United States Department of Labor
Employees' Compensation Appeals Board

TROY D. WATTS, Appellant	)	
	)	**Docket No. 05-184**
and	)	**Issued: July 27, 2006**
DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Anniston, AL, Employer	)	

Appearances:
Troy D. Watts, 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

JURISDICTION

On October 25, 2004 appellant filed a timely appeal of an October 6, 2004 merit decision of the Office of Workers' Compensation Programs which found that he received an overpayment in the amount of $4,190.35, resulting from the August 23, 2004 rescission of his compensation from May 1 through June 26, 2002. The Office further found that he was at fault in the creation of the overpayment. The Office ordered appellant to repay the overpayment in the amount of $100.00 per month. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment case.

ISSUES

The issues are: (1) whether the Office properly rescinded payment of compensation for the period May 1 through June 26, 2002 on the grounds that appellant was not disabled from employment during this period due to his March 7, 2002 employment injury; (2) whether the Office properly determined that he received an overpayment in the amount of $4,190.35; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the overpayment.

FACTUAL HISTORY

On March 7, 2002 appellant, then a 41-year-old heavy mobile equipment repairer, filed a traumatic injury claim alleging that on that date his lower back started to burn and then tightened up on him when he pulled a basket containing parts. He submitted medical evidence in support of his claim, including medical disability slips from Dr. James G. White, III, an attending Board-certified neurosurgeon, indicating that he could not return to work until May 7, 2002. In a March 25, 2002 treatment note, he diagnosed a centrally located herniated disc at L4 and recommended lumbar epidural. Dr. White noted that appellant was eligible for retirement from the employing establishment and that he had to retire from coaching a baseball team due to his pain.

On April 29, 2002 appellant filed a claim (Form CA-7) for compensation for the period May 1 through 15, 2002.

By letter dated May 8, 2002, the Office accepted appellant's claim for a broad-based central disc herniation at L4.

On May 13, 2002 appellant filed another Form CA-7 for the period May 16 through 31, 2002. He submitted Dr. White's May 6, 2002 disability certificate indicating that he could not return to work until June 4, 2002.

In an investigative report dated May 22, 2002, a criminal investigator with the employing establishment noted that appellant was observed from May 2 through June 18, 2002 participating in physical activities primarily related to a little league baseball team. He pitched at batting practice, bent down to pick up baseballs, demonstrated how to swing a bat, threw baseballs and carried a five-pound bucket of baseballs and a large equipment bag. Appellant was observed removing trash bags and other items from the back of his truck putting them in a dumpster.

On May 23, 2002 Dr. White requested authorization to perform a lumbar laminectomy. To determine whether the proposed surgery should be authorized, the Office, by letter dated May 30, 2002, informed him about the employing establishment's investigative findings. It requested that he provide whether appellant's condition was as severe as believed, whether he had a herniated disc when the images of a magnetic resonance imaging (MRI) scan were limited and whether someone in his condition could participate in the physical activities observed by the investigator.

In a June 10, 2002 letter, Dr. White stated that appellant specifically denied being the coach of a baseball team and explained the incidents observed by the investigator. Appellant stated that he did not pitch at baseball practice and the balls in the bucket were plastic. He noted, however, that he pitched a few balls to his son and another boy for a short period. Appellant "soft tossed" and did not strain. He stated that he received an epidural before engaging in this activity which made him feel better temporarily. Dr. White felt awkward in having to respond to the Office's letter as he relied only on appellant's history and that he had to believe him. He noted that appellant's diagnostic testing was abnormal, his severe pain, lumbar epidural treatment and desire to undergo surgery. Dr. White stated that while his symptoms could be

exaggerated, he could not imagine a person wanting to go through with surgery if he was not hurting badly enough to need it.

On June 12, 2002 appellant filed a Form CA-7 for the period June 1 through 15, 2002. He filed another Form CA-7 on June 27, 2002 for the period June 16 through 26, 2002. On July 5, 2002 the Office paid appellant compensation in the amount of $4,190.35, for the period May 1 through June 26, 2002.

By letter dated July 15, 2002, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Gordon J. Kirschberg, a Board-certified neurologist, for a second opinion medical examination to determine whether the proposed back surgery was warranted. In an August 6, 2002 medical report, Dr. Kirschberg provided a history of appellant's March 7, 2002 employment injury and medical treatment. He noted his complaints of back pain radiating down into his left leg more than the right leg. Dr. Kirschberg reported his essentially normal findings on physical examination. He opined that there was no definite evidence of a radicular problem. Dr. Kirschberg was not sure whether appellant had a herniated disc and recommended a comparison of MRI scans to confirm the diagnosis. He questioned appellant's statement that he never had any prior back problems as he understood that appellant had received chiropractic treatment at least five or six years ago. Dr. Kirschberg opined that the proposed surgery was not warranted. He stated that it would not relieve back pain and the disc was central and could just be a bulging disc. Dr. Kirschberg further stated that there was no way to determine whether other factors or an exaggeration of symptoms had any bearing on the severity of appellant's complaints, but he noted that the surveillance had already shown some discrepancy and his examination showed a little embellishment in terms of the amount of pain behavior compared to the objective findings which were nil. In a March 6, 2002 work capacity evaluation, he indicated that appellant could work eight hours a day with certain physical restrictions.

In an October 2, 2002 letter, Dr. White indicated that he had reviewed a videotape of appellant's activities taken by the investigator. He opined that appellant was not disabled from any type of work during the period of observation. Dr. Kirschberg stated that whether or not he still required surgery was strictly up to him, if his subjective complaints were severe enough.

The Office found a conflict in the medical opinion evidence between Dr. White and Dr. Kirschberg regarding the issue of whether the proposed surgery was warranted. To resolve the conflict, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Zenko J. Hrynkiw, a Board-certified neurosurgeon, for an impartial medical examination.

In a December 4, 2002 report, Dr. Hrynkiw agreed with Dr. Kirschberg's opinion. He stated that based on the objective evidence which was appellant's history, surgery was not warranted because an MRI scan he reviewed did not show any neural compression or nerve root compression. Further, appellant stated that he did not have any radicular component and that he was getting better and did not need an epidural block. By letter dated December 18, 2002, the Office requested that Dr. Hrynkiw provide information regarding appellant's work restrictions and current diagnosis. It also requested clarification of his statement that his conclusions were

based on the objective evidence represented by appellant's history, as it noted that his history was self-serving and not objective.

In a March 3, 2003 letter, Dr. Hrynkiw stated that he previously recommended a series of epidural blocks, an evaluation by a physiatrist and enrollment in a work hardening program to increase appellant's level of productivity at work. He noted that a functional capacity evaluation would be helpful. Dr. Hrynkiw diagnosed mechanical back pain and stated that his conclusions were based on appellant's history because there were no objective findings.

On May 30, 2003 appellant underwent a functional capacity evaluation which found that he could perform physical work at the medium level eight hours a day, he fully participated in the evaluation and his physical abilities did not match his job requirements. Conservative therapy, followed by work conditioning and simulation with the goal of returning appellant to modified duty with fewer restrictions was recommended. In a June 20, 2003 letter, Dr. Hrynkiw agreed with the functional capacity evaluation recommendation.

By decision dated August 23, 2004, the Office rescinded its acceptance of appellant's claim for compensation for the period May 1 through June 26, 2002 based on Dr. White's October 2, 2002 letter which indicated that he was not disabled during the period May 2 through August 2002, while being investigated by the employing establishment.

By letter dated August 23, 2004, the Office informed appellant that it had made a preliminary finding that he received an overpayment of compensation in the amount of $4,190.35 for the period May 1 through June 26, 2002, as he received compensation to which he was not entitled. The Office found that he was at fault in the creation of the overpayment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. He did not respond within the allotted time period.

By decision dated October 6, 2004, the Office finalized the preliminary determination regarding the fact of overpayment and the amount of the overpayment. The Office also finalized its preliminary finding of fault on the grounds that appellant should have known that he was not totally disabled for the period May 1 through June 26, 2002 since he was physically active. The Office directed appellant to repay the overpayment in the amount of $100.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[1] It is well established that, once the Office has

[1] *Andrew Wolfgang-Masters*, 56 ECAB ___ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[2] This holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[3]

The Board has held that, if the record establishes that limited-duty work within a claimant's work restrictions would be available for him if his behavior was acceptable and there is no evidence in the record that the claimant was terminated due to his physical inability to perform his assigned duty and no evidence that the claimant stopped work due to his physical condition, then the claimant has no disability within the meaning of the Federal Employees' Compensation Act.[4]

ANALYSIS -- ISSUE 1

In this case, the Office introduced new evidence in the form of an investigative report regarding videotape surveillance of appellant engaging in baseball activities and a subsequent report of Dr. White, an attending physician. The report indicated that he engaged in vigorous physical activity at the baseball field, performing activities such as pitching at batting practice even to his son and another boy, bending down to pick up baseballs, demonstrating how to swing a bat, throwing baseballs, carrying a five-pound bucket of baseballs and a large equipment bag. It also indicated that he removed trash bags and other items from the back of his truck and put them in a dumpster. The employing establishment showed the videotape to Dr. White. In an October 2, 2002 letter, he stated that, based on the videotape, appellant was not disabled for any type of work during the period of observation. Although he denied engaging in the baseball activities, the Board finds that this new evidence is sufficient to show that appellant was not totally disabled during the period May 1 through June 26, 2002. Therefore, the Board finds that the Office had sufficient medical basis to rescind acceptance of appellant's claim for compensation during this period. The Board further finds that, in rescinding acceptance of appellant's claim for compensation, the Office provided reasons for its decision and properly explained that he had no employment-related disability entitling him to compensation benefits. It did not act arbitrarily in this case.

LEGAL PRECEDENT -- ISSUE 2

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 duty.[5]

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[2] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[3] *Andrew Wolfgang-Masters*, *supra* note 1.

[4] *Janice Green*, 49 ECAB 307, 308 (1998); *Lester Covington*, 47 ECAB 539, 542 (1996).

[5] 5 U.S.C. § 8102(a); *see also Rose E. Tausel*, Docket No. 04-369 (issued April 21, 2004).

ANALYSIS -- ISSUE 2

On July 5, 2002 the Office paid appellant the amount of $4,190.35, in wage-loss compensation for total disability for the period May 1 through June 26, 2002. As discussed above, the Office erred in issuing compensation for this period as he was not disabled from employment due to residuals of his accepted condition. The Office properly rescinded its finding that appellant was entitled to compensation during this period. Consequently, he received an overpayment of compensation in the amount of $4,190.35.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act[6] provides that an overpayment of 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 Act or would be against equity and good conscience.[7] Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.[8] Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.[9]

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

> "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect."[10]

With respect to whether an individual is without fault, section 10.433(b) of the Office regulations provides in relevant part:

> "Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on 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."[11]

[6] 5 U.S.C. § 8129(b).

[7] *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

[8] *Norman F. Bligh*, 41 ECAB 230 (1989).

[9] *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

[10] 20 C.F.R. § 10.433(a).

[11] *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 3

The Office found that appellant accepted a payment which he knew or should have known to be incorrect in making its determination that he was at fault in creating the $4,190.35 overpayment. Appellant received compensation in the amount of $4,190.35, for disability during the period May 1 through June 26, 2002. During this period, the employing establishment observed him participating in physical activities related to baseball and dumping trash. The Office's procedure manual provides, in cases of rescission of acceptance of a claim, that a finding of fault is appropriate only where appellant is aware that the acceptance of the claim was in error.[12] There is no indication that when appellant received payments for compensation during the stated period, he knew or should have known that the Office made an error in accepting his claim. In fact, it was not until the issuance of the August 23, 2004 decision rescinding acceptance of the period of disability that appellant was aware of a finding of no employment-related disability. Thus, the Board finds that appellant was not at fault in creation of the overpayment.

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act[13] if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.[14] The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the $4,190.35 overpayment. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

CONCLUSION

The Board finds that the Office properly rescinded payment of compensation for the period May 1 through June 26, 2002 on the grounds that appellant was not disabled from employment during this period due to his March 7, 2002 employment injury. The Board further finds that the Office properly determined that appellant received an overpayment in the amount of $4,190.35, during the period May 1 through June 26, 2002. The Board, however, finds that the Office improperly found that appellant was at fault in the creation of the overpayment.

[12] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5(b) (May 2004); *see Walter Asberry, Jr.*, 38 ECAB 326 (1987).

[13] 5 U.S.C. § 8129(b).

[14] The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2004 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the overpayment. The decision is set aside with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board. The Office's August 23, 2004 decision is affirmed.

Issued: July 27, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board