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M.L., Appellant	)	
	)	
and	)	Docket No. 09-839
	)	Issued: October 20, 2009
DEPARTMENT OF HOMELAND SECURITY,	)	
CITIZENSHIP & IMMIGRATION SERVICES,	)	
Fresno, CA, Employer	)	
	)	

Case Submitted on the Record

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

On February 9, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated October 24 and December 17, 2008 concerning an overpayment of compensation. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$2,124.75 for the period May 2 through July 5, 2008; (2) whether the Office properly found appellant was at fault in creating the overpayment; and (3) whether the Office properly denied appellant's request for a precoupment hearing before an Office hearing representative.

FACTUAL HISTORY

Appellant, a 43-year-old adjudications officer, filed a claim for benefits on May 24, 2004, alleging that he experienced pain in his fingers, both hands, wrists and elbows while typing at a computer on April 24, 2004. The Office accepted the claim for bilateral carpal tunnel syndrome and bilateral ulnar nerve lesion. In the July 25, 2005 letter, advising appellant that he would be paid temporary total disability compensation, it 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."

Appellant returned to work for intermittent periods. He began working part time, on light duty, as of February 14, 2006, for six hours per day, with restrictions of no keyboarding.

In an interoffice memorandum/payroll worksheet dated July 16, 2008, the Office stated that appellant had returned to working eight-hour days as of May 2, 2008. It indicated that he received biweekly compensation in the amount of \$915.00, that he had an outstanding overpayment lasting 65 days, and that his total overpayment was \$2,124.11. A May 1, 2008 work restriction evaluation, received by the Office on July 16, 2008, indicated that appellant's attending physician increased his daily permitted work hours from six to eight.

On September 19, 2008 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$2,124.11 for the period May 2 through July 5, 2008 because he received compensation to which he was not entitled. It found that appellant was at fault in the matter because he continued to receive compensation for partial disability when he should have been aware, after returning to work on May 12, 2008, that the payments he had been receiving were incorrect. The Office calculated the amount of the overpayment by taking his biweekly payment from May 12 to July 5, 2008, \$915.00, adding it to his biweekly payment from May 12 to July 5, 2008, \$915.00, then adding the prorated figure for the nine days that he worked full time during the 28-day period from April 13 to May 10, 2008, which amounted to \$294.11, creating an overpayment of \$2,124.11. It advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. The Office 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. It informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a preredoupment 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 September 19, 2008 letter. Appellant did not respond to this letter within 30 days.

In a decision dated October 24, 2008, the Office finalized the preliminary determination regarding the overpayment of \$2,124.11.

On November 7, 2008 appellant requested a prerecoupment hearing. He indicated that he did not submit the requested documentation pertaining to his claim because he allegedly did not receive the Form OWCP-20 and questionnaire which the Office was supposed to have attached to its September 19, 2008 preliminary notice.

By decision dated December 17, 2008, an Office hearing representative denied appellant's request for a hearing. He stated that its September 19, 2008 letter indicated that appellant had 30 days to request a hearing, but did not do so. The hearing representative stated that appellant was not entitled to a hearing at this stage of his adjudication under section 8124(b) and that his only right of appeal was to the Board.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under the Act is payable when the employee starts to lose pay.¹ Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.² Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.³

ANALYSIS -- ISSUE 1

By letter dated September 19, 2008, the Office notified appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$2,124.11 for the period May 2 through July 5, 2008. The Board notes that appellant contends on appeal, as he did before the Office, that he did not receive a Form OWCP-20 with this notice, despite the fact that it was listed as an enclosure on the correspondence containing the preliminary notice of overpayment. The Board rejects this contention. Appellant has provided no evidence supporting this contention and there is no evidence that he contacted the Office about this alleged omission within 30 days of receiving the preliminary notice of overpayment.⁴ The notice of preliminary overpayment was sent to appellant's last address of record and was not returned as undeliverable. Thus, under the mailbox rule, the presumption is that he received proper notification of the overpayment as well as the attached Form OWCP-20.⁵ The record shows that appellant did not disagree with the fact or amount of the overpayment or submit new evidence or argument in

¹ 20 C.F.R. § 10.401(a) (2003).

² *Id.* at § 10.403(b) (2003).

³ *Id.* at § 10.500(a) (2003).

⁴ Appellant also contends in his appeal to the Board that he received checks as late as four, six or eight weeks after the pay period, so that he had no initial knowledge that there had been an overpayment. He also contends that he asked for written proof of the overpayment, but received no response to this request. As appellant has submitted no evidence to support these allegations, the Board rejects appellant's contentions.

⁵ Under the mailbox rule, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. See *James A. Gray*, 54 ECAB 277 (2002); *Charles R. Hibbs*, 43 ECAB 699 (1992).

support of his contention within 30 days; nor did he, within 30 days, request a prerecoupment hearing.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,124.11 for the period May 2 through July 5, 2008. The record shows that appellant received an overpayment during the period in question because he continued to receive checks for partial disability compensation after he returned to full-time, 40-hour per week, work on May 2, 2008. The Office calculated the \$2,124.11 overpayment by totaling the amount of temporary total disability compensation appellant received during the period May 2 through July 5, 2008, \$2,124.11, in accordance with the procedure outlined above. Based on this determination, it properly found that appellant received an overpayment of compensation in the stated amount during that period.⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁷ 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.⁸

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations 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:

- (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 provide information which the individual 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.”⁹

⁶ Appellant argues in his appeal to the Board that he did not receive the OWCP-20 form and questionnaire which were supposed to be attached with the Office’s September 19, 2008 letter. The Board rejects this argument. The mailbox rule.

⁷ 5 U.S.C. § 8129(a)-(b).

⁸ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁹ 20 C.F.R. § 10.433(a).

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have expected to know he was not entitled to.¹⁰ Appellant was informed by the Office on July 25, 2005 that he was required to notify it as soon as he returned to a 40-hour workweek; he was also informed that, if he received a compensation check which included payment for a period in which he had worked, he was required to return it to the Office immediately to prevent an overpayment of compensation. He returned to full duty on May 2, 2008 but did not report his return to work to the Office or return any compensation received after that date; he therefore knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to a 40-hour workweek. For these reasons, the Board finds that the Office properly found appellant at fault in the creation of the overpayment in the amount of \$2,124.11.

LEGAL PRECEDENT -- ISSUE 3

Under 20 C.F.R. § 10.439, a claimant who has been issued preliminary notice that an overpayment of compensation has occurred is entitled to a prerecoupment hearing at which an Office hearing representative will consider all issues in the claim on which a formal decision has been issued. Such a hearing will thus fulfill the Office's obligation to provide prerecoupment rights and a hearing under 5 U.S.C. § 8124(b).

Pursuant to 20 C.F.R. § 10.440, the only review of a final decision concerning an overpayment is to the Board. The provisions of 5 U.S.C. § 8124(b) do not apply to such a decision.

ANALYSIS -- ISSUE 3

In the present case, because appellant requested a hearing after the Office issued its final overpayment decision on October 24, 2008, he is not entitled to a hearing. The Office hearing representative properly found that appellant's only review of the October 24, 2008 overpayment decision was to the Board.¹¹ The Board therefore affirms the Office's December 17, 2008 decision denying appellant an oral hearing by an Office hearing representative.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,124.11 for the period May 2 through July 5, 2008. The Board finds that the Office properly determined that appellant was at fault in

¹⁰ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹¹ See 5 U.S.C. § 10.440. See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 2003, May 2004, September 2004, June 2009).

the creation of the overpayment. The Board finds that the Office properly denied appellant's request for a prerecoupment hearing before an Office hearing representative.¹²

ORDER

IT IS HEREBY ORDERED THAT the December 17 and October 24, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 20, 2009
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

¹² On appeal, appellant has submitted new evidence. However, the Board cannot consider new evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1).