

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILL V. WENGER and DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, Three Rivers, TX

*Docket No. 01-822; Submitted on the Record;
Issued November 1, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant received an overpayment of \$8,440.00 in compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

On December 12, 2000 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$8,440.00 which arose because he received compensation for temporary total disability from June 18 through November 4, 2000, and received retirement benefits from the Office of Personnel Management for the same period. The Office found appellant at fault in the creation of the overpayment because he accepted payments which he knew or should have known were incorrect.

By final decision dated January 17, 2000, the Office found that appellant received an overpayment of compensation in the amount of \$8,440.00, and that he was at fault in the matter of the overpayment. The Office noted that appellant had not requested a prerecoupment hearing or telephone conference, or submitted evidence or argument that he disagreed with the fact or amount of the overpayment or with the Office's determination of fault.

The Board finds that the case is not in posture for a decision.

By letter dated January 4, 2001, appellant, through counsel, responded to the Office's preliminary overpayment determination with arguments and additional evidence. Appellant asserted that he had returned several of the compensation checks sent to him by the Office, and therefore, had not received the overpayment of compensation found by the Office. Appellant further contested the Office's finding that he was at fault in the creation of the overpayment submitted evidence in support of his position. Appellant stated that, if the matter could not be resolved within seven days, the Office was to consider his letter a request for a prerecoupment hearing. The supporting documents submitted with the January 4, 2001 letter included, among other things, a completed Office overpayment recovery questionnaire, an Office form, signed by appellant, requesting a hearing and copies of the benefits checks returned to the Office by

appellant. Appellant's counsel's January 4, 2001 letter, and all 19 attachments, including the overpayment recovery questionnaire and request for a hearing are marked by the Office as received on January 10, 2001, which was within the 30 days allotted by the Office for response.¹ The memorandum enclosed with the Office's January 17, 2001 decision specifically states, however, that no response to the Office's preliminary determination was received from appellant.

As the Board's jurisdiction of a case is limited to reviewing the evidence which was before the Office at the time of its final decision,² it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,³ it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.⁴ This is particularly important in the instant appeal where, as noted above, appellant disputed both the fact and the amount of the overpayment, requested waiver, submitted both additional factual evidence and a completed overpayment recovery questionnaire, and requested that there be a hearing on the matter, but where there is no indication that any of this was considered by the Office. Because it does not appear that the Office considered the evidence that it received on January 10, 2001, in reaching its January 17, 2001 decision, the Board cannot review such evidence for the first time on appeal.⁵

Consequently, the case will be remanded for the Office to consider appellant's January 4, 2001 letter and supporting evidence, including his request for waiver, his overpayment recovery questionnaire and his request for a hearing.⁶ Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on this aspect of the claim.

¹ Because appellant requested either resolution of the matter within seven days, based on the additional evidence and arguments submitted, or a hearing before an Office representative, appellant's counsel sent complete copies of the January 4, 2001 letter and nineteen attachments both to the appropriate division of the Office, and to the Branch of Hearings and Review. Both packets are marked by the Office as initially received on January 10, 2001. Neither was acknowledged by the Office.

² 20 C.F.R. § 501.2(c).

³ See 20 C.F.R. § 601.6(c).

⁴ See *William A. Couch*, 41 ECAB 548 (1990).

⁵ See 20 C.F.R. § 501.2(c).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Conferencing*, Chapter 2.500 (July 1995); Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(3) (September 1994).

The decision of the Office of Workers' Compensation Programs dated January 17, 2001 is set aside and the case remanded to the Office for consideration of appellant's January 4, 2001 letter and supporting documents, to be followed by an appropriate decision.⁷

Dated, Washington, DC
November 1, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ The record also contains a decision dated June 28, 2000, reducing appellant's compensation based on his ability to earn wages as a radio dispatcher. On appeal, appellant, through counsel, specifically appealed only the Office's January 17, 2001 overpayment decision. Therefore, the Board did not review the Office's June 28, 2000 decision.