

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

OTHA J. BROWN, Appellant)
and) Docket No. 03-1916
DEPARTMENT OF VETERANS AFFAIRS,) Issued: December 23, 2004
VETERANS ADMINISTRATION MEDICAL)
CENTER, Baltimore, MD, Employer)

)

Appearances:

*Otho J. Brown, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 20, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' hearing representative dated April 28, 2003 which found an overpayment occurred in the amount of \$3,487.97, that appellant was at fault in the creation of the overpayment and that waiver was not warranted. 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 \$3,487.97; and (2) whether appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

Appellant, a 36-year-old health technician, filed a traumatic injury claim on February 27, 2001 alleging that on that date he injured his neck, shoulder and lower back when a patient became combative. The Office accepted appellant's claim for back strain on April 18, 2001 and expanded his claim to include right shoulder impingement on May 8, 2001. The Office

authorized right shoulder surgery on May 15, 2001 and appellant underwent this procedure on May 30, 2001.

Appellant stopped work on February 28, 2001 and received continuation of pay from February 28 to April 13, 2001. The Office entered appellant on the periodic rolls on May 23, 2001 authorizing a payment of \$1,577.98 every 28 days beginning May 20, 2001. Appellant returned to limited-duty work on October 1, 2001. The Office issued a payment dated October 6, 2001 covering the period September 9 to October 6, 2001 in the amount of \$1,577.98.

In a preliminary notice of overpayment dated November 14, 2001, the Office informed appellant that he had received an overpayment in the amount of \$332.01 as he returned to work on October 1, 2001 and continued to receive compensation benefits until October 6, 2001. On November 21, 2001 the Office noted that appellant had refunded the entire amount of the overpayment. In a report of a telephone call dated November 29, 2001, the Office noted that appellant received a second overpayment as he received a periodic rolls check for the period October 7 to November 3, 2001. Appellant repaid this overpayment.

The Office issued a payment to appellant on March 15, 2002 in the net amount of \$3,479.60 covering the period October 7 to December 1, 2001. The Office found that appellant had received an overpayment in the amount of \$3,155.96.¹ In a preliminary finding of overpayment dated March 22, 2002, the Office found that appellant received an overpayment in the amount of \$3,155.96 as appellant returned to work on October 1, 2001 but received compensation for total disability for the period October 7 to December 1, 2001. The Office found that appellant was at fault in the creation of this overpayment as he was aware that he was not entitled to receive compensation for total disability as well as wages.

Appellant requested an oral hearing on the issue of the overpayment, fault and waiver on April 10, 2001 and submitted an overpayment recovery questionnaire. Appellant testified at this oral hearing on February 27, 2003. He stated that he repaid the earlier overpayments and that his workers' compensation representative at the employing establishment had assured him that the Office was aware of his return to work. Appellant testified that his compensation benefits were directly deposited into his bank account. He stated that he was not aware of the payment until he received the March 22, 2002 letter from the Office stating that he had been overpaid. Appellant alleged that he never dealt with any money and that his wife likely believed that the compensation was Department of Veterans Affairs benefits owed for his initial shoulder injury in 1999.²

By decision dated April 28, 2003, the hearing representative found that the amount of the overpayment was correct and that appellant was at fault in the creation of the overpayments and that therefore waiver could not be granted. She finalized the Office's November 14, 2001 and

¹ The Office noted that an attempt to remove appellant from the periodic rolls on October 12, 2001 was unsuccessful.

² The record contains a right shoulder operative report dated August 30, 1999.

March 22, 2002 preliminary findings of overpayment finding that appellant had received overpayments in the amount of \$3,487.97. The hearing representative found:

"In this case, while the claimant testified that his checks went directly into his bank account and he was unaware of these deposits, his lack of knowledge of these deposits cannot be accepted with regard to the issue of fault. He should have been aware of the deposits and thus it cannot be found that he was without fault in helping to create the overpayment."

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act³ defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ The Office's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."⁵

ANALYSIS -- ISSUE 1

The Office found that appellant received three separate overpayments. The Office issued two preliminary findings of overpayment, the first on November 14, 2001 finding that appellant had received an overpayment in the amount of \$332.01 due to a check issued on October 6, 2001, *i.e.*, for the period October 1 to 6, 2001 which included payment after October 1, 2001 the date of appellant's return to work. The second preliminary finding of overpayment on March 22, 2002 found that appellant had received an overpayment in the amount of \$3,155.96 on March 15, 2002 as he received compensation from October 7 to December 1, 2001 for total disability after he returned to full-time work.⁶ The hearing representative concluded that appellant had received overpayments of compensation in the amount of \$3,487.97 by combining the amounts of the two preliminary findings of overpayment.

Appellant did not dispute the initial overpayment of compensation in the amount of \$332.01 and the record indicates that appellant returned this overpayment to the Office. Likewise, appellant did not dispute and refunded the second overpayment received for the period October 7 to November 3, 2001. Therefore, the only overpayment outstanding at the time of the hearing representative's April 28, 2003 decision was the March 15, 2002 payment of compensation in the amount of \$3,155.96 for the period October 7 to December 1, 2001.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ The Office did not issue a preliminary finding of overpayment regarding the second period of overpayment, a payment covering the period October 7 to November 3, 2001, as appellant apparently promptly returned this amount to the Office.

Appellant has not disputed that he received this overpayment and there is no evidence of record that appellant repaid this debt in whole or part at the time of the hearing representative's April 28, 2003 decision. Therefore, the Board finds that there remains an outstanding overpayment in the amount of \$3,155.96.

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, which may affect entitlement to or the amount of benefits. 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).⁷

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.⁸

ANALYSIS -- ISSUE 2

The overpayment of compensation occurred in this case after appellant returned to work on October 1, 2001. Appellant properly reported his return to work and returned two separate overpayments of compensation which occurred shortly after his return to work, the overpayment received on October 6, 2001 covering the period October 1 to 6, 2001 and the overpayment covering the period October 7 to November 3, 2001. The Office attempted to remove appellant from the periodic rolls on October 12, 2001, however, this attempt was unsuccessful.

The Office issued a payment covering the period October 7 to December 1, 2001 on March 15, 2002. The Office found that appellant was at fault in the creation of this third overpayment in a preliminary determination dated March 22, 2002 based on the third criterion above; namely, that he accepted a payment which he knew or should have known to be incorrect. Where the Office finds a claimant at fault in creating the overpayment because he or she accepted a payment which the individual knew or should have been expected to know was incorrect, it must establish at the time the claimant received the compensation check in question, the claimant knew or should have known that the payment was incorrect.⁹

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

⁹ *Lorenca Rodriguez*, 51 ECAB 295, 298 (2000).

The record establishes that the March 15, 2002 payment from the Office was deposited directly into appellant's bank account. The Board has distinguished such a situation from one in which a claimant receives a check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation but decides nonetheless to cash or deposit the check.¹⁰ The Board has found that the mere direct deposit by the Office is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the check before it was deposited to his account. Furthermore, appellant had no opportunity to review written bank statements and determine that the deposit was made prior to the Office's preliminary determination of fault.¹¹ The Office made the payment on March 15, 2002 and made the finding of fault in the overpayment only seven days later on March 22, 2002. As there was a gap of nearly four months between the Office's incorrect payment in November and the March direct deposit, appellant had no reason to suspect that the Office would make any further payments into his account.

The Office did not provide appellant with monthly compensation from December through March, but instead issued a single payment encompassing several months' compensation after a lengthy break in benefits. This single payment was directly deposited into appellant's bank account, precluding a personal review of the actual check, and the Office issued its preliminary finding of fault without allowing appellant a reasonable time to review bank statements. The Board finds that appellant was not at fault in the creation of the \$3,155.96 overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,479.60. The Board further finds that under the circumstances of this case the Office has not presented sufficient evidence to establish that appellant accepted a payment which he knew or should have known to be incorrect. The Board will, therefore, set aside the Office's finding of fault and remand the case to the Office for further development and a final decision on the issue of waiver.

¹⁰ *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002); *Leotis Hall*, Docket No. 02-2140 (issued February 5, 2004).

¹¹ *But see, William E. McCarty*, 54 ECAB ____ (Docket No. 03-308, issued April 14, 2003); *George A. Hirsch*, 47 ECAB 520, 525-26 (1996).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2003 decision of the Office of Workers' Compensation Programs is modified to reflect the correct amount of the overpayment, is set aside regarding the finding of fault and is remanded for further development consistent with this decision of the Board.

Issued: December 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member