



## **FACTUAL HISTORY**

On October 30, 2000 appellant, then a 47-year-old heating and air conditioning equipment mechanic, was taking a boat to the work site when the boat came out of rough water and slammed down, causing appellant to fall forward and strike his right knee on the deck. The Office accepted appellant's claim for internal derangement of the right knee and began paying temporary total disability effective February 28, 2001, when appellant entered into a leave-without-pay status. Appellant subsequently underwent several operations and received considerable medical attention for his right knee. He returned to limited duty on May 9, 2001 and worked intermittently until December 30, 2001, when he stopped working. He did not return to work after that date.

On September 21, 2003 the Office issued appellant a check for \$297.45 for reimbursement of the costs of prescribed drugs. In a May 5, 2004 preliminary decision, the Office found that appellant had received an overpayment of \$297.45 because he was reimbursed for pharmacy services in error. The Office explained that the pharmacy billed it directly for its services but the payment was sent to appellant instead of the pharmacy. The Office made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. The Office advised appellant of his right to submit additional evidence if he disagreed that an overpayment, if he disagreed with the amount of the overpayment, or if he believed that the overpayment occurred through no fault of his own. Appellant did not respond to the Office's preliminary decision.

In a September 20, 2004 decision, the Office found that appellant had received a \$297.45 overpayment in compensation because he was reimbursed for pharmacy services in error. The Office further found that the preliminary determination that appellant was at fault in the creation of the overpayment was correct because appellant knew or reasonably should have known that the payment was incorrect. To recover the debt, the Office noted that the entire sum would be withheld from appellant's continuing compensation benefits on October 2, 2004.

## **LEGAL PRECEDENT -- ISSUE 1**

"If an employee has paid bills for medical ... supplies due to an injury sustained in the performance of duty, he or she may submit an itemized bill ... together with a medical report to [the Office] for consideration."<sup>1</sup> However, if the bill for medical treatment or supplies furnished to an employee by a physician, provider or pharmacy is not paid by the employee, the bill shall be promptly submitted by form to the Office for payment by the physician, provider or pharmacy.<sup>2</sup>

Section 8129(a) of the Federal Employees' Compensation Act provides that "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 the individual is entitled."

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<sup>1</sup> 20 C.F.R. § 10.802(a).

<sup>2</sup> 20 C.F.R. § 10.801(a).

### **ANALYSIS -- ISSUE 1**

The Office found that appellant had received a \$297.45 overpayment of medical benefits because he received a check for payment for drugs that should have been sent to the pharmacy providing the medication. Evidence of record indicates that the pharmacy charged the Office directly for its services and drugs. Because of this arrangement, appellant should not have received reimbursement for drugs and medical supplies because he did not pay for the drugs and medical supplies from the pharmacy. The pharmacy, not appellant was entitled to reimbursement. The Office erred in this case however by paying the amount of money owed as the pharmacy's reimbursement to appellant. Appellant was not owed the \$297.45, which was instead owed to the pharmacy.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of the Act provides that "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."<sup>3</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.433(a) of the Office's regulations provide in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating of 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 been expected to know was incorrect. (This provision applies only to the overpaid individual)"<sup>4</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> 20 C.F.R. § 10.433(a).

## **ANALYSIS -- ISSUE 2**

The Board finds that appellant was at fault in the creation of the overpayment. Appellant did not pay the pharmacy for any medication or medical supplies. Payment was supposed to be sent directly to the pharmacy from the Office. Appellant was or should have been aware of this billing practice as he did not pay any amount for these medical expenses. Furthermore, appellant should have known that he was only entitled to reimbursement for medical or pharmacy supplies if he submitted a proper bill to the Office for reimbursement. Which he did not do in this case. Therefore, when appellant received a check for \$297.45 for reimbursement for drugs and medical supplies, he knew or should have known that he was not entitled to the check. As a result, appellant accepted a payment that he knew or should have known was incorrect.

The Office erred in mailing the pharmacy reimbursement to appellant. Nevertheless, even if an overpayment resulted from the negligence of the Office, the Office's error does not excuse the employee from accepting a payment that he knew or should have known was incorrect.<sup>5</sup> As found above, appellant accepted a payment that he knew or should have known was incorrect. His action cannot be excused by the Office's error in sending the check to him.

On appeal appellant alleges that he returned the check in question to the Office and therefore no overpayment exists. The Board notes that appellant did not raise this argument to the Office prior to the final overpayment decision. The Board also notes that the record does not substantiate that the Office received any correspondence or monetary reimbursement from appellant prior to the final overpayment decision on appeal.

## **LEGAL PRECEDENT -- ISSUE 3**

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If 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....”

## **ANALYSIS -- ISSUE 3**

In the present case, the Office requested that appellant provide financial information to enable it to determine the rate of recovery of the overpayment having due regard to the factors noted above. Appellant, however, did not provide any information as requested to indicate that his financial circumstances were such that recovery of the overpayment from his continuing compensation would cause undue financial hardship. Given the small amount of the

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<sup>5</sup> *Diana L. Booth*, 52 ECAB 370, 374-75 (2001).

overpayment in question, \$297.45, the Office acted properly to recover the debt from benefits as soon as possible.

**CONCLUSION**

Appellant was at fault in the creation of an overpayment of \$297.45 because he accepted a reimbursement for medical benefits that he knew or should have known was incorrect. The Office properly collected the entire sum of the overpayment from appellant's continuing compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 20, 2004 is hereby affirmed.<sup>6</sup>

Issued: March 25, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> Information submitted to the Board on appeal indicates that appellant has repaid the overpayment. The documentation submitted on appeal of repayment did not appear in the record prior to the final decision. The Board is therefore precluded from reviewing this evidence on appeal. 20 C.F.R. § 501.2(c).