United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, APACHE-SITGREAVES NATIONAL FOREST, Springerville, AZ, Employer	)	**Docket Nos. 06-2095 & 06-2096** **Issued: April 9, 2007**

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2006 appellant filed a timely appeal from a June 19, 2006 decision in which a hearing representative of the Office of Workers' Compensation Programs finalized overpayments in compensation in the amounts of $52,383.60 and $10,648.65. He also appealed an August 4, 2006 decision denying authorization for surgery.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for authorization for back surgery; (2) whether he received overpayments in compensation in the amount of $52,383.60, for the period April 21, 2002 through November 29, 2003 and $10,648.66, for the period February 27, 2002 through October 2, 2004; (3) whether the Office properly determined that appellant was at fault in accepting the overpayments and was, therefore, not entitled to waiver; and (4) whether the Office properly required repayment of the overpayment by deducting $400.00 every four weeks from appellant's continuing compensation, or $200.00, for each overpayment in compensation.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated February 16, 2005, the Board found a conflict of medical opinion regarding the necessity for surgery to cure, give relief or reduce the degree of or period of disability and remanded the case to the Office to refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical evaluation regarding whether the recommended surgery was suitable in this case. After such further development as deemed necessary, the Office was to issue an appropriate decision.[1] The law and the facts of the previous Board decision are incorporated herein by reference.

Prior to the Board's February 16, 2005 decision, by letter dated September 27, 2004, the Office informed appellant that his compensation rate was incorrect and that it had been changed to the 2/3 rate effective October 3, 2004. On September 29, 2004 the Office issued a preliminary finding that an overpayment in compensation in the amount of $54,190.88, for the period April 21, 2002 to November 29, 2003 had been created. The Office explained that after appellant stopped work on April 21, 2002 he continued to receive wages from the employing establishment in the form of sick and annual leave and also received wage-loss compensation under the Federal Employees' Compensation Act[2] (the Act benefits) for that period. The Office found appellant at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known was incorrect. Appellant was informed of the actions he could take in response.

On September 29, 2004 the Office issued a preliminary finding that an overpayment in compensation in the amount of $5,318.25, had been created because appellant continued to receive compensation at the augmented 3/4 rate when he had no dependents. The Office found him at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known was incorrect. Appellant was informed of the actions he could take in response. On November 2, 2004 the Office finalized the $5,318.25, overpayment finding noting that appellant did not respond to the preliminary notice. The Office advised him that $240.00 would be withheld each four-week period from his continuing wage-loss compensation. By letter dated October 28, 2004, received by the Office on November 17, 2004 appellant requested a hearing.[3]

By decision dated March 23, 2005, an Office hearing representative remanded both overpayment findings to the Office because the record did not contain worksheets showing how the overpayments had been calculated and because the November 2, 2004 decision was issued prematurely.

On June 8, 2005 the Office issued a preliminary finding that an overpayment in compensation in the amount of $54,262.3 had been created for the period April 21, 2002 through

[1] Docket No. 04-2172.

[2] 5 U.S.C. §§ 8101-8193.

[3] The postmark on the copy of the envelope found in the record is illegible.

November 29, 2003. The Office again explained that after appellant stopped work on April 21, 2002 he continued to receive wages in the form of sick and annual leave and also received the Act benefits for that period. The Office found appellant at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known was incorrect. He was informed of the actions he could take in response. An Office computer worksheet contained in the record provided that appellant received compensation totaling $54,262.30, for the period April 21, 2002 through November 29, 2003. It also contained employing establishment timesheets for this period.

By letter dated June 8, 2005, the Office referred appellant to Dr. John D. Ray, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Ray was informed that the accepted conditions were aggravation of spinal stenosis and aggravation of lumbosacral neuritis, caused by the work injury of September 10, 2001 and was specifically asked to provide a work-related diagnosis and provide an opinion on whether appellant's back condition was caused by the employment injury. He was also asked to provide an opinion as to whether the recommended surgery was necessary due to the work-related injury and was the proposed procedure within the realm of accepted medical practice. An attached statement of accepted facts dated April 4, 2004 described the employment injury and noted that appellant's attending physicians had recommended a lumbar fusion/decompression at L4 to S1.

On June 15, 2005 the Office issued a preliminary finding that an overpayment in compensation in the amount of $11,868.83 had been created for the period November 8, 2001 to October 10, 2004 because appellant received disability compensation at the augmented 3/4 rate when he did not have an eligible dependent living with him. The Office found appellant at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known was incorrect. He was informed of the actions he could take in response. An Office memorandum dated June 11, 2005 indicated that appellant received compensation at the 3/4 rate totaling $98,184.80, for this period when he should have received compensation at the 2/3 rate or $86,315.97, which equaled an overpayment in compensation of $11,868.83.

On June 14, 2005 appellant, through his attorney, requested a hearing on the June 8, 2005 preliminary overpayment finding and on June 24, 2005 requested a hearing on the June 15, 2005 preliminary finding. Counsel submitted a January 11, 2005 evaluation in which Dr. Gerald S. Fredman, a Board-certified psychiatrist, noted the history of injury. His diagnoses included depression and post-traumatic stress disorder. Dr. Fredman advised:

> "There are factors that militate for [appellant] knowing that there were overpayments by [the Office]:
>
> > (1) Some knowledge of receiving payments from both [the employing establishment] and [the Office] for the same period (April 21, 2002 to November 29, 2003).
> >
> > (2) Absence of psychotic disorder.
> >
> > (3) Absence of clear evidence of dementia.

(4) Records from Veterans Affairs (VA) reflecting absence of aberrant behaviors.

There are factors that militate against [appellant] knowing that there were overpayments by [the Office]:

(1) He did [not] appreciate that payments were continuing by [the employing establishment] during same period he received payments from [the Office] (April 21, 2002 to November 29, 2003).

(2) Presence of serious psychiatric disorders complicated by divorce in early 2002 and chronic pain.

(3) Likely drug interactions causing psychomotor impairment and CNS depression. This would lead to confusion and worsening depression.

(4) Records from VA indicating serious to major impairment and a documented amnesiac episode.

(5) Findings of psychomotor retardation and deficits in orientation, judgment, attention, concentration and short-term memory in the clinical evaluation."

Dr. Fredman concluded, "it is my opinion within a reasonable degree of medical certainty that [appellant] did not appreciate that he was not entitled to the payments from [the Office] during the time from April 21, 2002 through November 29, 2003."

In reports dated June 27, 2005, Dr. Ray noted appellant's complaints of severe back pain and that he underwent an L4-5 and L5-S1 interbody arthrodesis in June 2004. Examination findings included paraspinous muscle spasm and normal sensation in both lower extremities. Dr. Ray reviewed a June 8, 2005 computerized tomography (CT) myelogram and diagnosed low back pain and failed fusion. He recommended a bone scan which was performed on July 21, 2005 and demonstrated increased activity at the posterior element of L4 and the right ileum posteriorly. On July 25, 2005 Dr. Ray noted the bone scan findings and recommended against further intervention.

By decision dated August 24, 2005, the Office denied modification of its previous decisions. The Office credited the opinion of Dr. Ray and found that the requested surgery was not warranted. A telephone memorandum dated September 2, 2005 indicated that appellant was then receiving 100 percent disability from the VA for post-traumatic stress disorder. On September 15, 2005 appellant, through his attorney, requested reconsideration of the August 24, 2005 decision denying authorization for surgery. Counsel argued that, because appellant had undergone the procedure at issue in June 2004 and the statement of accepted facts presented to Dr. Ray was dated April 22, 2004 which predated the surgery, Dr. Ray was not presented with the correct facts. He contended that, thus, Dr. Ray failed to address whether the surgery, that had already been completed, was necessary and related to appellant's employment injuries. Counsel asked that the Office set aside the August 24, 2005 decision, prepare an amended statement of

accepted facts and refer the case back to Dr. Ray for a supplementary opinion regarding the June 2004 surgery.

On September 23, 2005 the Office reimbursed appellant $5,149.00, for incorrect health and life insurance deductions. On December 19, 2005 it requested that Dr. Ray provide a supplementary report. The Office notified him that at the time of the referral, the Office had not been aware that he had proceeded with the recommended surgery in June 2004. Dr. Ray was asked to again review the medical record and provide an opinion as to whether the June 2004 surgical procedure was supported.

The hearing, held on April 4, 2006, covered both overpayments in compensation. Appellant's attorney stated that appellant had serious psychiatric problems and he testified that he was overwhelmed and could not keep track of things. Appellant stated that both his salary and the Act benefits were directly deposited to his bank and that he did not check his bank statements. He stated that he did not understand augmented compensation and did not notify the Office when he and his wife separated but could not remember specific dates for his divorce, *etc*., but that he believed it was in February 2002. Appellant noted that he did not know the amount of his compensation but remembered filing for sick leave and stated that he had $34,000.00, in a brokerage account. He testified that he received a 100 percent VA disability for post-traumatic stress disorder and described his monthly expenses. Appellant submitted VA treatment notes dated July 29, 2005, February 14, April 11 and May 16, 2006, which described his medications and pain management and noted diagnoses of chronic back pain, depression, osteoarthritis of the spine, dysphagia and post-traumatic stress disorder.

In a June 19, 2006 decision, an Office hearing representative affirmed that overpayments had been created and that appellant was at fault but modified the amounts. The hearing representative found that the Office incorrectly calculated the overpayment in the June 8, 2005 decision because it used the augmented compensation rate when that was a separate issue. He found that, when the 2/3 rate was used, the overpayment in compensation for the period April 21, 2002 through November 29, 2003 was $52,383.60. Regarding the June 15, 2005 decision, the hearing representative found that the period the Office based the overpayment on was incorrect because appellant's divorce was not final until February 27, 2002. Thus, the correct overpayment period was February 27, 2002 through October 2, 2004 and the correct amount was $10,648.66. Regarding repayment, the hearing representative noted that appellant's monthly income was approximately $4,000.00 and his expenses $3,138.00 and that he had a brokerage account of $34,000.00. He found that appellant could repay the overpayments at a rate of $400.00 each compensation period or $200.00 for each overpayment and determined that compromise was not warranted for either overpayment.

By report dated July 13, 2006, Dr. Ray noted his review of October 2003 diagnostic tests and medical reports from Dr. Metzger, Dr. Blum and Dr. Jones[4] and advised that the records were sufficient to establish that the L4-5, L5-S1 decompression and arthrodesis performed by Dr. Metzger was reasonable. He stated:

[4] These reports are described in the Board's February 16, 2005 decision, *supra* note 1.

> "It is my understanding that [appellant] is being treated for lumbar radiculitis associated with his injury which developed in the setting of preexisting degenerative changes and canal stenosis. Lumbar radiculitis is generally evidenced by pain in a specific distribution. There are frequently minimal objective findings other than change of posture. Dr. Metzger had had what he considered adequate surgical result with [appellant] in the past and had reason to believe that [he] may do well with the proposed surgery.
>
> "In summary, I think it is reasonable to treat the L4-5 and L5-S1 degenerative disc disease with associated narrowing and symptoms consistent with lumbar radiculitis with interbody spacers and stabilization. I also think, given Dr. Metzger's personal experience surgically treating [appellant, it] would have been reasonable for him at that time to expect another satisfactory outcome."

In an August 4, 2006 decision, the Office addressed appellant's arguments regarding Dr. Ray's June 2005 report and noted that he had been asked to provide a supplementary report. The Office stated that merit review was denied because appellant had not informed the Office that he had proceeded with the recommended surgery. The Office stated that the attorney's arguments were not relevant as the actions taken by the Office subsequent to the Board's remand were predicated on what the Office knew to be factual at that time and that the case was not in posture for merit review of the surgery issue because of the "procedurally incorrect actions propagated by the omission of vital facts in this case." The Office stated that "denial of application for review is proper where a claimant fails to submit relevant new evidence or to advance legal contentions that have not been considered earlier" and concluded that appellant's application for review was denied because "the arguments presented are not sufficient to warrant a merit review of the file."

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[5] While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[6]

In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.[7] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are

[5] 5 U.S.C. § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003).

[6] *Kennett O. Collins, Jr*., 55 ECAB 648 (2004).

[7] *James R. Bell*, 52 ECAB 414 (2001).

contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[8] In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[9] Proof of causal relationship must include supporting rationalized medical evidence. In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[10]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination, and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS -- ISSUE 1

The Board initially finds that the decision of the Office dated August 4, 2006 was a decision on the merits. It is clear from a reading of the decision that appellant's argument regarding Dr. Ray's June 27, 2005 reports was considered by the Office. In fact, the Office undertook further development of the record and requested that Dr. Ray submit a supplementary report before concluding that appellant's arguments were insufficient.[14] Furthermore, regarding

[8] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[9] *Cathy B. Mullin*, 51 ECAB 331 (2000).

[10] *Id.*

[11] 5 U.S.C. § 8123(a); *see Roger G. Payne*, 55 ECAB 535 (2004).

[12] 20 C.F.R. § 10.321.

[13] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[14] The Board also notes that the standard for merit review quoted in the decision is incorrect. The decision states that a "denial of application for review is proper where a claimant fails to submit relevant new evidence or advance legal contentions that have not been considered earlier." The proper standard, as found in Office regulations at 20 C.F.R. § 10.606(b)(2), provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office. The Board also notes that had it deemed the August 4, 2006 decision a nonmerit decision, appellant requested reconsideration on September 15, 2005 and Office procedures provide that, when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a

the Office's statement that appellant did not notify the Office of the scheduled procedure, in an April 26, 2004 report, Dr. Meltzer noted that surgery was scheduled for June 1, 2004 and in his June 27, 2005 report, Dr. Ray acknowledged that appellant had undergone the procedure.

The Board also finds that a conflict in medical evidence remains regarding whether the June 2004 surgery was warranted. In his supplementary report dated July 13, 2006, Dr. Ray advised that he had reviewed the medical record and concluded that it was reasonable to treat the L4-5 and L5-S1 degenerative disc disease with surgical stabilization. Dr. Ray's opinion is, therefore, sufficient to establish that the decompression procedure was medically reasonable, satisfying one element needed before the surgery could be authorized. His opinion, however, did not contain a rationalized opinion regarding the second element that is to show that the surgery is for a condition causally related to an employment.[15] Both of these criteria must be met in order for the Office to authorize payment.[16] While Dr. Ray stated that appellant was being treated for lumbar radiculitis associated with his injury and noted that this developed in the setting of preexisting degenerative changes and canal stenosis, this statement is not of sufficient certainty to establish that the June 2004 surgical procedure was causally related to the accepted condition of severe lumbar stenosis and lumbar radiculopathy aggravated by the September 10, 2001 employment injury. As a conflict remains regarding whether the surgical procedure should be authorized, the case must be remanded to the Office on this issue. On remand the Office should refer appellant, an updated statement of accepted facts, the operative report and a list of specific questions to Dr. Ray for a supplementary opinion regarding whether the June 2004 surgical procedure was causally related to appellant's employment. After such further development as the Office deems necessary, the Office shall issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during, which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances such as for services actually performed or related to previous services performed in the armed services.[17]

---

merit review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (May 1996); *see Janice M. Hatcher*, 55 ECAB 155 (2003). The prior merit decision in this case was dated August 24, 2005, leaving appellant approximately two weeks from the date of the August 4, 2006 Office decision to file a timely appeal with the Board.

[15] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Mary J. Summers*, 55 ECAB 730 (2004).

[16] *Cathy B. Mullin, supra* note 9.

[17] 5 U.S.C. § 8116(a).

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.[18]

ANALYSIS -- ISSUE 2

Regarding the overpayment in compensation in the amount of $52,383.60 for the period April 21, 2002 through November 29, 2003, the Board finds that appellant was not entitled to receive the Act benefits concurrently with payment in the form of sick and annual leave from the employing establishment. Section 8116(a) of the Act clearly provides that an employee may not receive any sort of remuneration from the United States except in specified exceptions not present here while receiving compensation under the Act.[19] The Board, therefore, finds that an overpayment in compensation for the period April 21, 2002 through November 29, 2003 had been created because appellant was not entitled to receive dual benefits. The Board; however, finds that this case is not in posture for decision regarding the amount of the overpayment. The record contains timesheets from the employing establishment for this period which indicate that on some days appellant took annual leave, on some days sick leave, but on other days was in leave-without-pay status. Therefore, he was not in receipt of dual benefits for every day of the entire period and the case must be remanded for the Office to determine the periods in which appellant received both remuneration from the employing establishment and also received the Act's benefits and then determine the amount of the overpayment.[20]

The Board also finds that an overpayment in compensation had been created because appellant was paid compensation at a rate applicable to compensationers with dependents after his divorce was final and he had no other dependents. On claim forms dated September 14, November 15 and 26 and December 12, 2001, February 15 and 28, 2002, appellant advised that his only dependent was his wife. At that time he was paid at the augmented 3/4 rate and when placed on the periodic rolls effective February 24, 2002, he was also paid at the augmented rate. On EN1032 forms, signed by appellant on August 26, 2003 and April 9, 2004, he indicated that he was no longer married and had no dependents. The Office changed appellant's compensation to the 2/3 rate effective October 3, 2004. Appellant testified at the April 4, 2006 hearing that he "believed" his divorce was final in February 2002 and that he had no other dependents. An overpayment in compensation was thus, created because he would not be entitled to compensation at the augmented rate when he had no dependents.[21] The Board, however, finds that the case is not in posture for decision regarding the amount of the overpayment as there is nothing definite in the record regarding the date appellant's divorce became final. While he testified that he thought his divorce was final in February 2002 and the hearing representative established the date as February 27, 2002, there is nothing in the record such as a divorce decree

[18] 5 U.S.C. § 8110(b).

[19] 5 U.S.C. § 8116(a).

[20] *Id.*

[21] 5 U.S.C. § 8110(b).

to support this finding. Moreover, in his January 11, 2005 report, Dr. Fredman noted appellant's report that the divorce was finalized in 2000. The case must, therefore, be remanded to determine the date appellant's divorce became final so that the amount of the overpayment can be determined.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment in 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 the Act or would be against equity and good conscience."[22]

Section 10.433(a) of the Office's regulation provides that the Office:

> "[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating 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 known to be incorrect. (This provision applies only to the overpaid individual)."[23]

ANALYSIS -- ISSUE 3

The Board finds that the Office properly found appellant at fault in the creation of the two overpayments at issue in this case. He contended that he was mentally incompetent and unable to discern that he received both the Act benefits and remuneration from the employing establishment or that he continued to receive compensation at the augmented rate after his divorce. There is, however, no reasoned medical evidence explaining why appellant could not realize that he was receiving dual benefits or that he was not entitled to augmented compensation. In his January 11, 2005 report, Dr. Fredman provided reasons both pro and con for finding diminished capacity before concluding that appellant did not appreciate that he was not entitled to the payments from the Office for the period April 21, 2002 through November 29, 2003. Medical opinions which are speculative or equivocal in character have little probative value.[24] The Board finds that Dr. Fredman did not sufficiently explain why, if appellant had some knowledge of receiving remuneration from both the employing establishment

[22] 5 U.S.C. § 8129.

[23] 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

[24] *Jennifer L. Sharp*, 48 ECAB 209 (1996).

and the Act benefits for the same period, in the absence of a psychotic disorder, clear evidence of dementia or aberrant behaviors in appellant, he could reach such a firm conclusion. Additionally, a review of the case record indicates that appellant was actively pursuing his claim during the periods in question. The Board, therefore, finds that the record does not support that appellant was unable to manage his financial affairs such that he could not discern that he was not entitled to dual benefits or that he was receiving augmented compensation when he no longer had an eligible dependent.[25]

As each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that the payments he or she receives from the Office are proper,[26] the Board finds that the Office correctly found appellant to be at fault for both overpayments under the facts and circumstances of this case. The letter of acceptance dated November 8, 2001 informed appellant that he would be entitled to compensation at the 3/4 rate with dependents or the 2/3 rate without. When placed on the periodic rolls effective February 24, 2002, he was informed that this was at the augmented 3/4 or 75 percent rate and that he should immediately inform the Office upon his return to work to avoid an overpayment. In this case, appellant had not stopped work when he began receiving the Act benefits because he has continued to receive his government salary using sick and annual leave. The record, therefore, supports the Office's finding that appellant knew or reasonably should have known that he was not entitled to receive dual compensation in the form of remuneration from the employing establishment and the Act benefits or augmented compensation when he had no dependents. Appellant was, therefore, at fault in the creation of the overpayment and was not entitled to waiver.[27]

Finally, the Board finds that the fourth issue in this case, regarding recovery of the overpayments, is moot until the Office issues a decision or decisions regarding the amounts of the overpayments.

CONCLUSION

The Board finds that a conflict remains regarding whether appellant's June 2004 surgery should be authorized. The Board further finds that appellant was at fault in the creation of overpayments in compensation but the case must be remanded to the Office to determine the amounts of the overpayments.

[25] *See George A. Hirsch*, 47 ECAB 520 (1996).

[26] *Andrew R. Schwarz*, 54 ECAB 490 (2003).

[27] The Board also notes that, even had appellant been found to be without fault, he would not be entitled to waiver. He did not argue that repayment would be against equity or good conscience and regarding whether repayment would defeat the purpose of the Act, Office procedures provide that the assets must not exceed a resource base of $4,800.00, for an individual or $8,000.00, for an individual with a spouse or dependent plus $960.00, for each additional dependent. *W.F.*, 57 ECAB ___ (Docket No. 06-769, issued August 11, 2006). Appellant testified at the hearing that he had $34,000.00 in a brokerage account.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4 and June 19, 2006 are vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: April 9, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board