

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

RAY L. JOHNSON, Appellant)
and) Docket No. 04-45
DEPARTMENT OF DEFENSE, CARRON AIR) Issued: February 10, 2004
FORCE BASE, NM, Employer)

)

Appearances:

James G. Chakers, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 6, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs decision dated August 11, 2003 in which the Office found that an overpayment of \$40,620.96 was created, that appellant was fault in the creation of the overpayment and that appellant should be required to pay \$200.00 a month in repayment. Since he filed his appeal within one year of the Office's August 11, 2003 decision, the Board has jurisdiction to review the overpayment decision.

ISSUES

The issues are: (1) whether the Office properly found that an overpayment of \$40,620.96 was created; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

FACTUAL HISTORY

The Office accepted appellant's claim for a lumbar strain and mild herniated pulposus at L3-4 and L4-5. He stopped working on August 11, 1997 and was receiving temporary total

disability compensation. On March 22, 1999 appellant returned to a limited-duty position which the employing establishment had offered him. On March 24, 1999 appellant stopped working and, by letter dated March 31, 1999, the Office requested appellant's reasons for abandoning suitable alternate employment and gave appellant 30 days to respond. He submitted some medical evidence but, by decision dated June 28, 1999, the Office terminated his disability compensation effective July 17, 1999 because it found that he had abandoned suitable alternate employment. By letter dated July 7, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence. In a merit decision dated October 6, 1999, the Office denied his request for modification. By letter dated October 15, 1999, appellant requested a hearing over the telephone. By decision dated January 11, 2000, the Branch of Hearings and Review denied his request for a hearing and stated that, since he had previously requested reconsideration of the Office's decision, he was not entitled as a matter of right to an oral hearing on the same issue. The Branch of Hearings and Review found that appellant's request could "equally well be addressed by the district office" in a request for reconsideration and appellant could submit evidence not previously considered.

By letter dated February 25, 2000, appellant enclosed additional medical evidence including a report from Dr. Guy R. Fogel, a Board-certified orthopedic surgeon, dated February 18, 2000 in which he diagnosed appellant with degenerative arthritis with short pedicle syndrome and he did not believe that appellant was able to work. Appellant also requested approval for a corset and physical therapy.

By decision dated May 1, 2002, the Office found that an overpayment of \$40,620.96 was created because the Office terminated appellant's compensation benefits on June 28, 1999 yet appellant continued to receive compensation through February 23, 2002. The Office found that he was at fault in the creation of the overpayment because he was informed, by the Office's June 28, 1999 decision, that he was no longer entitled to compensation benefits and therefore knew or should have known that subsequent compensation payments were incorrect. The Office informed appellant that he could request a telephone conference, request that a final decision be issued based only on the written evidence or request a prerecoupment hearing. The Office also informed him that he could submit the appropriate financial information to establish waiver of the overpayment.

By letter dated May 15, 2002, appellant objected to the Office's finding that an overpayment was created on the grounds that the medical evidence in the record in March 1999 showed that appellant was unable to perform the job that was offered him and that the job exceeded his work restrictions. He stated that the Office denied his request for modification of the Office's June 28, 1999 decision terminating benefits and the Branch of Hearings and Review denied his request for an oral hearing. Appellant contended that there was no overpayment because the medical evidence establishes that he was unable to work through February 23, 2002 and there was no "contravening" evidence to support the Office's June 28 and October 6, 1999 decisions. He contended that he was without fault in the creation of the overpayment because the Office was at fault for allowing payments to continue and in not responding to appellant's "February 25" letter and the new evidence accompanying it. Appellant further requested a prerecoupment hearing before an Office hearing representative which was held on May 15, 2003. He submitted an overpayment recovery questionnaire showing his monthly income and expenses and his assets and liabilities.

At the hearing, appellant's attorney, James Chakeres, contended that, based on the disability slip from his doctor, appellant continued to receive his compensation payments and the Office never informed appellant during the two-year and eight-month period he was receiving compensation that the payments were erroneous. Mr. Chakeres reiterated that the medical evidence consistently showed that appellant was totally disabled and, therefore, the payment of disability compensation was warranted and there was no overpayment. Mr. Chakeres felt that the issue of appellant's disability was unresolved and pending because appellant challenged the Office's finding of no disability. Further, Mr. Chakeres noted that the Office had the obligation to send out one of its own doctors to followup with appellant's claim. He felt that the Office was estopped from now claiming that it made a mistake.

Appellant stated that he received about \$1,200.00 a month for disability compensation. The Office hearing representative also addressed his financial status. Appellant stated that he took care of his 74-year-old mother but she was not a dependent, that he lived with his mother but she owned the property and he did not pay rent. He stated that he performed household maintenance and bought groceries. He also stated that he spent \$200.00 a month on groceries, approximately \$150.00 a month on clothes and owned two cars, a 1994 Explorer and a 1979 Mercury and made \$300.00 in car payments a month.

By decision dated August 11, 2003, the Office hearing representative finalized the May 1, 2002 preliminary determination finding that an overpayment of \$40,620.96 was created, that appellant was at fault in the creation of the overpayment and that appellant was required to pay \$200.00 a month to the Office in repayment.

LEGAL PRECEDENT -- Issue 1

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."¹ The Board has held that section 8106 of the Act serves as a bar to a claimant's entitlement to further compensation for total disability, partial disability or permanent impairment arising out of an accepted employment injury in light of the language of the statute, legislative history and Board precedent.²

ANALYSIS -- Issue 1

The Board finds that the Office properly determined that an overpayment of \$40,620.96 was created. By decision dated June 28, 1999, the Office terminated appellant's disability benefits effective July 17, 1999 because appellant abandoned suitable work and the Office continued to pay appellant compensation benefits through February 23, 2002. Due to this termination, he was not entitled to receive disability benefits after July 17, 1999. A fiscal payment worksheet and a computer printout show that from July 18, 1999 through February 23,

¹ 5 U.S.C. § 8106(c)(2).

² See *Stephen R. Lubin*, 43 ECAB 564, 569-73 (1992).

2002 appellant received \$40,620.96 in disability benefits. No evidence of record refutes the amount of the overpayment.

LEGAL PRECEDENT -- Issue 2

Section 8129(b) of Act³ provides that an overpayment of compensation shall be recovered by the Office unless “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.”⁴ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.⁵

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulation provides in relevant part that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.⁶

ANALYSIS -- Issue 2

In this case, in determining that appellant was at fault in the creation of the overpayment, the Office applied the third standard. In order for the Office to establish that he was with fault in creating the overpayment of compensation, the Office must show that, at the time that appellant received the compensation checks in question, he knew or should have known that the payments were incorrect.⁷ Since appellant was informed by the Office’s decision dated June 28, 1999 that he was no longer entitled to disability benefits, he knew or should have known that he was not entitled to any subsequent benefits. Although his attorney contended that appellant relied on this doctor’s reports, that he was still totally disabled and the issue of appellant’s disability was pending, the record does not support these contentions. By decisions dated June 28 and October 6, 1999, the Office determined that appellant had not submitted the requisite medical evidence to establish that he was totally disabled. The Board does not have jurisdiction to review the merits of those decisions at this time as appellant did not appeal them within a year of their being issued.⁸ Further, the fact that his attorney continued to appeal the June 28, 1999 decision does not preclude appellant from having knowledge that he was no longer entitled to

³ 5 U.S.C. § 8129(b).

⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁵ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁶ 20 C.F.R. § 10.433(a) (1999).

⁷ *Diana L. Booth*, *supra* note 5.

⁸ See *Martha A. McConnell*, 50 ECAB 129, 130 n.2 (1998).

disability benefits. Because appellant knew or should have known after his receipt of the June 28, 1999 decision he was no longer entitled to disability benefits, he is at fault in the creation of the overpayment and the recovery of the overpayment is not subject to waiver.⁹

CONCLUSION

The Office properly determined that an overpayment of \$40,620.96 was created and that appellant was at fault in the creation of the overpayment, thereby precluding waiver of the overpayment. The Board does not have jurisdiction to rule on the amount of the monthly repayment.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2004

Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See *Lorenzo Rodriguez*, 51 ECAB 295, 298-99 (2000). In the present case, the Office is not seeking recovery from continuing compensation benefits. The Board notes that it does not have jurisdiction under the Debt Collection Act, 5 U.S.C. § 5511 *et seq.*, to consider the matter of recovery of an overpayment against the assets of the salary of an employee. See *Beverly E. Labbe*, 50 ECAB 440, 443 (1999); *Levon H. Knight*, 40 ECAB 658 (1989). The Board's jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Federal Employees' Compensation Act. *Id.* Therefore the Board does not have jurisdiction over the method of recovery of the overpayment in the present case.