

**United States Department of Labor
Employees' Compensation Appeals Board**

LAWRENCE J. DUBUQUE, Appellant)
and) Docket No. 04-437
DEPARTMENT OF VETERANS AFFAIRS,) Issued: August 26, 2004
VETERANS ADMINISTRATION MEDICAL)
CENTER, Bay Pines, FL, Employer)

)

Appearances:
Lawrence J. Dubuque, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 9, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated September 12, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$847.10 because he received two compensation checks for the same period; (2) whether the Office properly found that appellant was not without fault in the creation of the overpayment and therefore recovery of the overpayment was not subject to waiver; and (3) whether the Office properly found that the overpayment should be recovered by withholding \$84.00 every four weeks from his continuing compensation.

FACTUAL HISTORY

On August 2, 1999 appellant, then a 48-year-old nurse, filed a claim for a traumatic injury occurring on August 1, 1999 in the performance of duty. The Office accepted appellant's claim for lumbar strain and a herniated nucleus pulposus at L5-S1. Appellant stopped work on August 4, 1999 and returned to light-duty work at the employing establishment on March 13, 2000.

By decision dated October 26, 2000, the Office reduced appellant's compensation based on its finding that his actual earnings as a modified nurse effective August 13, 2000 fairly and reasonably represented his wage-earning capacity. The Office continued to pay appellant for intermittent periods of wage loss.¹

On October 17, 2002 appellant submitted a claim for compensation for time lost from work due to medical appointments for the period January 15 to September 30, 2002. In a payment worksheet dated December 10, 2002, the Office determined that appellant was entitled to compensation for 50 hours of leave without pay in the amount of \$847.10 for the period January 15 to September 30, 2002. The Office issued appellant a check dated December 11, 2002 in the amount of \$847.10 for the period January 15 to July 30, 2002.²

An Office internal memorandum dated December 26, 2002 requested a tracer for the check issued for the period January 15 to July 30, 2002. In a payment worksheet dated December 31, 2002, the Office indicated that it was reissuing a check for the period January 15 to July 30, 2002 in the amount of \$847.10.

Computer records show that on January 1, 2003 the Office reissued appellant a check in the amount of \$847.10 for the period January 15 to July 30, 2002. Computer records also indicate that, on February 1, 2003, the Office issued appellant a check in the amount of \$847.10 for the period January 15 to July 30, 2002.³

The record reveals that on January 17, 2003 appellant endorsed and Sun Trust Bank processed a check dated January 10, 2003 in the amount of \$847.10. The check indicates that the

¹ By decision dated September 13, 2002, the Office denied appellant's claim for compensation for wage loss from January 3 to May 10, 2002 on the grounds that the medical evidence was insufficient to establish a material worsening of his condition. In a decision dated October 20, 2003, the Office denied modification of its September 13, 2002 decision. Appellant has not appealed this decision and therefore it is not before the Board at this time.

² The Office made a typographical error in specifying the period covered as January 15 to July 30, 2002 rather than January 15 to September 30, 2002.

³ On the computer form, the Office included a handwritten correction of the date from July 30 to September 30, 2002. The Office noted that it had keyed the check period as January 15 to July 30, 2002.

period covered is January 15 to July 30, 2002. The record further reveals that on February 21, 2003 appellant endorsed and Sun Trust Bank processed a check dated February 7, 2003 in the amount of \$847.10.⁴

Appellant submitted a letter signed February 11, 2003 and dated January 22, 2003 showing 36 hours of time lost from work due to medical appointments for the period October 2, 2002 to February 10, 2003. On February 24, 2003 he submitted a claim for compensation to the Office for the period October 2, 2002 to February 10, 2003.

In a payment worksheet dated June 2, 2003, the Office noted that it had issued appellant two checks in the amount of \$847.10 as compensation for 50 hours of time lost from work during the period January 15 to July 30, 2002. The Office indicated that it had reissued a check for the period in question upon the return of the original check but that it had also previously reissued the check when appellant failed to receive the original check. The Office further noted that the period covered by the check was January 15 to September 30, 2002.

By letter dated July 12, 2003, the Office notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$847.10 for the period January 15 to September 30, 2002. The Office advised appellant of its preliminary determination that he was at fault in the creation of the overpayment because he knowingly accepted compensation to which he was not entitled when he cashed a duplicate check for the same amount and period. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of the letter if he disagreed that the overpayment occurred, if he disagreed with the amount of overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an attached overpayment recovery questionnaire and submit supporting documentation.

In a letter dated July 30, 2003, appellant argued that he was without fault in the creation of the overpayment. He noted that the Office made the mistake by sending him duplicate checks. Appellant further related:

“On January 22, 2003 I gave [the employing establishment] a list of dates and times to be submitted to [the Office] for 36 hours. I was expecting to receive a check to cover this amount in February. So, when I received a check on February 21, 2003 with an issue date of February 7, 2003, I was under the impression that this was reimbursement for those hours. I did not look at the period paid dates on the benefit statement, as I was expecting a check.”

Appellant maintained that he would not accept compensation to which he was not entitled and noted that he had previously returned a check to the Office issued for the incorrect amount of \$9,660.03 in June 2002. He submitted a January 22, 2003 list of dates of time lost or anticipated

⁴ The period indicated on the check appears to be January 15 to July 30, 2002; however, the numbers are partially obscured.

lost time from work for the period October 10, 2002 to February 11, 2003. He returned the overpayment recovery questionnaire and requested a decision based on the written evidence.

By decision dated September 12, 2003, the Office finalized the determination that appellant received an overpayment of compensation in the amount of \$847.10 for the period January 15 to September 30, 2002 because he received a duplicate payment. The Office finalized its determination that appellant was not without fault in the creation of the overpayment because he accepted a payment that he knew or should have known was incorrect. The Office indicated that it would withhold \$84.00 from appellant's continuing compensation to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act, at 5 U.S.C. § 8116(a), provides:

“(a) While an employee is receiving compensation under this subchapter, ... he may not receive salary, pay, or renumeration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the [employing establishment] unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the [a]rmed [f]orces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

“However, eligibility for or receipt of benefits under [S]ubchapter III of [C]hapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”⁵

ANALYSIS -- ISSUE 1

In this case, the Office determined that appellant was entitled to compensation in the amount of \$847.10 for 50 hours of time lost from work during the period January 15 to September 30, 2002. Appellant, however, did not receive the check issued by the Office on December 10, 2002. The Office reissued appellant checks dated January 10 and February 7, 2003 in the amount of \$847.10 for the period January 15 to September 30, 2002. On January 17,

⁵ See comparable cases *Robert Craw*, 38 ECAB 253 (1986) (where appellant received an overpayment because he received a duplicate payment for a schedule award); *Wanda L. Brown*, 33 ECAB 1133 (1982) (where appellant received an overpayment because she received a payment covering part of a period previously paid).

2003 appellant endorsed the check dated January 10, 2003 for \$847.10 and on February 21, 2003 he endorsed the check dated February 7, 2003 for \$847.10. As appellant cashed two checks for \$847.10 covering the same period of wage-loss compensation, he received an overpayment of compensation in the amount of \$847.10.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides that “[a]djustment 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 this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulation⁷ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

- “(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.”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁸

ANALYSIS -- ISSUE 2

The Board finds that the facts of this case establish that appellant accepted a payment which he knew or should have known to be incorrect. As noted above, appellant’s signature appears on the back of the January 10, 2003 check in the amount of \$847.10. In addition, on February 21, 2003 appellant endorsed the check dated February 7, 2003 in the amount of \$847.10. Appellant contended that he believed that the February 7, 2003 check was in payment for his claim for 36 hours of compensation for the period October 2, 2002 to February 10, 2003. Appellant argued that he submitted a request for compensation for the 36 hours to the employing establishment on January 22, 2003. However, it appears from the record that, while appellant originally submitted a statement to the employing establishment showing 36 hours of time lost or anticipated lost time from work for the period October 2, 2002 to February 10, 2003 on January 22, 2003, he subsequently resubmitted the statement to the employing establishment on

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433.

⁸ See *Robin O. Porter*, 40 ECAB 421 (1989).

February 11, 2003. Additionally, he did not submit the actual claim form (Form CA-7) to the Office requesting compensation for that period until February 24, 2003, subsequent to his endorsing on February 21, 2003 the second check sent by the Office for \$847.10. Appellant has submitted numerous claims for compensation (Form CA-7) to the Office and thus can reasonably be expected to know that he cannot receive compensation from the Office for any period claimed prior to the date he submits the claim for compensation to the Office. Further, it was not reasonable for appellant to believe that the Office would pay him an identical amount of compensation for his claim for 36 hours of compensation from October 2, 2002 to February 10, 2003 as his request for 50 hours of compensation from January 15 to September 30, 2002. Further, regarding appellant's contention that an error by the Office caused the overpayment, section 10.435(a) provides that an error by a government agency, including the Office, which resulted in an overpayment does not by itself relieve a claimant from liability for repayment.⁹ In this case, the evidence establishes that appellant knew or should have known that he was not entitled to two checks in the amount of \$847.10 for the period January 15 to September 30, 2002. The Office, therefore, properly found that appellant was at fault in the creation of the overpayment as he should have known that he received an incorrect payment. As appellant is not without fault, the overpayment is not subject to waiver.

On appeal, appellant contends that repayment of the overpayment would cause severe hardship. However, as the Office found appellant at fault in the creation of the overpayment, he is not entitled to waiver.¹⁰

LEGAL PRECEDENT -- ISSUE 3

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”

ANALYSIS -- ISSUE 3

In this case, according to the overpayment recovery questionnaire, appellant's monthly income exceeds his expenses by approximately \$164.00 a month. The Board, therefore, finds that the Office's determination that the overpayment would be recovered by withholding \$84.00 from appellant's continuing compensation benefits is not unreasonable as appellant is left with \$80.00 per month in excess income after such withholding and as it is a rate at which the

⁹ 20 C.F.R. § 10.435(a).

¹⁰ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

overpayment will be recovered within the least amount of time without causing undue hardship on appellant.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$847.10 because he received two compensation checks for the same period. The Board further finds that appellant was not without fault in the creation of the overpayment and therefore recovery of the overpayment was not subject to waiver. The Board also finds that the Office properly found that the overpayment should be repaid by withholding \$84.00 every four weeks from his continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2003 is affirmed.

Issued: August 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member