

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. McCARTY and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Camp Lejeune, NC

*Docket No. 03-308; Submitted on the Record;
Issued April 14, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$7,989.40; (2) whether he was at fault in the creation of this overpayment; and (3) whether the overpayment was discharged in appellant's bankruptcy proceeding.

On February 9, 1998 appellant, then a 39-year-old store worker, filed a claim for a traumatic injury to his low back sustained on January 17, 1998 by pulling heavy pallets with a jack.

The Office of Workers' Compensation Programs accepted that appellant sustained a lumbosacral strain, but did not accept that his lumbar disc disease was related to his employment. Following 45 days of continuation of pay, the Office began payment of compensation for temporary total disability.

On May 14, 2001 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence established that appellant had no continuing disability as a result of his January 17, 1998 employment injury.

By decision dated June 25, 2001, the Office terminated appellant's compensation effective July 15, 2001 on the basis that the weight of the medical evidence established that his injury-related disability had ceased no later than that date and that he currently suffered no residuals related to his January 17, 1998 employment injury.

On December 18, 2001 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$7,989.40 that occurred because he was no longer entitled to compensation after July 14, 2001 but was paid compensation for the period July 15 to December 1, 2001. The Office preliminarily found that appellant was at fault in the matter of the overpayment for "not returning the checks" after he was advised that he was no longer entitled to compensation.

Appellant requested a hearing, which was held on August 6, 2002. He testified that his income consisted of \$826.00 a month for Social Security disability and \$421.00 a month for Civil Service disability retirement and that he thought the payments from July to December 2001 were coming from the employing establishment because they wrote to him at the end of February or beginning of May stating that he was medically retired as of May 14, 2001. Appellant testified that he mailed the Office a copy of the May letter from the Office of Personnel Management (OPM) advising him of his disability retirement, that this letter advised him he would be paid beginning June 1, 2001 that when his payments continued he thought they were coming through OPM and that when the Office advised him of the overpayment in December 2001 he realized that OPM had not been paying him. Appellant testified that he understood that the Office had terminated his compensation effective July 15, 2001 but that someone at the employing establishment told him that his retirement would amount to 75 percent of his base pay, which would be exactly what he had received in compensation from the Office. Appellant testified that his bankruptcy was finalized in May or June and that he had listed the Department of Labor as a creditor when he filed for bankruptcy. The Office hearing representative then noted that a document labeled Exhibit A listed the Department of Labor as a creditor in appellant's filing for bankruptcy and requested that he submit a copy of that document.

Prior to the hearing, appellant submitted evidence, labeled Exhibit A, regarding his April 17, 2002 filing for Chapter 13 bankruptcy in United States Bankruptcy Court, Eastern District of North Carolina. Included were a certification from appellant's attorney in the bankruptcy case of a true and accurate list of all creditors, which included the Office, a "proof of claim" form sent by the Bankruptcy Court to the Office, listing it as a creditor, a notice of the May 16, 2002 meeting of creditors, a motion for confirmation of a plan whereby appellant would make payments of \$309.00 a month for 36 months and a notice of motion for confirmation of plan, which lists the Office as an addressee.

By decision dated October 15, 2002 an Office hearing representative found:

"In this case, the Office determined that [appellant] was no longer entitled to continued compensation based on the weight of medical evidence which they appropriately found rested with Dr. Moore. After appropriate due process the claimant was advised that his benefits would stop effective July 15, 2001. However, the Office continued to pay compensation benefits for wage loss through December 1, 2001. As a result an overpayment in the amount of \$7,989.40 was created as [appellant] received compensation for wage loss during the period July 15 through December 1, 2001 that he was no longer entitled to receive. [Appellant] has alleged that he was not at fault in the creation of this overpayment as he believed that the checks being received were from OPM for his disability retirement."

* * *

"During the hearing [appellant] indicated that he was not aware that the checks being received were from the Office of Workers' Compensation Programs but believed that they were from OPM as he had been advised that his medical retirement would start around June 1, 2001. However, I find that this is less than

believable. [Appellant] would have us believe that he applied for and accepted medical disability retirement without knowing at least an estimate of what this benefit would entail. He later noted that the disability retirement benefits was only \$421.00 a month compared to the workers' compensation benefit of \$1,600.00 a month. It would seem unlikely that the claimant applied for and accepted disability retirement without some idea of the amount of his monthly check, which is significantly lower than the amount being received from the Department of Labor. [Appellant] was advised by the Office that his entitlement to compensation would be stopped effective July 15, 2001 yet he continued to receive direct deposits into his checking account on the same 28-day cycle in the same exact amount of \$1,597.88. A reasonable person should have been aware that a deposit in the exact same amount on the exact same schedule would more likely than not be from the same source. As such, I find that the claimant's argument that he believed that the money being received was from his disability retirement is not credible and I find that the evidence demonstrates that he accepted payment that he knew or should have known was incorrect. Therefore I find that the Office's determination that [appellant] is with fault in the creation of this overpayment is correct. No waiver of the overpayment is possible if [appellant] is with fault in the creation of the overpayment."

The Office hearing representative then found that repaying the overpayment at the rate of \$75.00 a month would not result in a financial hardship yet would result in repayment within a reasonable period of time. With regard to appellant's bankruptcy filing, the Office hearing representative found:

"It is noted that [appellant] testified that this debt had been cleared during the bankruptcy proceeding finalized on May 16, 2002. The Office Procedure Manual does allow that an overpayment will be nullified if the bankruptcy court has discharged the debt in their proceedings. However for this debt to be cleared, [appellant] must have listed it in petitioning the court and amount then [be] nullified by the court. In this case, although requested to do so, [appellant] has not provided a finalized finding by the court that nullified the debt incurred to the Department of Labor in the amount of \$7,989.40. Since the overpayment is not listed as a bankruptcy creditor on the Confirmation of Plan presented to the Office nor does it appear to be incorporated into the \$309.00 payments made each month by [appellant] to dispose of his debits and the overpayment does not appear to have been discharged or liquidated by the court, I find that it is, therefore, considered separate, distinct and outstanding."

The Board finds that appellant received an overpayment of compensation in the amount of \$7,989.40.

The Office properly determined that appellant was no longer entitled to compensation after July 15, 2001.¹ Dr. Robert M. Moore, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, stated in a February 6, 2001 report:

“There is no objective evidence that the lumbosacral strain of January 17, 1998 is the cause of his current back and lower extremity symptoms. All of his objective findings, including those noted above, are consistent with lumbar degenerative disc disease as the cause for his chronic low back pain. This is supported by the fact that [appellant] did have a long history of low back pain and documented lumbar degenerative disc disease, including an episode of herniated lumbar disc, prior to his injury of January 17, 1998.”

* * *

“In my opinion, the injury of January 17, 1998 aggravated his preexisting condition of lumbar degenerative disc disease and chronic lumbosacral strain. In my opinion, his long history of multiple severe episodes of low back pain, on more than one occasion requiring transport by ambulance and a report that his symptoms were gradually worsening prior to the injury of January 17, 1998, support the position that the lumbar degenerative disc disease was a progressive disease and it is likely that his current condition would have been reached without the injury of January 17, 1998. Therefore, I would consider the injury of January 17, 1998 a temporary aggravation of his lumbar degenerative disc disease, in spite of the fact that he has not returned to his baseline state.”

* * *

“In my opinion, the recommended surgery of lumbar fusion with internal fixation, bone graft and bone growth stimulator is appropriate treatment for his chronic low back pain due to lumbar degenerative disc disease. However, as noted above, I would not consider this to be treatment for a lumbosacral strain, which was the accepted injury of January 17, 1998.”

After obtaining a supplemental report from Dr. Moore stating that appellant’s temporary aggravation had ceased, the Office sent his reports to appellant’s attending physician, Dr. Adam P. Brown, a Board-certified neurosurgeon, for his comments. In a report dated May 8, 2001, he stated:

“I would agree with Dr. Moore that [appellant] has lumbar disc disease with chronic pain as a degenerative process. The difficult thing here is whether his condition was aggravated by the injury. Dr. Moore agrees that the surgical

¹ In an overpayment decision, the Board must first determine whether an overpayment occurred by examining the underlying decision of the Office. *Russell E. Wageneck*, 46 ECAB 653 (1995). After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

treatment would be appropriate for his chronic lumbar pain and degenerative condition. The decision of whether this would be covered under his worker's compensation benefits or his insurance is a difficult one. I am not sure that I can give you a straight answer to this. Dr. Moore feels that it was not due to the work-related injury. Therefore, perhaps we should go along with this opinion."

These reports are sufficient to establish that appellant's disability causally related to his January 17, 1998 employment injury ended by July 15, 2001. Dr. Moore's report was based on a complete and accurate history and his conclusions were supported by rationale. Two prior reports supported a causal relation between appellant's ongoing symptoms and his employment injury. A November 20, 1998 report from Dr. Barbara McNeil, a physiatrist, stated that "the accident of January 17, 1998 was the exacerbating factor in his current pain symptomatology as it is not unusual to have degenerative changes that were suddenly exacerbated by an injury" and a January 27, 1999 report from Dr. David Rockwell, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, stated that there "does appear to be evidence of a lumbosacral sprain with facet joint irritation and probably changes at the disc space level stemming from the January 17, 1998 work injury. This is causing objective symptoms. It does not appear that the problem has resolved." These reports, however, are entitled to lesser probative value than the reports of Dr. Moore because they contain no rationale and because they were prepared over two years before the Office's determination that appellant's injury-related disability had ceased.

The Board finds that appellant was at fault in the creation of the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when 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."² No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

Section 10.433 of Title 20 of the Code of Federal Regulations provides:

"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 he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

² 5 U.S.C. § 8129.

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”³

By decision dated June 25, 2001, the Office notified appellant that his compensation would be terminated effective July 15, 2001. Despite this notification, appellant continued to accept periodic payments, made by direct deposit every 28 days, from the Office through December 1, 2001.

Appellant testified at an August 6, 2002 hearing before an Office hearing representative, that he was aware that his compensation was terminated on July 15, 2001 but that he believed the continuing payments after that date were from OPM for his disability retirement. However, he also testified that he was advised no later than May 2001 that he had been medically retired as of May 14, 2001 and that he would be paid beginning June 2001. Appellant’s professed belief that the continuing payments after July 15, 2001 represented a seamless transition from compensation from the Office to disability retirement from a different agency, OPM, was not reasonable.⁴ He can point to no paperwork from either agency that would have led him to believe that this is what occurred.

The Board does not find credible, appellant’s contention that he had no idea that his periodic payments for his disability retirement, which were about one-fourth as much as his compensation from the Office, would not be less than the payments from the Office. Appellant testified that someone at the employing establishment told him that disability retirement was paid at three-fourths of salary, but the Office’s regulations provide that an individual may be found not at fault if he or she “relied on misinformation given in writing by the Office (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations.”⁵ The advice appellant alleges he received does not meet any of the standards of this regulation: it was not in writing, there was no reason to believe the employing establishment was connected with the administration of benefits by OPM and it was not advice as to the interpretation of the Act or its regulations.

³ 20 C.F.R. § 10.433(a).

⁴ In applying the tests to determine fault, the Office applies a “reasonable person” test. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5a (September 1994).

⁵ 20 C.F.R. § 10.435.

Even though the Office may have been negligent in making the incorrect payments from July 15 to December 1, 2001, this does not excuse appellant from accepting payments he knew or should have known to be incorrect.⁶ He was at fault in the creation of the overpayment because he accepted compensation payments he knew or should have known to be incorrect.⁷

The Board finds that the case is not in posture for a decision of whether the overpayment of compensation was discharged in appellant's bankruptcy proceeding.

The Office's procedure manual provides: "A claimant's obligation to repay an overpayment is nullified if the bankruptcy court has discharged the debt in a bankruptcy proceeding."⁸ As the Office was named as a creditor in appellant's filing for bankruptcy, the bankruptcy court was required to give the Office notice by mail of the order for relief.⁹ Although not associated with the case record, the Office must have in its possession the bankruptcy court's disposition of appellant's case, which would indicate whether appellant's debt to the Office was discharged.¹⁰ This evidence must be considered before the Office can reach a reasoned determination of whether appellant's overpayment was discharged in appellant's bankruptcy proceeding.

⁶ 20 C.F.R. § 10.435(a) states: "The fact that the Office may have erred in making the overpayment or that the overpayment may have resulted from an error by another Government agency, does not by itself relieve the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment." See *Martin Boroian*, 40 ECAB 1260 (1989).

⁷ See *Henry C. Dolan*, 39 ECAB 1206 (1988) (claimant found at fault for accepting compensation benefits after he elected retirement benefits).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4e(3) (September 1994). This is consistent with 11 U.S.C. § 523, "Exceptions to Discharge," which does not list a debt such as appellant's as one that is excepted from being discharged in bankruptcy.

⁹ U.S.C. Title 11, Bankruptcy Rule 2002(f).

¹⁰ The Board notes that the transcript of the hearing indicates that, contrary to a statement in the Office hearing representative's October 15, 2002 decision, the hearing representative did not request appellant to submit a copy of the bankruptcy court's "finalized finding."

The October 15, 2002 decision of the Office of Workers' Compensation Programs is affirmed with regard to the findings that appellant received an overpayment of compensation in the amount of \$7,989.40 and that he was at fault in the creation of this overpayment. The finding in this decision that the overpayment was not shown to have been discharged in appellant's bankruptcy proceeding is set aside and the case remanded to the Office for action consistent with this decision of the Board and an appropriate decision on this issue.

Dated, Washington, DC
April 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member