

FACTUAL HISTORY

The Office accepted that on or before November 26, 1999 appellant, then a 38-year-old corrections officer, sustained an aggravation of spinal stenosis in the performance of duty due to repeated squatting, bending, lifting and prolonged walking. He briefly returned to work in a light-duty position in February 2000, stopped work on February 23, 2000 and did not return. Appellant received total temporary disability compensation from April 25 to May 20, 2000 on the daily roll and, commencing from May 21, 2000, on the periodic rolls.

Appellant received continuous treatment for his lumbar condition through February 2002. Dr. Deborah A. Blades, an attending Board-certified neurosurgeon, performed a March 5, 2001 lumbar microdiscectomy to treat a right-sided L5-S1 disc herniation, October 22 and 29, 2001 procedures to place a dorsal spinal stimulator and a February 18, 2002 surgical revision of the stimulator. His physicians prescribed several medications related to the lumbar condition.¹ In a July 6, 2001 letter, the Office explained that, due to confusion regarding who was prescribing appellant's medication and for what conditions, the Office was unable to process medical bills he submitted for reimbursement.

To obtain additional information about the nature and expected duration of the accepted condition, the Office referred appellant to Dr. Robert Keisler, a Board-certified orthopedic surgeon, for a second opinion examination on February 25, 2002. At appellant's request,² the Office rescheduled the examination to April 29, 2002, with transportation provided at the Office's expense. He submitted an April 26, 2002 letter, asserting that he could not travel. Appellant did not attend the April 29, 2002 appointment. The Office advised him by an April 29, 2002 letter, that he had 14 days to explain his reasons for refusing to attend the scheduled examination or be found in obstruction under section 8123(d) of the Federal Employees' Compensation Act. In an April 29, 2002 letter, appellant again asserted that he was unable to travel.

By decision dated May 10, 2002, the Office suspended appellant's compensation benefits effective May 19, 2002 on the grounds that he refused to attend the scheduled April 29, 2002 second opinion examination without good cause.

Appellant again requested postponement of the scheduled second opinion examination. In response, the April 29, 2002 appointment was rescheduled to June 4, 2002. Appellant again requested that the examination be postponed. In a June 4, 2002 letter, the medical management company rescheduled the examination to June 12, 2002. A June 13, 2002 note from the medical management company stated that appellant did not attend the June 12, 2002 examination.

¹ A May 26, 2000 to May 14, 2001 record from RA Discount Pharmacy showed eight different medications prescribed for appellant. He paid \$68.61 of the \$468.63 retail price.

² In an April 22, 2002 letter, appellant requested that the April 24, 2002 second opinion examination be postponed due to pending surgical replacement of his dorsal column stimulator. He explained prolonged sitting and vehicle travel caused back pain radiating into the lower extremities. Appellant submitted an April 19, 2002 note from Shane Dixon, a physician's assistant, recommending that he not travel until replacement of his dorsal stimulator.

In a July 11, 2002 letter and telephone conversation, the Office advised appellant to return a forthcoming July 13, 2002 compensation check to the Office as his compensation was suspended and he was “not entitled to that payment. The July 13, 2002 check cover[ed] the period June 16 to July 13, 2002.” The Office advised that, if appellant failed to return the check, an overpayment of compensation could result and he would be found with fault in its creation.

The record reveals a compensation check dated July 13, 2002, in the amount of \$2,236.14, showing the notation “comp[ensation] from June 16 to July 13, 2002.” The back of the check shows bank processing codes demonstrating that the check was negotiated.

Appellant disagreed with the May 10, 2002 decision and requested an oral hearing, held February 25, 2003. At the hearing, he testified that he did not attend the scheduled April 29, 2002 appointment as he could not travel and the Office’s transportation arrangements were inadequate. After the hearing, he submitted April 2003 reports from Dr. William O. Witt, an attending Board-certified anesthesiologist, explaining that he required additional surgery and had “considerable difficulties traveling.” Appellant also submitted an April 17, 2003 letter asserting that the Office misconstrued or ignored medical evidence showing that he could not travel to the examinations.

By decision dated May 15, 2003, the Office affirmed its May 10, 2002 decision, finding that the Office properly suspended appellant’s compensation benefits on the grounds that he failed to attend the scheduled second opinion examination. The Office found that he submitted insufficient rationalized medical evidence to demonstrate that he was physically unable to attend the April 29, 2002 appointment.

By notice dated July 7, 2003, the Office advised appellant that it had made the preliminary determination that an overpayment of compensation had occurred in his case, in the amount of \$2,236.14, for the period June 16 to July 13, 2002, after his compensation was suspended. The Office made the preliminary determination that he was with fault in creation of the overpayment as he knew or should have known that he was no longer eligible for compensation. Appellant requested a prerecoupment hearing on the issues of fault and waiver.³

By notice dated May 24, 2004, the Office advised appellant that he was overpaid \$275.46, on an unspecified date as he was reimbursed for “pharmacy services in error.” The Office advised him that it appeared he was “with fault in the creation of his overpayment, because [he] accepted a payment that [he] knew or reasonably should have known was incorrect.” Appellant requested a prerecoupment hearing on the issues of fault and waiver. He asserted that he was not at fault in creation of the overpayment as he believed and the Office informed him that the check was for medication reimbursement pursuant to forms appellant had filled out. The Office requested that he complete an overpayment recovery questionnaire (Form OWCP-20).

³ On December 9, 2003 Dr. Blades implanted a dorsal epidural stimulator and performed a T9 laminectomy, authorized by the Office. As appellant developed a postoperative infection, she removed the pump on December 24, 2003. On May 18, 2004 Dr. Blades performed a thoracic laminotomy and placement of a dorsal column stimulator.

A hearing was held on August 17, 2004. At the hearing, appellant asserted that he was not at fault in creating the \$2,236.14 overpayment of compensation, as the Office wrongly suspended his benefits. He asserted that he believed the \$275.46 check was owed to him for nonreimbursed medical expenses in 2001. Appellant requested waiver of both overpayments. The hearing representative explained the overpayment recovery questionnaire and the type of additional documentation needed to support his income and expenses. The record establishes that appellant did not submit the requested questionnaire or financial information.

By decision dated and finalized December 10, 2004, the Office hearing representative finalized the \$2,236.14 overpayment of compensation finding that appellant accepted compensation benefits after they were suspended. The hearing representative found that appellant was at fault in creation of the overpayment as he knew or should have known that he was not entitled to receive compensation while it was suspended. The hearing representative further found that waiver could not be considered as appellant was at fault in creation of the overpayment. Regarding the issue of recovery, the hearing representative noted that appellant did not submit financial documentation as requested. The hearing representative, therefore, concluded that recovery was “necessary” as appellant was at fault in creation of the overpayment. Regarding the \$275.46 overpayment of compensation, the Office hearing representative found that it had occurred as appellant cashed a check that should have been paid to a pharmacy. However, the hearing representative found that he was not at fault as he “was not aware of what the check represented and cashed it because appellant assumed it was due him.” The hearing representative waived recovery of the \$275.46 overpayment as the potential costs to pursue recovery were likely to exceed the amount owed.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁵ Section 8123(d) of the Act provides that, if an employee refuses to submit to or obstructs an examination directed under section 8123(a) of the Act,⁶ his or her right to compensation is suspended until the refusal or obstruction stops.⁷ 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.⁸ Compensation paid

⁴ As the overpayment was waived, appellant was not adversely affected with regard to this issue and it is not contested on this appeal. Following issuance of the December 10, 2004 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8102(a).

⁶ 5 U.S.C. § 8123(a).

⁷ *Alfred R. Anderson*, 54 ECAB ____ (Docket No. 02-1417, issued November 5, 2002).

⁸ *Id.*

during a period of suspension under 8123(d) of the Act constitutes an overpayment of compensation.⁹

ANALYSIS

The record establishes that the Office suspended appellant's wage-loss compensation benefits effective May 19, 2002 under section 8123(d) of the Act, on the grounds that he failed to attend a scheduled April 29, 2002 medical examination. Appellant was no longer entitled to compensation after May 19, 2002 as his benefits remained suspended.¹⁰ The Office issued the July 13, 2002 compensation check in the amount of \$2,236.14, covering the period June 16 to July 13, 2002, after appellant's compensation was suspended. The \$2,236.14 check thus, constitutes an overpayment of compensation. Therefore, the Office properly determined that her received an overpayment of compensation in the amount of \$2,236.14.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹¹ provides: 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."¹² Section 10.433 of the Office's implementing regulations¹³ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

- “(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual 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.”

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁴

⁹ *Id.*

¹⁰ *Id.*

¹¹ 5 U.S.C. §§ 8101-8193.

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.433

¹⁴ 20 C.F.R. § 10.433(a); *Janet Condon*, 55 ECAB ____ (Docket No. 2003-1610, issued June 25, 2004).

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that he was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.¹⁵

In a July 11, 2002 letter, the Office advised appellant that his entitlement to compensation remained suspended and that he was not entitled to a forthcoming July 13, 2002 compensation check covering the period June 6 to July 13, 2002. The Office instructed him to return the check in order to avoid an overpayment. The record reflects issuance of the July 13, 2002 check in the amount of \$2,236.14, the period June 16 to July 13, 2002. Despite the Office's notice he cashed the check. The Board finds that the Office's July 11, 2002 letter, as well as the dates listed on the July 13, 2002 compensation check, provided appellant sufficient notice that he was not entitled to the \$2,236.14 payment as his benefits were suspended. He knew or should have known when he cashed the July 13, 2002 compensation check that he was not entitled to that payment. Therefore, appellant is not without fault in creation of the overpayment and waiver is not possible.¹⁶

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,236.14, for the period June 16 to July 13, 2002, as he received compensation after his benefits were suspended effective May 19, 2002. The Board further finds that the Office properly determined that he was at fault in creation of the overpayment and that, therefore, the overpayment was ineligible for waiver.

¹⁵ *Judith A. Cariddo*, 55 ECAB ____ (Docket No. 03-2270, issued February 24, 2004).

¹⁶ The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act. *Lewis George*, 45 ECAB 144 (1993). Thus, as appellant is not in receipt of continuing compensation payments, the Board has no jurisdiction to review the recovery issue in this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 10, 2004 is affirmed.

Issued: October 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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