

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHERINE E. CREWS and DEPARTMENT OF DEFENSE,
TRICARE MANAGEMENT ACTIVITY, Aurora, CO

*Docket No. 01-1462; Submitted on the Record;
Issued March 7, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment during the period January 23, 2000 to February 24, 2001; (2) whether the Office properly determined the amount of the overpayment to be \$726.75; and (3) whether the Office properly determined that recovery of the overpayment would be accomplished by reducing appellant's continuing compensation benefits by \$250.00 every 28 days.

In this case, on December 10, 1998 appellant, then a 30-year-old health care analyst, filed a claim for an employment-related back injury. On January 20, 1999 the Office accepted that appellant sustained an aggravated lumbar disc displacement with myelomat (displaced lumbar disc) and authorized lumbar spinal fusion. The Office placed appellant on the periodic rolls and paid all appropriate compensation benefits.

By letter dated March 1, 2001, the Office notified appellant that it had recently been informed by the Office of Personnel Management that it was not withholding the proper life insurance premiums from appellant's continuing compensation. The Office informed appellant that her March 24, 2001 check would reflect the adjusted amount, taking into account a deduction of \$3.60 for "one times salary and family coverage," \$32.40 for postretirement coverage and \$18.60 for basic life insurance coverage. On March 16, 2001 the Office informed appellant that it had made a preliminary determination that an overpayment of compensation in the amount of \$726.75 had occurred, but that appellant was not at fault in the creation of the overpayment. The Office enclosed an election form and requested that appellant indicate whether she wished either a telephone conference with the Office, a decision by the Office based on the written evidence, or a hearing with the Branch of Hearings and Review on the issues of the fact or amount of the overpayment, or possible waiver of the overpayment. The Office also asked her to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

By letter dated March 26, 2001, appellant's attorney of record contacted the Office regarding the March 16, 2001 preliminary determination, noting that he had not received a copy of this letter from the Office. Appellant's counsel noted that he had been appellant's representative for over a year and stated that the Office had not been sending him copies of all letters released in appellant's file, despite his specific requests. Appellant's counsel asked that the Office delay its final overpayment determination to allow him the opportunity to consult with his client and provide the Office with a response.

In a decision dated April 16, 2001, the Office finalized its preliminary determination, noting that no response to the preliminary decision had been received from appellant. Therefore, the Office informed appellant that \$250.00, or less than 10 percent of her 28-day net compensation, would be withheld from her continuing compensation benefits until the debt was repaid.

By letter dated April 20, 2001, the Office informed appellant's counsel that his March 26, 2001 response to the preliminary overpayment determination was not received by the Office until April 26, 2001.¹ The Office reiterated the terms under which the overpayment would be recouped.

The Board finds that the Office properly found that there was an overpayment of compensation in resulting from the Office's failure to withhold the proper life insurance premiums from appellant's continuing compensation for the period January 23, 2000 to February 24, 2001. On appeal appellant does not contest the fact of the overpayment.² Thus, the only questions remaining before the Board are whether the Office properly determined the amount of the overpayment, whether the Office properly declined to waive recovery of the overpayment and the rate of repayment from continuing compensation set by the Office.

The Board further finds that with respect to the issues of amount, waiver and repayment, this case is not in posture for decision.

The Office procedure manual under Part 2, Chapter 2.300 provides, in pertinent part:

“Where the employee has an attorney or other legal representative, the original of any letter to [appellant] should be sent to that person, with a copy to [appellant].

¹ Counsel's letter is date stamped by the Office as having been received on April 26, 2001, however, as the Office did not retain a copy of the envelope, there is no postmark contained in the record file. The Board has held that, in determining timeliness of a request, if the envelope bearing the postmark is not available, the date of the letter itself is used. *See Algimantas Bumelis*, 48 ECAB 679 (1997).

² In a May 2, 2001 letter to the Office, appellant's counsel disputed the amount of the overpayment and asked for an accounting by the Office and further contested the Office's decision to recoup the overpaid amount in just three months. By letter dated May 11, 2001, the Office provided counsel with a breakdown of the overpaid amount and supporting documents, but this letter was not received by appellant prior to his appealing to the Board on May 10, 2001. The Office did not address the repayment schedule.

Similarly, where [appellant] is sent a copy of a letter, the attorney or other representative should receive a copy as well.³

Appellant's counsel argues, *inter alia*, on appeal that the Office improperly failed to send him copies of both the Office's March 16, 2001 preliminary overpayment determination and April 16, 2001 final decision, despite specific requests that he be provided with copies of all correspondence. Appellant's counsel has been of record since January 10, 2000 and in a March 2, 2000 letter, he specifically asked that the Office send him copies of all correspondence released in appellant's file.

By letter dated March 26, 2001, appellant's counsel notified the Office that he had not received a copy of the preliminary determination and requested additional time to prepare a response, but by letter of response dated April 30, 2001, the Office simply stated that appellant's letter had not been received before the final decision was issued.

In this case, the record does not reveal that appellant's counsel was sent a copy of the Office's March 16, 2001 preliminary overpayment determination, as there is no indication on the determination itself that a copy was sent to appellant's counsel. Similarly, there is no indication in the record that the Office sent appellant's counsel a copy of the final overpayment decision. As appellant's counsel was of record prior to both the preliminary and final determinations, the Office should have sent appellant's counsel copies of the relevant decisions in order that counsel could have assisted appellant in preparing a response. The Board, therefore, finds that, since the Office did not follow its own procedures, the finalization of the overpayment determination was improper. The Board will set aside the Office's April 16, 2001 decision and remand the case for proper handling and for further development of the evidence as necessary. The Office shall then issue an appropriate final decision on appellant's claim.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications, Regular Correspondence* Chapter 2.0300.4e (February 2000).

The April 16, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed with regard to the fact of the overpayment; the decision is set aside for further development consistent with this decision with regard to the issues of amount, waiver and recovery of the overpayment.

Dated, Washington, DC
March 7, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member