

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

DONNA R. SCHLENKRICH, Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Kansas City, MO, Employer)

**Docket No. 06-411
Issued: April 12, 2006**

Appearances:
Donna R. Schlenkrich, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 12, 2005 appellant filed a timely appeal of a November 14, 2005 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated compensation for wage-loss and medical benefits effective April 14, 2005; (2) whether the Office properly found that an overpayment of \$6,773.86 was created, and (3) whether the Office properly found that appellant was not entitled to waiver as she was not without fault in creating the overpayment.

FACTUAL HISTORY

The Office accepted that appellant sustained a right hip contusion, with cervical and lumbar strains, when she slipped and fell while in the performance of duty on July 1, 2004. She

stopped working and began receiving compensation for wage loss on the daily roll. As of November 28, 2004, she began receiving compensation for wage loss pursuant to the periodic rolls. The payments were direct deposited into her bank account. The record indicates that appellant returned to work for four hours on February 3, 2005 and then stopped working. According to the Office, appellant continued to receive compensation for wage loss.

The Office referred appellant for a second opinion examination by Dr. Edward J. Prostic, an orthopedic surgeon. In a report dated February 8, 2005, Dr. Prostic provided a history and results on examination. He stated that he saw “no orthopedic reason why the patient cannot return to her previous duties as a nurse.” Dr. Prostic stated that appellant’s current symptoms were contributed to by trochanteric bursitis and psychological decompensation. He suggested that appellant have a cortisone injection and a gradually increasing exercise program. No opinion was offered as to whether all residuals of the employment injury had ceased.

In a report dated March 28, 2005, Dr. Joseph Galate, an orthopedic surgeon, provided results on examination and opined that appellant could return to work at full duty. He indicated that appellant should continue her home exercise program.

By decision dated April 14, 2005, the Office terminated compensation for wage loss and medical benefits effective April 14, 2005. The Office found that the weight of the medical evidence established that she no longer had an employment-related disability.

In a letter dated June 24, 2005, the Office advised appellant that it had made a preliminary determination that an overpayment of \$6,773.86 was created from April 15 to June 11, 2005, because appellant continued to receive compensation for wage loss. The Office also made a preliminary determination that she was at fault in creating the overpayment. The record transmitted to the Board does not contain any evidence with respect to specific compensation payments from April 15 to June 11, 2005.

By decision dated November 14, 2005, the Office finalized the preliminary determination of a \$6,773.86 overpayment. The Office found that appellant was not entitled to waiver as she was at fault in creating the overpayment.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.² A short-lived and unsuccessful attempt to return to work does not discharge the Office’s burden to justify termination of compensation.³ The right to medical benefits is not limited to the period of entitlement to disability. To terminate authorization for medical treatment, the Office must

¹ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

² *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

³ *Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005); *Carl C. Graci*, 50 ECAB 557 (1999).

establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁴

Office procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic rolls.⁵ Pretermination notice is not required when the claimant dies, returns to work, is convicted of defrauding the Federal Employees' Compensation Act program or forfeits compensation by failing to report earnings.⁶ The Board has held that the Office must follow its procedures and provide notice an opportunity to respond prior to the termination of compensation benefits.⁷

ANALYSIS

The Office began paying appellant compensation pursuant to the periodic rolls as of November 28, 2004. Although there was a brief return to work for four hours on February 3, 2005, that does not shift the burden of proof and appellant continued to receive compensation for wage loss. There is no indication that appellant was removed from the periodic rolls. Moreover, there was no evidence of record establishing that one of the exceptions to the pretermination notice requirement was applicable in this case.⁸ The Office should have provided appellant with notice that it intended to terminate her compensation and provided appellant an opportunity to submit evidence supporting a continuing employment-related disability.

In this case, there is no indication that the Office followed its procedures and issued a pretermination notice prior to the April 14, 2005 final decision. Due process and elementary fairness require that a claimant under the circumstances presented have notice and an opportunity to respond prior to termination of benefits.⁹ The Board finds that the April 14, 2005 termination was improper and it will be reversed. Since the overpayment of compensation was based on a finding that compensation for wage loss was properly terminated as of April 14, 2005, the overpayment determination must also be reversed.¹⁰

⁴ *Frederick Justiniano*, 45 ECAB 491 (1994).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(a) (March 1997).

⁶ *Id.*, Chapter 2.1400.6(c) (March 1997).

⁷ *Winton A. Miller*, 52 ECAB 405 (2001).

⁸ There is a note dated March 7, 2005 from the nurse assigned to medical management of the claim stating that appellant intended to work in private employment, but the record does not establish that appellant had returned to work or that the Office was aware of a return to work.

⁹ *Winton A. Miller*, *supra* note 7.

¹⁰ The Board notes that the record transmitted to the Board would not have been sufficient to substantiate the overpayment determination in this case. No evidence was provided as to the actual payments issued that comprised the overpayment; it is not clear when they were issued, whether they were direct deposited, and if so, how appellant would have been aware of the period covered by a specific payment.

CONCLUSION

The Board finds that the April 14, 2005 termination decision was improper as it failed to provide notice of proposed termination prior to the final decision. Since the termination was improper, the Office has not established that an overpayment was created.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 14 and April 14, 2005 are reversed.

Issued: April 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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