

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES BOYKINS and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

*Docket No. 03-1884; Submitted on the Record;
Issued January 15, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$39,763.80 for the period September 16, 1996 to January 1, 2000; (2) whether the Office of Workers' Compensation Programs properly declined to waive the recovery of the overpayment; and (3) whether the Office properly determined to recover the overpayment by withholding \$92.31 of appellant's continuing compensation benefits every 28 days.

This case has previously been before the Board on appeal. After his initial employment injury on December 15, 1981 accepted by the Office for lumbosacral strain, appellant stopped work on April 11, 1983 due to an accepted recurrence of disability and returned to work on February 12, 1987 working four hours a day. Appellant filed a notice of recurrence of disability on March 24, 1987 alleging that on March 6, 1987 he sustained a recurrence of total disability due to his accepted employment injury. The employing establishment removed appellant from duty on August 30, 1989. Appellant received disability retirement benefits beginning on his date of separation. The Office denied appellant's claim for recurrence on April 13, 1990. Appellant requested an oral hearing and, by decision dated March 7, 1991, the hearing representative set aside the April 13, 1990 decision and remanded the case for referral to an impartial medical specialist to resolve a conflict of medical opinion. By decision dated July 16, 1991, the Office denied appellant's claim for recurrence on the grounds that appellant obstructed a medical examination. In a decision dated August 19, 1992, the Board amended the Office's July 16, 1991 decision to reflect that appellant's compensation benefits were suspended due to his obstruction of a medical examination.¹ The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

In a letter dated May 17, 1996, appellant requested a medical examination. On September 16, 1996 appellant attended an impartial medical examination. In a letter dated

¹ Docket No. 92-228 (issued August 19, 1992).

February 24, 1998, the Office informed appellant that his entitlement to continuing compensation benefits began on the date of his medical examination, September 16, 1996.²

Appellant elected compensation benefits on March 23, 1998 and again on May 28, 1999 effective September 16, 1996. The Office issued appellant a check dated September 24, 1999, for the period from September 16, 1996 to May 30, 1999, in the amount of \$37,881.20 based on a weekly pay rate of \$383.90. Appellant received a check in the amount of \$7,042.29 covering the period of May 31 to September 11, 1999. He also received a check on October 9, 1999 in the amount of \$1,896.00 for the period of September 12 to October 9, 1999. On September 28, 1999 the Office entered appellant on the periodic rolls. In a separate letter of the same date, the Office informed appellant that he was receiving compensation based on total disability.

In a preliminary finding of overpayment dated May 7, 2001, the Office found that appellant received an overpayment in the amount of \$39,763.80, as the Office paid him compensation for total disability, rather than partial disability of four hours a day. The Office found that appellant was at fault in the creation of the overpayment.

Appellant requested an oral hearing and submitted financial information. He testified at his oral hearing that he did not believe that he had received an overpayment as he was totally disabled during the period in question. However, he did not dispute that the Office had paid him compensation for total disability, nor did he disagree with the calculation of what his compensation for partial disability should be. By decision dated July 18, 2002, the hearing representative found that appellant had received an overpayment of compensation in the amount of \$39,763.80, that appellant was not at fault in the creation of the overpayment, that waiver was not appropriate and that appellant could repay the overpayment by withholding \$100.00 from his monthly compensation benefits.

Appellant requested that the Board review this decision and by remanding case dated December 12, 2002, the Board found that the record was not complete as it did not contain the hearing representative's decision and remanded for reassemblage of the record and an appropriate decision.³ By decision dated June 23, 2003, the Office reissued its prior decisions finding that appellant received an overpayment in the amount of \$39,763.80, that he was not at fault in the creation of the overpayment, that he was not entitled to waiver of the amount of the overpayment, but granted waiver of the interest on the overpayment and that recovery in the amount of \$100.00 per month of \$92.31 every 28 days was appropriate.

The Board finds that appellant received an overpayment of compensation in the amount of \$39,763.80.

At the time of his alleged recurrence of disability on March 6, 1987, appellant was receiving compensation for partial disability for four hours a day. Appellant alleged a recurrence

² The Office has not issued a final decision addressing appellant's recurrence of total disability beginning March 6, 1987. As the Office has not issued a final decision on this issue, the Board will not address this issue or any evidence regarding this issue on appeal. 20 C.F.R. § 501.2(c).

³ Docket No. 02-2264 (issued December 12, 2002).

of total disability, which the Office has not accepted. The record establishes that beginning September 16, 1996, when appellant's temporary suspension of compensation benefits ended with his cooperation with a medical examination, appellant was entitled to receive continuing compensation benefits for four hours a day based on a percentage of his weekly pay rate for eight hours a day of \$383.90 per week. The Office issued appellant compensation for the period September 16, 1996 through January 1, 2001, based on total disability in the amount of \$79,619.49, when he was entitled to receive compensation in the amount of \$39,855.69 resulting from a 20-hour work week pay rate of \$191.95, which resulted in an overpayment in the amount of \$39,763.80.

The Board finds that the Office properly denied waiver of the overpayment.

Regarding waiver, section 10.434 of the Office's regulations provides that if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery would defeat the purposes of the [Federal Employees' Compensation Act⁴];

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”⁵

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all his current income to meet current ordinary and necessary living expenses⁶ and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁷ Section 10.437 provides that an recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.⁸

In this case, the hearing representative considered the financial information submitted by appellant, noting that his monthly income was \$5,109.00 per month and that appellant claimed \$5,188.51 in expenses. The hearing representative found that appellant included monthly expenses of “personal expenses” in the amount of \$600.00; special food for \$200.00 and clothing of \$500.00 without providing any financial documentation to support these amounts. He found that appellant had not submitted supporting documents to establish expenses listed as requested

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.434.

⁶ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB 659, 661 (2000).

⁷ 20 C.F.R. § 10.436. This amount has been considered to be \$3,000.00 for an individual. *Fitzgerald*, *supra* note 6.

⁸ 20 C.F.R. § 10.437.

by the Office in the preliminary finding of overpayment and that, therefore, he could not calculate whether appellant needed substantially all of his income to meet current ordinary and necessary living expenses and, therefore, whether recovery of the overpayment would defeat the purpose of the Act.

The Office's regulations provide that failure to submit the requested information within 30 days of the request shall result in denial of waiver.⁹ As appellant did not provide the requested information substantiating his expenses, the Board finds that the hearing representative did not abuse his discretion in denying waiver.¹⁰

The Board further finds that the Office properly withheld \$100.00 per month or \$92.31 every 28 days from appellant's continuing compensation to recover the overpayment.

Section 10.441(a) of the regulations¹¹ provides:

"When an overpayment has been made to an individual who is entitled to further payments, ... 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."

The record supports that, in requiring repayment of the overpayment by deducting \$100.00 per month or \$92.31 every 28 days, the Office took into consideration the specific financial information submitted by appellant as well as the factors set forth in the regulations noting that appellant had unexplained questionable expenses totaling more than \$1,352.00 for items such as special foods, clothing and personal expenses and concluding that appellant had viable income to make monthly payments in the amount of \$100.00 per month. Therefore, the Office properly required repayment of the overpayment by deducting \$100.00 every month or \$92.31 every 28 days.

⁹ 20 C.F.R. § 10.438.

¹⁰ *Linda Hilton*, 52 ECAB 476, 479 (2001).

¹¹ 20 C.F.R. § 10.441(a).

The decision of the Office of Workers' Compensation Programs dated June 23, 2003 is hereby affirmed.

Dated, Washington, DC
January 15, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member