

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

CARLA C. WOOD, Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Arvada, CO, Employer)

**Docket No. 05-434
Issued: June 21, 2005**

Appearances:
Gregory A. Hall, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 9, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 30, 2004 in which an Office hearing representative affirmed a September 23, 2003 decision suspending appellant's compensation benefits because she failed to submit to a scheduled physical examination. On February 5, 2005 she amended her appeal to include the November 19, 2004 decision in which the Office finalized a \$1,279.04 overpayment in compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these Office decisions.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's compensation benefits because she failed to submit to a scheduled physical examination; (2) whether the Office properly determined that appellant received a \$1,279.04 overpayment in compensation for the period February 23, 2001 to March 22, 2003 because health insurance premiums had not been deducted from her compensation; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly required repayment of the overpayment at the rate of \$200.00 each compensation period.

FACTUAL HISTORY

On July 17, 2001 appellant, then a 43-year-old rural mail carrier, filed a Form CA-1, traumatic injury claim, alleging that on January 17, 2001 she sustained employment-related injuries when she was involved in a motor vehicle accident while on her way to work. The claim was initially denied. By decision dated August 26, 2002, an Office hearing representative reversed the denial and remanded the case for the Office to determine appellant's entitlement to benefits.

On October 4, 2002 the Office accepted that she sustained multiple employment-related injuries.¹ By letter dated February 19, 2003, the Office informed appellant that she was being placed on the periodic rolls. The letter indicated that no deduction was being made for health benefits, and Office computer print-outs contained in the record indicate that no deductions for health benefits were made for the period February 23, 2001 to March 22, 2003. A form contained in the record, signed by appellant on April 24, 2001, indicates that she wished to continue health benefits. A notice of change in health benefits enrollment form dated April 3, 2003 indicates that appellant was to be enrolled under code D61, effective February 23, 2003. Appellant thereafter underwent physical and cognitive therapy and a nurse was assigned to assist in her recovery.

On May 2, 2003 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$1,279.04 because deductions for health insurance premiums had not been made for the period February 23, 2001 to March 22, 2003. The Office found appellant without fault in creating the overpayment, informed her of the actions she could take in response and provided an overpayment questionnaire to submit. She was given 30 days to respond. On June 24, 2003 the Office forwarded a copy of the May 2, 2003 preliminary overpayment determination to appellant's attorney of record, Gregory A. Hall, advising him that the 30-day response period would begin on that date.

By letters dated July 18 and 23, and August 8 and 19, 2003, the Office informed appellant that appointments had been scheduled with Dr. Charles D. McMahon, a Board-certified ophthalmologist, for September 8, 2003² and for September 2, 2003 with Anne Steinberg, Ph.D.³ Appellant was apprised of the time and place of the appointments and informed of her rights and responsibilities pursuant to sections 8123(a) and (d) of the Federal Employees' Compensation Act. In a September 3, 2003 letter, the Office informed appellant that it proposed to suspend her compensation because she did not attend the appointment on September 2, 2003 with Dr. Steinberg. Appellant was again informed of the provisions of section 8123(d) and was given 14 days to provide an explanation for her failure to attend the scheduled examination. The

¹ The accepted conditions were whiplash, cervical and lumbar sprains, left shoulder impingement, aggravation of senile psychosis, aggravation of postconcussion syndrome and temporomandibular joint syndrome.

² An Office medical adviser had advised that a second opinion evaluation by an ophthalmologist was needed to determine whether appellant required corrective lenses that had been prescribed by Dr. Edwin Mammiko, an optometrist.

³ Dr. Steinberg was to identify conditions medically connected to the employment injury by conducting a mental status examination and psychological and personality testing.

Office informed appellant that, if good cause were not established, entitlement to compensation would be suspended until she reported for examination. On September 23, 2003 the proposed suspension was made final. The Office noted that appellant did not respond to its September 3, 2003 letter. The record indicates that appellant also failed to attend the scheduled September 8, 2003 examination with Dr. McMahon. An Office memorandum dated October 2, 2003 advised that appellant telephoned the Office, requesting that the appointments be rescheduled. The reasons given for her failure to attend the scheduled appointments were that she had incorrectly written down the times of the appointments, did not have access to her mail, was depressed and unable to drive.

On October 22, 2003 appellant, through her attorney, requested a review of the written record⁴ and submitted a report dated October 28, 2003 in which her attending Board-certified psychiatrist, Dr. Marita J. Keeling, advised that during the period of the scheduled appointments, appellant was feeling overwhelmed. During this period, appellant saw her orthopedic surgeon, Dr. Ryan, who dismissed her from his care, and felt helpless and hopeless. Dr. Keeling noted that the poor judgment exhibited by appellant was a consequence of her dementia. Appellant thereafter attended an examination with Dr. Steinberg on October 29, 2003 and by Dr. Robert B. Keyser, a Board-certified ophthalmologist, on October 31, 2003. Appellant's compensation was reinstated, effective October 29, 2003.⁵

In a decision dated July 30, 2004, an Office hearing representative affirmed the September 23, 2003 decision, finding that appellant failed to respond to the September 3, 2003 notice and her compensation was properly suspended. He reviewed Dr. Keeling's report and advised that this did not establish good cause for appellant's failure to appear for examination.

By decision dated November 19, 2004, the Office finalized the overpayment, finding that an overpayment in the amount of \$1,279.04 had been created for the period February 23, 2001 to March 22, 2003 because health insurance premiums were not deducted from appellant's compensation. The Office found appellant without fault but noted that she did not respond to the preliminary overpayment notice and provided no financial information. The Office determined that \$200.00 would be withheld from her continuing compensation each pay period to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) of the Act⁶ authorizes the Office to require an employee who claims compensation as the result of an injury due to his or her federal employment to undergo such physical examinations as it deems necessary.⁷ The determination of the need for an examination,

⁴ Appellant initially requested a hearing but changed the request to a review of the written record.

⁵ On April 16, 2004 a third-party settlement of \$100,000.00 was reached regarding the January 17, 2001 motor vehicle accident with disbursements of \$31,714.02 to the Office, \$27,453.91 to appellant, and \$40,832.07 to her attorney.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8123(a).

the type of examination, the choice of the locale and the choice of medical examiners are matters within the discretion of the Office.⁸ A time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.⁹ Office regulations provide that an employee must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.¹⁰ The only limitation on this authority is that of reasonableness.¹¹ Section 8123(d) of the Act provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops.¹² The Board has interpreted the "plain meaning" of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.¹³

Office procedures provide that, if the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with section 8123(d) until the date on which the claimant agrees to attend the examination. The agreement may be expressed in writing or by telephone. When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.¹⁴

ANALYSIS -- ISSUE 1

In order to assess appellant's psychological conditions, by letters dated August 8 and 19, 2003, the Office informed appellant that an appointment had been scheduled for September 2, 2003 with Dr. Steinberg. Appellant was apprised of her rights and responsibilities pursuant to sections 8123(a) and (d) of the Act. However, she did not attend the scheduled examination. In a September 3, 2003 letter, the Office informed appellant that it proposed to suspend her compensation because she did not attend the appointment with Dr. Steinberg. She was again informed of the provisions of section 8123(d) and was given 14 days to provide an explanation for her failure to attend the scheduled examination. The Office informed appellant that, if good cause were not established, entitlement to compensation would be suspended until she reported for examination. Appellant did not respond to the proposed suspension and, on September 23, 2003, the proposed suspension was made final.

⁸ *Anthony H. Jackson*, 53 ECAB 529 (2002).

⁹ *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB ____ (Docket No. 02-625, issued January 28, 2003).

¹⁰ 20 C.F.R. § 10.320.

¹¹ *Anthony H. Jackson*, *supra* note 8.

¹² 5 U.S.C. § 8123(d).

¹³ *Alfred R. Anderson*, 54 ECAB ____ (Docket No. 02-1417, issued November 5, 2002).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); see *Anthony H. Jackson*, *supra* note 8.

The notification from the Office regarding the appointment with Dr. Steinberg properly informed appellant of the time and place of the scheduled examination and the consequences for failing to attend. When appellant called the Office on October 2, 2003 to reschedule the missed appointments, she merely stated that she confused the dates of the appointments, did not have access to her mail, was depressed and unable to drive. Appellant's attending psychiatrist, Dr. Keeling, provided an October 28, 2003 report in which she advised that, during the period prior to the scheduled appointments, appellant was feeling overwhelmed, helpless and hopeless and that poor judgment was a consequence of her dementia. The Board however finds that these reasons do not constitute a good cause for appellant's failure to appear. The Office afforded her an opportunity to explain her failure to appear for the examination with Dr. Steinberg. She did not respond until October 2, 2003, well after the suspension was made final. The Board therefore finds that appellant presented insufficient justification for not attending the examination scheduled with Dr. Steinberg on September 2, 2003, and the Office acted properly in suspending her compensation on September 23, 2003.¹⁵

The Board notes that appellant's compensation was reinstated following her examination with Dr. Steinberg on October 29, 2003, effective as of the date of the examination. Office procedures, however, provide that payment may be made retroactive to the date on which the claimant agreed to attend the examination.¹⁶ The Board therefore finds that appellant is entitled to compensation benefits as of October 2, 2003, the date she agreed to attend the examination with Dr. Steinberg.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁷

The Office of Personnel Management (OPM), rather than the Office, has jurisdiction over the matter of health insurance deductions from compensation and enrollment under the Federal Employees' Health Benefits (FEHB) Program.¹⁸ OPM regulations regarding the FEHB Program provide that an employee or annuitant is responsible for payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due the United States in the amount of the proper employee withholding required

¹⁵ 5 U.S.C. § 8123(d); *Anthony H. Jackson*, *supra* note 8.

¹⁶ *Supra* note 14.

¹⁷ 5 U.S.C. § 8129.

¹⁸ *See Raymond C. Beyer*, 50 ECAB 164 (1998).

for that pay period.¹⁹ The regulations further provide that an agency that withholds less than or none of the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under 5 U.S.C. § 8906 to OPM for deposit in the Employees Health Benefits Fund.²⁰

ANALYSIS -- ISSUE 2

In this case, deductions for health insurance premiums were not taken from appellant's compensation payments for the period February 23, 2001 to March 22, 2003. The record indicates that appellant wished to continue health benefits after her employment injury, but no deductions were made from her compensation until March 22, 2003. The Office calculated that the payments for health benefits of \$1,279.04 should have been deducted from her compensation for this period. As no health benefit deductions were made from appellant's compensation during the period February 23, 2001 to March 22, 2003, and there is no evidence that appellant cancelled her health benefits enrollment, the Board finds that an overpayment was created in the amount of \$1,279.04 due to the under withholding of health insurance premiums.²¹

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that, when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulation prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.²² Section 8129(b) provides the only exception to this mandatory adjustment:

“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.”²³

Section 10.436 of the implementing regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid

¹⁹ 5 C.F.R. § 890.502(b)(1).

²⁰ 5 C.F.R. § 890.502(d); *see John Skarbek*, 53 ECAB 630 (2002); *Jennifer Burch*, 48 ECAB 633 (1997).

²¹ *Id.*

²² 5 U.S.C. § 8129(a).

²³ 5 U.S.C. § 8129(b).

beneficiary of income and resources needed for ordinary and necessary living expenses.²⁴ Office procedures state that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses and

“(b) The individual’s assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent.”²⁵

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.²⁶

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.²⁷

ANALYSIS -- ISSUE 3

The Office determined that appellant was not at fault in the creation of the overpayment. Because she is without fault in the matter of the overpayment, the Office may make recovery only if adjustment would not defeat the purpose of the Act or be against equity and good conscience. In this case, however, appellant did not submit an overpayment recovery questionnaire or other financial information as the Office requested prior to the final November 19, 2004 overpayment decision. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.²⁸ The Board finds that, as appellant did not complete an overpayment recovery questionnaire or submit any type of financial information, she is not entitled to waiver. On May 2, 2003 the Office mailed appellant an overpayment questionnaire and requested that she furnish the requested information within 30 days. On June 24, 2003 appellant’s attorney was notified of the preliminary overpayment finding, and the 30-day period to respond was extended. Appellant did not respond, and on

²⁴ 20 C.F.R. § 10.436.

²⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (May 2004).

²⁶ *Id.*

²⁷ 20 C.F.R. § 10.437.

²⁸ 20 C.F.R. § 10.438.

November 19, 2004, the Office finalized the overpayment decision. Without an accurate and complete breakdown of appellant's monthly income, monthly expenses and assets, supported by financial documentation, the Office is not able to calculate whether appellant's assets exceed the specified resource base.²⁹ The Office therefore properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt,³⁰ or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.³¹ Appellant, however, submitted no evidence to establish that she relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines. As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office properly denied waiver.

LEGAL PRECEDENT -- ISSUE 4

The Office's implementing regulation provides 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 payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.³²

ANALYSIS -- ISSUE 4

As stated above, appellant did not submit an overpayment recovery questionnaire or other financial information as the Office requested prior to the final November 19, 2004 overpayment decision. Regarding recovery of an overpayment, 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.³³ As appellant did not submit the financial information requested by the Office, the Board finds that there is no evidence in the record to show that the recovery rate of \$200.00 every 28 days is unreasonable. She has not shown that the Office

²⁹ *Gail M. Roe*, 47 ECAB 268 (1995).

³⁰ 20 C.F.R. § 10.437(a).

³¹ 20 C.F.R. § 10.437(b).

³² 20 C.F.R. § 10.441(a).

³³ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).

improperly required withholding \$200.00 from her continuing compensation payments every 28 days.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits for the period September 2 to October 29, 2003 because she did not submit to a scheduled physical examination. The Board further finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,279,04 and did not abuse its discretion in denying waiver and requiring recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 19 and July 30, 2004 be affirmed.

Issued: June 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member