U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR R. THURMAN and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 96-1219; Submitted on the Record;
Issued November 13, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether an overpayment of compensation occurred when the Office of Workers' Compensation Programs reimbursed appellant for travel expenses incident to the securing of vocational rehabilitation services while he was already in receipt of the maximum allowance authorized under 5 U.S.C. § 8111(b); and if so, (2) whether appellant was with fault in the matter of the overpayment, thereby precluding waiver of recovery.

On August 18, 1992 appellant, a shipfitter, sustained an injury in the performance of duty. The Office accepted his claim for sprain of both knees and lumbosacral back strain. Appellant received compensation for temporary total disability on the periodic rolls. While undergoing vocational rehabilitation, he received a maintenance allowance of $200.00 a month.

On September 29, 1994 appellant wrote that he was receiving the maximum allowance payable but that the allowance covered less than half of his actual travel expenses. He acknowledged that the Office maintained that the allowance covered transportation costs, and he stated that he was dissuaded from filing mileage reimbursement requests. Appellant argued that the Rehabilitation Act of 1973, specifically, 29 U.S.C. §§ 723(a)(5) and 723(a)(10), entitled him to both reimbursement of transportation expenses and $200.00 a month maintenance allowance for incidental expenses.

On October 19, 1994 the Office advised appellant's congressman that appellant was receiving the maximum maintenance allowance of $200.00 monthly, which included lunches, incidental expenses and transportation. "There is no provision in the Act," the Office advised, "to pay the injured worker an additional amount for travel to and from training." In a letter dated February 1, 1995, the Office advised appellant that a voucher for travel to and from school was

not payable "as you have been advised that you are not entitled to travel reimbursement and a maintenance allowance." On February 13, 1995 the Office advised appellant as follows:

> "Please be advised that travel to and from the congressional office, your rehabilitation counselor, the university and Davis Boat Works and Norfolk Naval Shipyard are not payable by this office. You were previously advised that you are already being paid the maximum allowable for maintenance, therefore your only entitlement for travel would be for travel to and from medical care."

Appellant submitted a travel voucher and rehabilitation maintenance certificates to obtain reimbursement for travel expenses, including travel expenses incident to the securing of vocational rehabilitation services, which the Office paid. On March 10, 1995 appellant advised the Office that he had recently received travel reimbursement checks and that an Office official had telephoned him on March 9, 1995 to advise that the checks were issued in error. "I had anticipated that the payment of travel expenses claimed would be denied," appellant stated, and he set forth his reasons for believing that the claims he made were valid and payable by the Office.

On April 20, 1995 the Office issued a preliminary determination that an overpayment of $4,494.45 occurred in appellant's case because the Federal Employees' Compensation Act did not authorize the payment of travel expenses other than for travel to and from medical treatment.[1] The Office found that appellant was with fault in the matter of the overpayment on the grounds that he was advised both orally and in writing that he was not entitled to compensation for such travel expenses, but he submitted travel vouchers anyway.

Appellant requested a prerecoupment hearing. He argued that section 8104 of the Act authorized reimbursement of travel expenses. He indicated that all of the checks he received in this matter were deposited into his savings account.

In a decision dated December 4, 1995, the Office finalized its preliminary determination. The Office found that, however sincere appellant may have been in his belief that he was entitled to reimbursement for travel expenses to and from vocational rehabilitation, he was informed on numerous occasions by various officials that this was not the position of the Office. The Office noted that appellant had conceded that it was his expectation that his travel vouchers would be formally denied. The Office also noted that immediately after receiving the reimbursement checks, appellant was informed by an official at the district Office that an error had been made in issuing the checks. Under these circumstances, the Office found that appellant did accept a payment that he should have been expected to know was incorrect and must therefore be considered with fault in the creation of the overpayment. Attempting to avoid, to the extent possible, any financial hardship to appellant but taking into account the requirement to collect debts owed to the government, the hearing representative found that recovery should be made by deducting $160.00 from appellant's continuing compensation, producing less than a 10 percent reduction of monthly income and allowing full recovery within two and a half years.

[1] The Office would later calculate the overpayment to be $4,484.45.

The Board finds that an overpayment occurred in this case.

Pursuant to section 8104 of the Act, the Office shall provide for furnishing any vocational rehabilitation services, but this section does not explicitly authorize the payment or reimbursement of travel expenses incident to the securing of such services:

> "(a) The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services. In providing for these services, the Secretary, insofar as practicable, shall use the services or facilities of State agencies and corresponding agencies which cooperate with the Secretary of Health, Education, and Welfare in carrying out the purposes of chapter 4 of title 29, except to the extent that the Secretary of Labor provides for furnishing these services under section 8103 of this title. The cost of providing these services to individuals undergoing vocational rehabilitation under this section shall be paid from the Employees' Compensation Fund. However, in reimbursing a State or corresponding agency under an arrangement pursuant to this section the cost to the agency reimbursable in full under section 32(b)(1) of title 29 is excluded.
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> "(b) Notwithstanding section 8106, individuals directed to undergo vocational rehabilitation by the Secretary shall, while undergoing such rehabilitation, receive compensation at the rate provided in sections 8105 and 8110 of this title, less the amount of any earnings received from remunerative employment, other than employment undertaken pursuant to such rehabilitation."[2]

This section does not specify that the Office shall authorize the payment of travel expenses incident to the securing of vocational rehabilitation services, and neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute.[3] Section 8111(b), however, does authorize the payment of additional compensation for vocational rehabilitation:

> "The Secretary may pay an individual undergoing vocational rehabilitation under section 8104 of this title additional compensation necessary for maintenance, but not to exceed $200.00 a month."[4]

The Board has held that the purpose of section 8111(b) of the Act is not to supplement the income of an employee undergoing vocational training where he is already receiving the full

[2] 5 U.S.C. § 8104.

[3] *Richard T. DeVito*, 39 ECAB 668 (1988) (finding that the claimant was not entitled to interest on his retroactive award of compensation). Compare 5 U.S.C. § 8103, which explicitly authorizes the Office to furnish necessary and reasonable transportation and expenses incident to the securing of services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in the lessening the amount of the monthly compensation.

[4] 5 U.S.C. § 8111(b).

amount of disability compensation authorized by the Act and all the costs of his training program are being paid by the Office. With respect to such an employee, the section was intended to cover only such expenses incidental to his training as transportation to and from class, parking, lunch etc.[5] Accordingly, as section 8111(b) expressly limits the amount of additional compensation that may be paid for such expenses to $200.00 a month, any additional compensation exceeding this amount must be considered an overpayment.

In this case, appellant accepted additional compensation for reimbursement of travel expenses incident to the securing of vocational rehabilitation services while already in receipt of the maximum allowance authorized under 5 U.S.C. § 8111(b). For this reason, the Board finds that an overpayment of compensation occurred when the Office reimbursed appellant for such expenses.

Section 8129(a) of the Act provides that an overpayment of compensation shall be recovered by the Office 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."[6] Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320(b) of the implementing federal regulations provides the following:

> "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) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[7]

The Board finds that appellant was with fault in the matter of the overpayment under the third criterion above, namely, that he accepted a payment which he knew or should have been expected to know was incorrect.

[5] *Denis F. Rafferty*, 27 ECAB 524 (1976); *see Charles Rivers*, 21 ECAB 258 (1970).

[6] 5 U.S.C. § 8129(a).

[7] 20 C.F.R. § 10.320(b).

The Office advised appellant that the additional compensation he sought for travel expenses to and from vocational rehabilitation services was not payable as he was already receiving the maximum allowance permitted. He was well aware of the Office's position in this matter, and he knew that the Office had rejected his legal argument to support the additional compensation he sought. Indeed, appellant anticipated that payment of the travel expenses would be denied; nonetheless, when he received the checks, he deposited them and accepted payment. Under these circumstances, the Board finds that appellant was with fault in the matter of the overpayment.[8]

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.[9]

In its December 4, 1995 decision, the Office attempted to avoid, to the extent possible, any financial hardship to appellant but took into account the requirement to collect debts owed to the government. The Office determined that recovery should be made by deducting $160.00 from appellant's continuing compensation, producing less than a 10 percent reduction of monthly income and allowing full recovery within two and a half years. As the Office properly took into consideration the relevant factors cited in 20 C.F.R. § 10.321(a), the Board finds that it did not abuse its discretion in setting the rate of recovery.[10]

[8] It is immaterial, under section 8129(a) of the Act or section 10.320(b) of the implementing regulations, that the Office may also be said to be with fault in issuing compensation to which appellant was not entitled.

[9] 20 C.F.R. § 10.321(a).

[10] *See Robert C. Schenck*, 38 ECAB 531 (1987).

The December 4, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
November 13, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member