U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETER L. DUTTWEILER and U.S. POSTAL SERVICE, POST OFFICE, Albany, NY

Docket No. 00-2649; Submitted on the Record;
Issued April 12, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether an overpayment of $805.00 occurred in appellant's case; and if so, (2) whether the Office of Workers' Compensation Programs properly denied waiver.

On March 18, 1987 appellant, then a 38-year-old letter carrier, filed an occupational disease claim asserting that his pulmonary condition was a result of his federal employment. The Office accepted his claim for the condition of temporary acceleration of chronic obstructive pulmonary disease and paid compensation benefits. On March 4, 1998 the Office issued a schedule award for a 100 percent permanent impairment of each lung.

On October 7, 1998 appellant submitted a claim for reimbursement of $805.00 representing the itemized cost of air conditioning for a new 1998 Dodge Ram pickup truck purchased on August 26, 1998. On November 17, 1998 the Office advised that the requested service was not payable. On November 29, 1998 appellant argued medical necessity and submitted a September 24, 1998 report from Dr. Timothy M. Creamer, a general practitioner, who reported as follows:

> "[Appellant] has been a patient of mine for the last two years and a patient of the [Lafayette Family Health] Center here for ten years. He is also followed at the VA [Veterans Administration] Medical Center in Syracuse.
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> "He carries a diagnosis of alpha-1 antitrypsin deficiency with severe end stage lung disease. [Appellant] recently moved to the country to a log home to avoid the pollution of the inner city where he was living previously. He had central air conditioning installed in his new home as well as in his new vehicle.

> "It is my feeling that [appellant's] lung disease is at a point where the air conditioning installed in his home and vehicle was a medical necessity. He is totally and permanently disabled."[1]

In a letter dated February 1, 1999, the Office explained the reasons it was denying appellant's bill for $805.00. The Office noted that appellant had purchased his pickup about a month prior to Dr. Creamer's letter of medical necessity. The Office noted that appellant placed no separate or special order for the air conditioning, as it was a part of the package he chose to order. The Office explained that before making the purchase appellant was supposed to notify the Office that he needed air conditioning for his automobile. He was supposed to send a letter of medical necessity at the same time and then await for the Office's approval. The Office quoted provisions of its procedure manual. The Office noted that in order for it to pay for any modification, appellant must first purchase the least expensive model. He must also provide three bids prior to purchase so that the Office could decide which was most applicable.

On February 6, 1999 appellant offered his rebuttal and enclosed a claim.

On March 4, 1999 the Office issued a check to appellant in the amount of $805.00.

In a decision dated March 22, 1999, the Office denied reimbursement of $805.00. The Office found that Dr. Creamer's opinion was not probative as to the medical necessity of an air conditioner in appellant's pickup truck. He did not explain the reason air conditioning in appellant's automobile was necessary for the effects of the compensable disability. Also, Dr. Creamer was not a specialist in the field of pulmonary medicine and therefore did not satisfy the requirement that proposals be supported by "a physician who is a recognized authority in the appropriate medical specialty."

The Office further found that appellant had failed to advise the Office or submit a proposal prior to his purchase of the vehicle, preventing the Office from exploring whether it was practical to modify appellant's prior vehicle.

On April 6, 1999 appellant requested reconsideration. He argued the seriousness of his condition and the purpose of air conditioning. Appellant subsequently submitted an April 26, 1999 report from Dr. Kumar Ashutosh, Chief of the Pulmonary Medicine/Critical Care Department of the Veterans Affairs Medical Center in Syracuse, New York. Dr. Ashutosh stated as follows:

> "I have been taking care of [appellant] for many years. He has severe emphysema with an asthmatic component and alpha-1 antitrypsin deficiency.
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> "Patients with asthma and emphysema are known to be hyperreactive to a wide range of environmental irritants which pose a significant threat to their health. As automobile air conditioners control the temperature and humidity and remove pollens and exhaust fumes, they protect the patients from the ill effects of the

[1] The Office approved payment for central air conditioning in appellant's new home and sent him a check for $4,280.00 on November 27, 1998.

above. Therefore, it is my opinion that automobile air conditioning would be a medical necessity for [appellant]."

In a decision dated May 10, 1999, the Office reviewed the merits of appellant's claim for reimbursement and denied modification of its prior decision. The Office found that, while Dr. Ashutosh had confirmed that patients with asthma and emphysema would benefit from automobile air conditioning, appellant did not comply with the Office procedure manual's requirement that he submit a detailed proposal for the proposed modification or purchase of the equipment, thereby limiting the opportunity of the Office to review the proposal and issue a decision. The Office further found that, because the air conditioning system was purchased as part of a package, the cost of the system was an indivisible part of the total package and the price of $805.00 would appear to an arbitrary and capricious figure.

On May 10, 1999 the Office also made a preliminary finding that an overpayment of $805.00 occurred in appellant's case. He was notified in letters dated February 1 and March 22, 1999 that he was not entitled to reimbursement for the air conditioning system he ordered for his new vehicle. Notwithstanding the letter of February 1, 1999, appellant resubmitted his request for reimbursement on February 10, 1999 and the Office made payment in error. The Office also made a preliminary finding that appellant was at fault in the matter.

The Office advised appellant to complete the attached overpayment recovery questionnaire and to submit supporting documents, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips and any other records that support the income and expenses listed. The Office explained that this information would help determine whether or not to waive the overpayment or help decide how to collect the overpayment. The Office further advised as follows:

"Also please note that, under 20 C.F.R. § 10.438, we will deny waiver if you fail to furnish the information requested on the enclosed Form OWCP-20 (or other information we need to address a request for waiver) within 30 days. We will not consider any further request for waiver until the requested information is furnished."

In a decision dated June 5, 2000 but reissued on July 21, 2000, an Office hearing representative found that an overpayment of $805.00 occurred in appellant's case but that appellant was without fault in its creation. Because appellant had failed to submit the financial information requested, the hearing representative denied waiver and sought recovery by deducting two installments from appellant's schedule award payments.

The Board finds that an overpayment of $805.00 occurred in appellant's case.

In an overpayment decision, the Board must first determine whether an overpayment occurred by examining the underlying decision of the Office.[2]

[2] *Russell E. Wageneck*, 46 ECAB 653 (1995) (citing *Samuel J. Russo*, 28 ECAB 43 (1976), which held that a determination of whether, in fact, there was an overpayment necessarily required a review of the Office's previous decision finding that the claimant was no longer totally disabled for work).

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[3] In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act.[4] The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest possible extent in the shortest amount of time. The Office therefore, has broad administrative discretion in choosing the means to achieve this goal.[5] The only limitation on the Office's authority is that of reasonableness.[6] As this is the only limitation, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or action taken that are contrary to both logic and probable deductions from known facts.[7]

Exercising its discretion in the present case, the Office advised appellant on February 1, 1999 of the reasons it was denying his bill for $805.00. These reasons were primarily based on his failure to comply with the requirements in the Office procedure manual. Appellant had purchased the air conditioning system without notice, without authorization and without a prescription or recommendation from a qualified physician. He had also prevented the Office from exploring whether modification of his previous vehicle was practical before considering the new purchase. The Office further noted that the air conditioning appellant purchased was part of a package.

In its formal decision dated March 22, 1999, the Office noted that appellant had failed to advise the Office or to submit a proposal prior to his purchase of the vehicle, preventing the Office from exploring whether it was practical to modify appellant's prior vehicle. In its merit review on May 10, 1999, the Office again explained that appellant did not comply with the Office procedure manual's requirement that he submit a detailed proposal for the proposed modification or purchase of the equipment, thereby limiting the opportunity of the Office to review the proposal and issue a decision. The Office again noted that the air conditioning system was purchased as part of a package, so the cost of the system was an indivisible part of the total package.

The Board's function in cases such as this is to review whether the Office abused the exercise of its discretion. The Board does not substitute its own judgment for that of the Office. Whether the facts of the case could reasonably support a conclusion different from that reached by the Office is immaterial. In this case, the Office has explained its reasons for denying the bill, reasons based primarily on appellant's failure to obtain authorization prior to making his

[3] 5 U.S.C. § 8103(a).

[4] *Daniel J. Perea*, 42 ECAB 214 (1990).

[5] *See M. Lou Riesch*, 34 ECAB 1001 (1983).

[6] *Joe E. Williamson*, 36 ECAB 494 (1985).

[7] *Daniel J. Perea, supra* note 4.

purchase. The Board finds that the Office has acted within the broad administrative discretion granted it under section 8103(a) of the Act.

The Board also finds that an overpayment of $805.00 occurred in appellant's case.

As noted above, the Office advised appellant on February 1, 1999 of the reasons it was denying his bill for $805.00. The Office also issued a formal decision on March 22, 1999 denying payment. These actions demonstrate that when the Office issued a check to appellant for $805.00 on March 4, 1999, it did so erroneously. It was the erroneous issuance of this check that created an overpayment.

The Board further finds the Office acted within its discretion in denying waiver.

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.[8] The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.[9] If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.[10]

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.[11]

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.[12]

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[8] *See William J. Murphy*, 40 ECAB 569 (1989).

[9] 20 C.F.R. § 10.433(a) (1999).

[10] *Id*. § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id*. § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id*. § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id*. § 10.437(b).

[11] *Id*. § 10.438(a).

[12] *Id*. § 10.438(b).

Although appellant was without fault in accepting and cashing the March 4, 1999 check, he was nonetheless responsible for providing the financial information necessary to support his request for waiver of the overpayment. The Board has long held that when a claimant submits no financial evidence to support his request for waiver of an overpayment, the Office commits no abuse of discretion in denying that request.[13] The Board so finds in this case.

The July 21, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 12, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[13] *E.g., William J. Murphy*, *supra* note 8; *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); *Joseph H. Light*, 13 ECAB 358 (1962).