

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

LOYCE G. OWEN, Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Talladega, AL, Employer**

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**Docket No. 04-636
Issued: August 11, 2004**

Appearances:

*Debbie McBride, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 9, 2004 appellant, through his representative, filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated September 23, 2003, which denied his request for reconsideration on the grounds that the evidence submitted was immaterial and irrelevant to modify the wage-earning capacity decision. He also appeals the Office's decision dated September 24, 2003, modifying its previous overpayment decision, which found, among other things, that an overpayment occurred in the amount of \$12,333.89, for the period January 30 through November 4, 2000, to reflect that an overpayment occurred in the amount of \$7,515.74 for the period January 30 through July 11, 2000. Pursuant to 5 U.S.C. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision and the merit overpayment decision in this case.

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's claim for further review of the merits of the wage-earning capacity determination pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly found that appellant received an overpayment in the amount of \$7,515.74, for the period January 30 through July 11, 2000 and denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been on appeal before the Board. In its July 17, 2002 decision, the Board affirmed the Office's June 13, 2001 decision, reducing appellant's compensation based on its determination that the selected position of social services aide represented his wage-earning capacity. The Board also affirmed the Office's July 11, 2001 decision, finding that an overpayment occurred in the amount of \$12,333.89, during the period January 30 through November 4, 2000, that appellant was not at fault in the creation of the overpayment and that waiver of the overpayment was not warranted and that \$330.00 would be deducted from each of appellant's continuing compensation payments to repay the overpayment. The facts of this case are accurately set forth in the Board's decision.¹

By letter dated August 15, 2002, appellant filed a petition for reconsideration with the Board. The Board issued an order dated January 27, 2003 denying appellant's petition.² In an August 8, 2003 letter, appellant, through his congressional representative, requested reconsideration before the Office and submitted medical and factual evidence in support thereof. Thereafter, the Office received additional medical evidence.

By decision dated September 23, 2003, the Office denied appellant's request for a merit review of his claim with regard to the wage-earning capacity. The Office found the evidence submitted to be of an immaterial and irrelevant nature and, thus, insufficient to warrant review of the prior wage-earning capacity decision reducing appellant's compensation.

In a September 24, 2003 decision finalized on that date, the Office reviewed the overpayment and determined that an error had been made in the calculation of the overpayment period and the amount of the overpayment. The Office found that appellant received compensation for total disability rather than based on his wage-earning capacity for the period January 30 through July 11, 2000, although its decision reducing his compensation on the grounds that the selected position of social services aide represented his wage-earning capacity had been in effect since June 25, 1999. The Office found that, when appellant underwent back surgery on July 12, 2000 he was considered totally disabled again and he was entitled to total disability compensation for the period July 12 through November 4, 2000. Thus, the Office determined that the overpayment period was from January 30 through July 11, 2000 and the amount of the overpayment was \$7,515.74. In addition, the Office stated that waiver of recovery of the overpayment was not an issue as this matter was previously determined in its July 11, 2001 decision.³

¹ Docket Nos. 01-1804 and 01-1945 (issued July 17, 2002).

² Docket Nos. 01-1804 and 01-1945, Order Denying Petition for Reconsideration (issued January 27, 2003).

³ Regarding repayment of the overpayment, the record reveals that appellant had already repaid \$9,240.00 of the previous overpayment amount of \$12,333.89. Thus, the Office directed that he be reimbursed for any excess payments he had made.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,⁴ the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 1

The relevant issue with regard to the Office's September 23, 2003 decision is a medical one, whether appellant could perform the duties of the position of social services aide at the time of the Office's reduction of his compensation on June 25, 1999. In support of his request for reconsideration, appellant submitted a functional capacity evaluation (FCE) report dated May 27 and 28, 2003, stating that he had no capacity to work at that time. This report is irrelevant as it did not address appellant's ability to perform the duties of a social services aide at the time of the Office's June 25, 1999 decision reducing his compensation.

Appellant also submitted an August 1, 2002 letter from Charlene M. Bozzle, an employee of the Alabama state employment service, indicating that, according to examination announcements, the position of health social worker required a bachelor's degree in social work and the position of rehabilitation counselor required a master's degree in rehabilitation counseling, rehabilitation services, rehabilitation administration or vocational evaluation or counseling. Her August 1, 2002 letter is irrelevant as the Office found that appellant could perform the duties of a social services aide and not those of a health social worker or a rehabilitation counselor.

A June 13, 2003 letter indicated that appellant was delinquent in the payment of his home mortgage and facing possible foreclosure. A June 24, 2003 letter revealed that his life insurance policy was going to expire due to an outstanding loan on his policy. The Office received copies of appellant's performance appraisals indicating excellent and outstanding work performance. The financial letters and performance appraisals are irrelevant as they failed to address the issue in this case of whether appellant was able to perform the duties of the position of social services aide at the time of the Office's June 25, 1999 decision, reducing his compensation.

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(1)-(2).

⁶ *Id.* at § 10.607(a).

A July 1, 2003 letter signed by Sharon Guin-Renfro, a registered nurse, on behalf of Dr. Robert C. Brunner, appellant's Board-certified psychiatrist, revealed that, based on the May 27 and 28, 2003 FCE, appellant was totally disabled and unable to engage in gainful employment. Ms. Guin-Renfro's letter is irrelevant inasmuch as it was not signed by a physician. The Board has long held that a nurse is not considered a "physician" under the Federal Employees' Compensation Act.⁷

Prior to the receipt of appellant's request for reconsideration and subsequent to the Board's January 27, 2003 decision denying his petition for reconsideration, the Office received an April 29, 2002 x-ray report of Dr. Gary H. Morgan, a Board-certified radiologist, demonstrating that appellant had an unremarkable heart and mediastinum, clear lungs and considerable fecal material in the colon. The Office also received an April 13, 2000 report of Dr. Jarrett Moss, an anesthesiologist, revealing that back surgery could benefit appellant's back pain and restore him to employment status. The reports of Drs. Morgan and Moss are irrelevant as they do not address whether appellant was able to perform the duties of a social services aide.

The Office received several reports from Dr. Brunner. In a June 14, 2000 report, he stated that appellant had complained of back pain since his April 24, 1995 employment injury. He provided a history of appellant's medical treatment and stated that it was reasonable that the proposed back surgery would benefit appellant and may restore him to some employment status. Dr. Brunner's April 15 and May 13, 2002 reports indicated that appellant had chronic low back pain that was multifactorial in origin. He reiterated this diagnosis in his July 1, 2002 report. Dr. Brunner also diagnosed constipation and hemorrhoids. On October 10, 2002 he again reported that appellant had chronic low back pain that was multifactorial in origin. In addition, Dr. Brunner stated that he would see what appellant's appeal had to show in regards to his work status. He also stated that he would consider a repeat FCE in the future. Dr. Brunner indicated that the ultimate goal was to get appellant back to some type of occupation and that whatever it was, appellant would have to start at a lower level and that, although an FCE was the place to start, an evaluation by his supervisor as to whether he was able to perform a job would be helpful in the future. His January 29, 2003 report indicated that appellant had chronic low back and left ankle pain, fatigue and sleepiness. Dr. Brunner noted his medical treatment for these conditions. In his May 14, 2003 report, he diagnosed chronic low back pain, occasional confusion and short-term memory deficits which were most likely related to appellant's medication regime. Dr. Brunner's reports failed to address whether appellant could perform the position of social services aide at the time of the Office's reduction of his compensation on June 25, 1999.

In a February 9, 2001 letter, Dr. Ann C. Still, a Board-certified anesthesiologist, noted a history of appellant's April 24, 1995 employment injury and medical treatment. She noted appellant's complaints of low back and leg pain. Dr. Still opined that he had persistent pain in his lower back and left leg since his employment injury. She further opined that, despite consistent treatment of his chronic pain, appellant continued to have a persistent and significant disability with the inability to return to work. Although Dr. Still opined that appellant was disabled for work since his April 24, 1995 employment injury, she did not discuss whether he was able to perform the duties of a social services aide.

⁷ *Bertha Arnold*, 38 ECAB 282 (1986).

For the foregoing reasons, the Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered by the Office; or submit any relevant and pertinent new evidence not previously considered by the Office.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act⁸ provide 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.”⁹

ANALYSIS -- ISSUE 2

The Office reopened the case, modified its July 11, 2001 overpayment decision to reflect that the overpayment period was from January 30 through July 11, 2000 rather than January 30 through November 4, 2000. The Office found that appellant underwent back surgery on July 12, 2000 and, thus, he was entitled to compensation for total disability during the period July 12 through November 4, 2000. The record reveals that appellant received compensation in the amount of \$18,824.46 during the period January 30 through July 11, 2000, while he should have received compensation in the amount of \$11,308.72. Thus, an overpayment occurred in the amount of \$7,515.74.

The Board previously affirmed the Office’s finding that recovery of the overpayment will not defeat the purpose of the Act, inasmuch as appellant’s monthly income and assets exceeded the dollar criteria. On reconsideration appellant submitted two letters dated June 12 and 24, 2003, indicating that he was delinquent in the payment of his home mortgage and facing possible foreclosure and that his life insurance policy was going to expire due to an outstanding loan on the policy. This evidence, however, does not establish that appellant experienced an increase in his expenses or a decrease in his income and the value of his assets.

The Board previously affirmed the Office’s finding that repayment of the overpayment in this case would not be against equity or good conscience. On reconsideration appellant has submitted no evidence establishing that he relinquished a valuable right or changed his position for the worse in relying on the overpaid compensation. Thus, the Board again finds that recovery of the overpayment would not be against equity or good conscience.

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 5 U.S.C. § 8129.

As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience,” the Board finds that the Office properly denied waiver of recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant’s claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The Board further finds that appellant received an overpayment in the amount of \$7,515.74, for the period January 30 through July 11, 2000 and that the Office properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 24 and 23, 2003 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: August 11, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member