

FACTUAL HISTORY

In a decision dated February 8, 1999, the Office terminated appellant's compensation effective that date on the grounds that the weight of the medical evidence, as represented by the opinion of an impartial medical examiner, supported that she had no continuing objective residuals of her January 25, 1992 employment injury, which the Office accepted for bilateral knee contusions and a herniated disc at L4-5. The impartial medical examiner found that the accepted knee conditions had resolved and that the herniated disc was in remission; there was no evidence of radiculopathy and no need for treatment. As a preventative measure he recommended restrictions.

On February 16, 1999 appellant requested an oral hearing before an Office hearing representative. In a decision dated September 8, 1999, an Office hearing representative found that the opinion of the impartial medical examiner constituted the weight of the medical evidence and supported that there were no active residuals of the January 25, 1992 employment injury. On September 20, 2002 the Board affirmed the termination of appellant's compensation effective February 8, 1999.² The facts of this case, as set forth in the Board's prior decision, are hereby incorporated by reference.

Following the Office's February 8, 1999 decision, appellant continued to receive compensation. She received checks dated February 27, March 27, April 6 and 24, 1999 covering the period from January 31 through April 24, 1999.

On July 6, 1999 the Office made a preliminary finding that an \$858.92 overpayment occurred in appellant's case from February 9 through April 24, 1999 because she received compensation payments subsequent to the termination of her benefit entitlement. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment for the following reason:

"You were notified by formal decision of February 8, 1999 that your benefit entitlement was terminated. It is reasonable to assume that you were aware that you were not entitled to these additional benefit payments."

Appellant, through her attorney, requested a prerecoupment hearing. The attorney stated as follows: "My client does not believe that any overpayment is due inasmuch as her pay was arbitrarily reduced \$500.00 in 1998, which has not yet been made up,³ plus the fact that this case is on appeal and it is our belief that this matter will be terminated in her favor." Appellant submitted an overpayment recovery questionnaire dated July 23, 1999. Continuing to object to the validity of the termination, she explained the reason she believed the overpaid amount was due her: "Yes -- not terminated and still disabled. This case is on appeal. Hearing held in Cleveland, July 19, 1999." Appellant indicated that she believed she was not at fault in the creation of the overpayment.

² Docket No. 00-486 (issued September 20, 2002).

³ On September 3, 1998 an Office hearing representative set aside a decision on appellant's wage-earning capacity and remanded the case for retroactive payment of compensation.

At the prerecoupment hearing, which was held on November 17, 1999, appellant's attorney argued that the history of the case was so confusing, with an earlier reduction in compensation reversed and a large payment made for restored compensation in January 1999, appellant simply believed that the Office was somehow bringing things up to date. He argued that the history of compensation payments from the Office had been erratic at best: "They would start, they would stop, they would make adjustments." Appellant also indicated that she was not at fault in the creation of the overpayment because "we didn't even have our appeal yet. We were supposed to get an appeal." She submitted an updated overpayment recovery questionnaire.

In a decision dated July 22, 2002, the Office finalized its preliminary determinations. The Office found that an \$858.92 overpayment occurred in appellant's case from February 9 through April 24, 1999, because she received compensation after the Office terminated her benefits. The Office found that appellant was at fault in the creation of the overpayment because she accepted payment of compensation through April 24, 1999, which she knew or should have known was incorrect. The Office explained how the amount of the overpayment was calculated.

On August 8, 2003 appellant requested an oral hearing before an Office hearing representative on the matter decided by the Office in its July 22, 2002 decision. In a decision dated October 22, 2003, the Office found that the final decision concerning an overpayment is not subject to the hearing provisions of 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE I

The Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴

ANALYSIS -- ISSUE I

Appellant was receiving compensation for disability resulting from a personal injury sustained while in the performance of her duty. In a decision dated February 8, 1999, however, the Office terminated compensation effective that date, on the grounds that she had no continuing objective residuals of her January 25, 1992 employment injury. Although appellant was no longer entitled to compensation for disability under the Act, the Office continued to pay compensation for disability through April 24, 1999. The Board; therefore, finds that an overpayment occurred because appellant received compensation to which she was not entitled.

The Office has well explained how the amount of the overpayment was calculated. Appellant received a check for the period January 31 to February 27, 1999 in the amount of \$317.00. As she was entitled to compensation through February 8, 1999, the amount paid from February 9 through 27, 1999, \$215.11, was an overpayment. Added to subsequent checks for \$317.00, \$4.82 and \$322.00,⁵ the overpayment amounted to \$858.93. Ignoring a rounding issue

⁴ 5 U.S.C. § 8102(a).

⁵ The Office erroneously reported in its July 22, 2003 decision that appellant's final compensation check was for \$422.00.

with the first check, the Office settled on a total overpayment of \$858.92. The Board will affirm the Office's July 22, 2003 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits received. 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 (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁶

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁷

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, namely, that she accepted a payment which she knew or should have known to be incorrect. The Office issued a notice of proposed termination on January 8, 1999, which allowed her 30 days to submit additional evidence or argument and which stated that her compensation would not be terminated during that 30-day period. In a decision dated February 8, 1999, the Office notified appellant that her compensation was terminated because the weight of the medical evidence established that she had no continuing objective residuals of her employment injury. Upon receiving this decision, appellant should have known that she was no longer entitled to compensation for disability or at least that the Office intended to stop her compensation after February 8, 1999. She should have known that the compensation she received after February 8, 1999 was compensation that continued for an additional two and a half months, was inconsistent with the Office's February 8, 1999 decision and was incorrect.

Appellant's attorney has argued that the payment of compensation in this case, was so confusing and erratic that appellant did not know payments after February 8, 1999 were incorrect. He also suggested that pursuing appeal rights effectively stayed the termination. The Board has considered the circumstances surrounding this overpayment and finds that appellant remains at fault. The record indicates an improper reduction of compensation in 1998, but the Office reinstated compensation retroactive to the effective date of reduction and explained this to appellant's attorney in a letter dated January 8, 1999. The January 8, 1999 notice of proposed

⁶ 20 C.F.R. § 10.433(a) (1999).

⁷ *Id.* § 10.433(b).

termination of compensation and the February 8, 1999 decision terminating compensation are sufficiently clear in describing the reasons for the action taken and in communicating that appellant was no longer entitled to compensation. The Board can find no basis in this case to support the argument that the termination of compensation was stayed pending appellate review.

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁸ As there is no evidence that appellant accepted incorrect payments after February 8, 1999 because of reliance on written misinformation,⁹ the Board will affirm the Office's July 22, 2003 decision on the issue of fault.¹⁰

LEGAL PRECEDENT -- ISSUE 3

The only review of a final decision concerning an overpayment is to this Board. The provisions of 5 U.S.C. § 8124(b), concerning hearings and 5 U.S.C. § 8128(a), concerning reconsiderations, do not apply to such a decision.¹¹

ANALYSIS -- ISSUE 3

In its July 22, 2003 overpayment decision, the Office correctly notified appellant that she had the right to appeal that decision to the Board. No other appeal rights attached. Because the Office had no jurisdiction to grant appellant's August 8, 2003 request for an oral hearing before an Office hearing representative, the case was not in posture for a hearing. The Board will affirm the Office's October 22, 2003 decision denying appellant's request.

CONCLUSION

The Board finds that an \$858.92 overpayment occurred in appellant's case from February 9 through April 24, 1999 and that she was at fault in the creation of the overpayment, thereby precluding waiver. The Board also finds that the Office properly denied appellant's August 8, 2003 request for an oral hearing before an Office hearing representative.

⁸ *Id.* § 10.433(a).

⁹ *See id.* § 10.435.

¹⁰ *See supra* text accompanying note 6; *see also* 5 U.S.C. § 8129. Because appellant was at fault in creating the overpayment, the Office must recover the overpayment and may not consider waiving it.

¹¹ 20 C.F.R. § 10.440(b) (1999).

ORDER

IT IS HEREBY ORDERED THAT the October 22 and July 22, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 21, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member