment and failed to offer appellant a clear formula or explanation as to how it arrived at the sum of \$2,352.05.

² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004).

³ *Id.* at Chapter 6.200 (September 1994) states:

“When an overpayment is discovered, the claims examiner (CE) will enter information concerning the correct period of entitlement and the actual period paid on Form CA-24, CA-25, whichever form is appropriate, and arrange for certification of this entry. The mathematics involved in the calculation of the overpayment must be documented in writing in the case file. In performing these calculations, use should be made of the worksheet calculation capabilities of the Automated Compensation Payment System (ACPS), for compensation paid since 1981; and/or of the ACPS *Shadrick* (CA-816) calculation capability for compensation payments for any prior period of time.”

Accordingly, because the Office failed to follow procedures in calculating the overpayment and did not provide a clear explanation to appellant, the Board will set aside the Office's June 23, 2006 decision on the issue of overpayment and amount and remand the case for further development.⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that an overpayment must be recovered unless 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. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations⁶ provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

Failed to provide information which the individual knew or should have known to be material; or

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

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. It is unclear from the finding of facts but it appears that the Office is finding that single direct deposit payment appellant received on September 30, 2005 created the overpayment in question.

⁴ As the Board has remanded the case on the issues of fact and amount of overpayment, it need not consider the issue of fault of overpayment.

⁵ 5 U.S.C. § 8129.

⁶ 20 C.F.R. § 10.433.

Upon his receipt of the first direct deposit in the amount of \$3,226.60 for the monthly period commencing September 1, 2005 fault may not be imputed because appellant would not necessarily have known of the pending payment before receipt. However, after the initial payment it could be presumed that he knew he was not entitled to the amount of compensation contained in subsequent direct deposit checks.⁷

CONCLUSION

The Board will set aside the Office's findings on the issues of amount of overpayment and fault. Upon return of the case record, the Office shall further develop the case as necessary and thereafter issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2006 decision of the Office of Workers' Compensation Programs is set aside and remanded in accordance with this opinion.

Issued: January 18, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁷ The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office, or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.