

FACTUAL HISTORY

On December 29, 2000 appellant, then a 44-year-old clerk, filed a traumatic injury claim for continuation of pay/compensation (Form CA-1) alleging that he sustained a left shoulder injury in the performance of duty on December 28, 2000. By letter dated April 16, 2001, the Office accepted a left shoulder rotator cuff tear. The Office advised appellant: "When you return to work, or obtain new employment, notify this Office right away. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation." Appellant underwent left shoulder surgery on May 2, 2001; he stopped working and received compensation for temporary total disability. He received a payment for the period May 20 to June 16, 2001 in the amount of \$2,001.46. The Office issued a payment of \$2,176.88 on July 14, 2001 for the period June 17 to July 14, 2001, and appellant continued to receive payments of \$2,176.88 every 28 days.

The record indicates that appellant returned to a full-time light-duty position on July 2, 2001. He continued to work through March 10, 2002, when his employment was terminated due to his inability to perform his regular position. On March 15, 2002 the Office received a March 8, 2002 claim for compensation (Form CA-7) indicating that appellant was also claiming a schedule award. Following the termination of employment, the Office authorized vocational rehabilitation services.

By decision dated August 5, 2004, the Office reduced appellant's compensation on the grounds that he had the wage-earning capacity of a gate guard or surveillance system monitor. Appellant requested an oral hearing before an Office hearing representative. The Office advised appellant in a March 9, 2005 letter that the hearing was scheduled for May 6, 2005 at 3:00 p.m.

In a letter dated August 12, 2004, the Office advised appellant of a preliminary determination that an overpayment of compensation totaling \$17,905.03 was created from July 2, 2001 to March 9, 2002. The Office explained that appellant had received compensation for total disability during this period after he had returned to work. With respect to fault, the Office made a preliminary determination that appellant was at fault in creating the overpayment. Appellant submitted an overpayment recovery questionnaire and requested a telephone conference. The Office scheduled a telephone conference for September 29, 2004 and requested that appellant confirm his participation or make appropriate arrangements for rescheduling. There is no indication that a telephone conference was held.

By decision dated June 15, 2005, the Office found that appellant did not appear for the scheduled May 6, 2005 hearing and did not explain his failure to appear. The Office determined that appellant had abandoned his request for a hearing.

In a letter dated June 15, 2005, the Office noted that the issue of an overpayment remained unresolved and requested that appellant call on July 11, 2005 for a telephone conference. There is no evidence of record that appellant attempted to contact the Office.

In a decision dated August 4, 2005, the Office finalized its determination of a \$17,905.03 overpayment of compensation and a denial of waiver on the grounds that appellant was at fault in creating the overpayment. The Office requested that he forward a payment in the amount of the

overpayment. On August 16, 2005 the Office received an undated letter from appellant stating that he did not attend the scheduled hearing because the road was blocked and he got lost. Appellant stated that he left messages on the hearing officer's answering machine.

In a letter dated September 9, 2005, the Office indicated that appellant had not submitted a payment or indicated his intent to cooperate in this matter. By decision dated September 16, 2005, the Office advised appellant that the overpayment would be recovered by deducting \$140.00 from his continuing compensation. The Office explained that this represented 10 percent of his net compensation every 28 days.

LEGAL PRECEDENT -- ISSUE 1

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary....”

With respect to abandonment of hearing requests, Chapter 2.1601.6.e of the Office's procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office].”¹

ANALYSIS -- ISSUE 1

In the present case, appellant was notified that an oral hearing was to be held on May 6, 2005. On appeal, appellant stated that he attempted to attend the hearing, but the road to the hearing building had been blocked off, and he spent three hours in traffic. He asserted that he left messages that day and tried to contact the hearing representative by telephone after the hearing, but was unsuccessful and that he sent a letter to the Office. The record contains a letter from appellant received by the Office on August 16, 2005, explaining that the road was blocked and that he got lost while attempting to find the building at which the hearing would be held. As noted, appellant must provide an explanation for his failure to appear within 10 days of the May 6, 2005 hearing. There is no evidence of record with respect to the failure to appear at the scheduled hearing that was received by the Office within 10 days of the scheduled hearing.

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999). See also Chris Wells, 52 ECAB 445 (2001).

The evidence establishes that appellant did not request a postponement of the hearing, failed to appear at the hearing and failed to provide adequate explanation for his failure to appear within 10 days. Appellant is therefore found to have abandoned his request for a hearing in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration 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 Veterans Administration unless such benefits payable for the same injury or the same death....”²

ANALYSIS -- ISSUE 2

Appellant returned to work on July 2, 2001 in a full-time position, and he continued to work through March 9, 2002, when his employment was terminated. He received compensation for temporary total disability during this period in the amount of \$17,905.03. Appellant is not entitled to receive compensation for temporary total disability during a period that he worked and received wages.³ The record establishes that, as appellant worked full time and would not be entitled to any compensation for wage loss from July 2, 2001 to March 9, 2002, the amount he was paid is an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment in 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

² 5 U.S.C. § 8116.

³ See *Kenneth E. Rush*, 51 ECAB 116, 117 (1999).

⁴ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office's regulations provides:

“[T]he 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 receives 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 in 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.)”⁵

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines 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.⁶

ANALYSIS -- ISSUE 3

The Office found that appellant had accepted payments he knew or should have known to be incorrect. The record reflects that appellant was advised on April 16, 2001 that he must notify the Office of his return to work and that he could not keep any compensation paid for a period that he had worked and earned wages. Appellant received a compensation payment for 28 days of total disability on June 16, 2001 and he accepted subsequent payments for temporary total disability after his return to work on July 2, 2001.

Appellant's explanation appears to be that he believed he was receiving schedule award payments. The evidence does not support this explanation. According to the record, appellant did not submit a request for a schedule award until March 8, 2002. The Board finds no probative evidence to support that appellant could reasonably believe the payments were made pursuant to a schedule award. The payments were compensation for total disability and he knew or should have known they were incorrect after his return to full-time work. Appellant was properly found to be at fault in creating the overpayment and is not entitled to waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

The Office's implementing regulation provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future

⁵ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁶ 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.⁷

ANALYSIS -- ISSUE 4

In this case, the Office offered appellant the opportunity for a telephone conference regarding repayment of the overpayment, and he had an opportunity to submit relevant current financial information. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.⁸ When an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.⁹ In this case, the Office set the repayment rate at \$140.00 every 28 days from continuing compensation, which represents 10 percent of his compensation.

The Board finds that there is no evidence in the record to show that a recovery rate of \$140.00 every 28 days was unreasonable. The probative evidence does not establish that the Office improperly required withholding \$140.00 from his continuing compensation payments every 28 days.

CONCLUSION

The Board finds the following: (1) the Office properly found that appellant abandoned his request for a hearing; (2) an overpayment of \$17,905.03 was created during the period July 2, 2001 to March 9, 2002; (3) appellant was not entitled to waiver as he was not without fault in creating the overpayment; and (4) the Office properly held that the overpayment should be recovered by deducting \$140.00 from appellant's continuing compensation.

⁷ 20 C.F.R. § 10.441(a).

⁸ 20 C.F.R. § 10.438 (2003).

⁹ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Chapter 6.200.4(c)(2) (FECA Tr. No. 94-38, September 1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4 and June 15, 2005 are affirmed.

Issued: December 14, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board