

FACTUAL HISTORY

On April 21, 2004 appellant, a 33-year-old rural carrier, filed a traumatic injury claim alleging that she injured her back while lifting mail from her car. On August 18, 2004 her claim was accepted for lumbar strain and temporary aggravation of degenerative disc disease and she was placed on the periodic rolls.

The Office determined that a conflict in medical opinion existed between appellant's attending physician, Dr. John L. Dunn, a treating physician, and the Office's second opinion physician, Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, as to whether she had any continuing residuals causally related to her accepted injury. On February 27, 2006 the Office notified appellant that she was being referred for an impartial medical evaluation in order to resolve the conflict. The Office advised appellant of her responsibility to attend the appointment and that, if she failed to do so without an acceptable reason, her compensation benefits would be suspended in accordance with 5 U.S.C. § 8123(d). It informed appellant that she had an appointment on March 8, 2006 at 12:00 p.m. with Dr. Michael Jurenovich, a Board-certified osteopath, specializing in orthopedic surgery. Appellant was advised to contact the Office prior to that time if it was necessary to reschedule the appointment. The notice was properly addressed to appellant's address of record and included Dr. Jurenovich's address and telephone number.

The Office was notified that appellant did not attend the scheduled medical examination with Dr. Jurenovich. By letter dated October 10, 2006, the Office proposed to suspend appellant's compensation benefits on the grounds that she failed to attend the medical examination scheduled for March 8, 2006. The Office afforded appellant 14 days to furnish her reasons in writing, with supporting evidence, for failing to attend the examination. The Office advised her that, if her reasons were deemed invalid, then she would be found to be in obstruction of a medical examination and her compensation benefits would be suspended under section 8123(d) of the Federal Employees' Compensation Act until the obstruction ceased. Appellant did not submit any evidence or argument in response to the Office's letter of proposed suspension.

By decision dated February 7, 2007, the Office suspended appellant's compensation benefits, effective that date. It found that appellant failed to attend the medical examination scheduled for March 8, 2006, or to provide written evidence justifying her failure to attend the examination.¹

In a letter dated November 23, 2004, the Office outlined appellant's entitlement to compensation benefits, stating that she would receive compensation in the gross amount of \$549.28 every 28 days, commencing October 31, 2004. Appellant was advised that she should

¹ The Board notes that appellant submitted additional evidence after the Office rendered its February 7, 2007 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36n.2 (1952). Therefore, this new evidence cannot be considered by the Board on appeal. Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

immediately return any payment to which she was not entitled upon return to work. On November 29, 2004 she notified the Office that she had returned to limited duty, four hours per day. However, appellant continued to receive compensation from the Office in accordance with the terms of its November 23, 2004 letter until she voluntarily resigned on July 8, 2005.

An automated computer payment system (ACPS) form, bearing a "run date" of October 11, 2006, reflected compensation payments made to appellant for the period November 28, 2004 through July 9, 2005, in the gross amount of \$4,394.24. The form also indicated that the amount of \$28.80 was withheld for basic life insurance for the same period. A separate worksheet, bearing the run date of October 5, 2006, reflected that appellant was entitled to compensation for November 28, 2004 in the gross amount of \$26.15.

In a letter dated October 11, 2006, the Office asked the employing establishment to provide appellant's leave analysis for the period November 28, 2004 through July 9, 2005. The Office also requested information regarding the current hourly rate for the position held by appellant on November 28, 2004.

In a preliminary overpayment decision dated October 11, 2006, the Office found that appellant had incorrectly received compensation in the amount of \$4,341.42 for the period November 29, 2004 through July 9, 2005, due to the fact that she continued to receive compensation following her return to part-time employment. In the memorandum accompanying the preliminary finding, the Office indicated that it had credited the amount of \$26.67 for basic life insurance deductions, as well as the amount of \$26.15 for compensation owed to appellant for November 28, 2004, against the total gross payments made to her in the amount of \$4,394.24, resulting in a total overpayment of \$4,341.42. The Office also made a preliminary determination of fault in the creation of the overpayment, finding that appellant retained payments that she knew or should have known were erroneous. The Office noted that appellant had been placed on notice of her obligation to return any amounts to which she was not entitled by letter dated November 23, 2004 and that she acknowledged her obligation to do so on November 29, 2004. The Office advised appellant of actions available to her if she believed that she should receive a waiver instead of repaying the overpayment, including requesting a preresoupment hearing. The Office further advised appellant to submit a detailed explanation of her reasons for seeking a waiver; a completed Form OWCP-20; and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

In a letter dated October 17, 2006, the employing establishment stated that appellant's earnings for the period November 28, 2004 through July 9, 2005 were as follows: \$123.44 for the period December 11 through 24, 2004; \$61.72 for the period January 8 through 21, 2005; \$259.84 for the period May 28 through June 10, 2005; and \$64.96 for the period June 11 through 24, 2005, for total payments of \$509.96. Appellant's hourly rate for the period was reportedly \$15.43. The record contains an employing establishment printout reflecting payments made to appellant as described above.

By decision dated November 14, 2006, the Office finalized its decision that an overpayment existed and that appellant was at fault in the creation or acceptance of the overpayment. However, based upon the information provided by the employing establishment, the Office found the total amount of the overpayment to be \$3,573.50, after reducing the gross

overpayment amount of \$3,600.17 by \$794.07, the additional compensation due based on appellant's part-time, limited-duty work schedule and by the amount of \$26.67 for basic life insurance withheld. The Office instructed appellant to repay the total amount within 30 days.

On December 18, 2006 appellant requested a prerecoupment hearing. She stated that she did not realize that she was not entitled to the compensation received, as she worked only eight hours per month.

By decision dated January 29, 2007, an Office hearing representative denied appellant's request for a hearing on the grounds that a final decision concerning overpayment is not subject to the hearing provisions of section 8124(b) of the Act.

LEGAL PRECEDENT -- ISSUE 1

The Act² provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period November 28, 2004 through July 9, 2005. However, the Board finds that the case is not in posture for a decision regarding the amount of overpayment.

Effective October 31, 2004, the Office began paying compensation benefits to appellant for total disability, in the gross amount of \$549.28 every 28 days. When appellant returned to part-time employment on November 29, 2004, she was no longer entitled to receive compensation benefits in the amount originally determined by the Office. Although she informed the Office that she had returned to part-time employment, she continued to receive compensation for total loss of wage-earning capacity until July 9, 2005.

The record reflects that appellant received compensation for the period November 28, 2004 through July 9, 2005 in the amount of \$4,394.24, the amount she would have been entitled to receive had she not resumed part-time employment. The record also reflects that she received income in the amount of \$509.96 during that period of time. Since appellant was not entitled to receive compensation benefits for total disability after her return to part-time employment, the Office properly determined that she received an overpayment of compensation. However, the Office used an improper method to calculate the amount of overpayment, resulting in an incorrect overpayment amount.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

Based upon the information provided by the employing establishment, the Office found the total amount of the overpayment to be \$3,573.50, after reducing the gross amount of \$3,600.17 by \$794.07, the additional compensation due based on appellant's part-time, limited-duty work schedule and by the amount of \$26.67 for basic life insurance withheld. It appears that the Office imputed income to appellant based upon her ability to work an undetermined number of hours per week. The Board notes, however, that the Office did not issue a decision establishing appellant's wage-earning capacity after she notified the Office of her part-time employment; nor did it adequately explain the basis for its overpayment calculation. Although appellant informed the Office that she planned to return to work four hours per day, the evidence of record establishes that she earned only \$509.96 from her part-time employment during the period in question, as opposed to compensation payments in the amount of \$4,394.24 to which she would have been entitled had she not returned to work. This case must be remanded to the Office for a proper calculation of the overpayment amount based on appellant's actual earnings during the period in question.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ provides that 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. Section 10.433 of the Office's implementing regulations⁶ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. 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

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

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the overpayment that occurred between November 28, 2004 and July 9, 2005 and was therefore not entitled to a waiver of the overpayment amount.

Appellant returned to work on November 29, 2005, but admittedly continued to receive compensation based on a total loss of wage-earning capacity. She was on notice, by virtue of the Office's November 23, 2004 letter, of her obligation to return any incorrect payments to the Office and she acknowledged her obligation to do so on November 29, 2004. Appellant's

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433.

actions also indicate that she was aware that she was receiving payments she knew to be incorrect. She notified the Office of her return to work, signaling a change in her entitlement to benefits. Yet, appellant continued to accept the erroneous payments. The Board has consistently held that the Office's erroneous payment of benefits does not excuse an employee from accepting a payment that she knew or should have known to be incorrect.⁷ Under these circumstances, the Board finds that the Office properly found that appellant was at fault in the creation of the overpayment. Therefore, the overpayment was not subject to waiver.

LEGAL PRECEDENT -- ISSUE 3

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.⁸ However, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.⁹

ANALYSIS -- ISSUE 3

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁰ Appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter. Therefore, this Board lacks jurisdiction to review recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

Section 8123 of the Act authorizes the Office to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.¹¹ The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.¹² The Office's federal regulations, at section 10.320, provides that a claimant must submit to examination by a qualified physician as often and at such time and places as the Office considers reasonably necessary.¹³ Section 8123(d) of the Act and section

⁷ See *Ricky Greenwood*, 57 ECAB ____ (Docket No. 05-1739, issued March 10, 2006).

⁸ 5 U.S.C. § 8129(a).

⁹ *Terry A. Keister*, 56 ECAB ____ (Docket No. 04-1136; issued May 23, 2005); see also *Albert Pineiro*, 51 ECAB 310 (2000).

¹⁰ See *Terry A. Keister*, *supra* note 9.

¹¹ 5 U.S.C. § 8123(a).

¹² *James C. Talbert*, 42 ECAB 974, 976 (1991).

¹³ 20 C.F.R. § 10.320.

10.323 of the Office's regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her entitlement to compensation is suspended until the refusal or obstruction ceases.¹⁴ However, before the Office may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.¹⁵ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.¹⁶

ANALYSIS -- ISSUE 4

Following appellant's failure to attend a scheduled medical examination on March 8, 2006, the Office suspended her entitlement to compensation benefits, effective February 1, 2007, pursuant to section 8123(d) of the Act. The Board finds that the suspension of benefits was proper.¹⁷

The Board notes that the Office determined that a conflict in medical opinion existed between appellant's attending physician and the Office's second opinion physician as to whether she had any continuing residuals causally related to her accepted injury. The impartial medical examination was reasonably necessary to determine whether appellant had continuing employment-related residuals. Under section 8123 of the Act and its implementing regulations, appellant was required to attend the examination.¹⁸

On February 27, 2006 the Office notified appellant that she was being referred for an impartial medical evaluation in order to resolve the conflict in medical opinion between her treating physician and the Office's second opinion physician on the issue of continuing residuals. The Office informed her of her obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or obstruction of the examination. The Office advised appellant of the date and time of her scheduled March 8, 2006 appointment with Dr. Jurenovich. Appellant was also provided with Dr. Jurenovich's address and telephone number. As noted, she did not appear for the appointment, nor did she attempt to reschedule the appointment prior to the designated time. Appellant's refusal to submit

¹⁴ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

¹⁶ *Id.*; see *Scott R. Walsh*, 56 ECAB ____ (Docket No. 04-1962, issued February 18, 2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

¹⁷ The Board notes that appellant was not actually in receipt of compensation at the time when the Office issued its decision suspending entitlement to compensation. However, section 8123(d) of the Act addresses not only an employee's receipt of benefits, but also her entitlement to benefits. The Board further notes that the February 7, 2007 decision suspended entitlement to benefits effective February 7, 2007. The Board surmises that the Office's reference to February 1, 2007 as the suspension date in the body of the decision, was a typographical error, harmless in nature.

¹⁸ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.320.

to the medical examination warrants suspension of entitlement to compensation unless she can establish good cause for her failure to report at the scheduled time.¹⁹

The Board finds that appellant did not establish good cause for her failure to report to the scheduled examination with Dr. Jurenovich. The Office notified her on October 10, 2006 that it proposed suspension of her entitlement to compensation benefits. Appellant was given 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. She provided no evidence to explain why she was unable to attend the scheduled medical examination.

The Office, in its February 27, 2006 letter, appropriately directed appellant to report for an impartial medical examination on March 8, 2006. Appellant failed to appear for the examination on the scheduled date and did not provide adequate reasons for not complying with the Office's directive. The Office properly determined that appellant refused to submit to a scheduled medical examination without good cause and properly suspended her right to compensation benefits effective February 7, 2007.²⁰

The Board finds that appellant received proper notice of her rights and responsibilities and proper notice of the scheduled examination with Dr. Jurenovich. The Office followed established procedures in suspending appellant's entitlement to compensation under 5 U.S.C. § 8123(d). The Board will affirm the Office's February 7, 2007 decision suspending entitlement to compensation effective that same date.

LEGAL PRECEDENT -- ISSUE 5

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 (concerning reconsiderations) do not apply to such a decision.²¹ 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.²²

ANALYSIS -- ISSUE 5

On December 18, 2006 appellant requested a precoupment hearing, after the Office's November 14, 2006 overpayment decision. By decision dated January 29, 2007, the Office denied her request for a hearing, based on its finding that a final overpayment decision is not subject to the hearing provisions of section 8124. The Office's regulations at section 10.440(b)

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

²⁰ 5 U.S.C. § 8123; *see Maura D. Fuller*, 54 ECAB 386 (2003).

²¹ 20 C.F.R. § 10.440(b).

²² *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

provides that the only review of a final decision concerning an overpayment is by the Board.²³ The regulations further provides that the hearing provisions of section 8124(b) do not apply to an overpayment decision.²⁴ 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.²⁵ In view of the limitations on review rights set forth in section 10.440(b), the Board finds that the Office properly denied appellant's request for an oral hearing made after issuance of the final overpayment decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period November 28 through July 9, 2005 and that she was at fault in the creation of the overpayment and therefore not entitled to waiver. However, the case is not in posture for a decision regarding the amount of overpayment and the case must be remanded to the Office for a proper calculation in accordance with the terms of this decision. The Board further finds that, as appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, it lacks jurisdiction to review recovery of the overpayment. The Board also finds that the Office properly suspended appellant's entitlement to compensation benefits effective February 1, 2007, as she failed to attend a scheduled medical examination without showing good cause for her refusal and that the Office properly denied her request for a prerecoupment hearing after issuance of a final overpayment decision.

²³ 20 C.F.R. § 10.440(b).

²⁴ *Id.*

²⁵ *Charles E. Nance, supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of overpayment and the issue of fault. The decision is set aside and remanded to the Office for a determination as to the amount of overpayment.

IT IS FURTHER ORDERED that the decisions of the Office of Workers' Compensation Programs dated February 7 and January 29, 2007 are affirmed.

Issued: November 20, 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