

FACTUAL HISTORY

On July 7, 1980 appellant filed a traumatic injury claim alleging that on July 6, 1980, while bending down to pick up a pack, he injured his back. Appellant's claim was accepted for lumbar strain at L2-3 and L3-4 herniated disc.

On October 20, 2005 the Office made a preliminary determination that appellant had received an overpayment in the amount of \$61,975.57.¹ The Office also made a preliminary finding that appellant was at fault in the creation of the overpayment. Appellant was notified that he could request a telephone conference, request that the district office issue a final decision based on written evidence only or request a prerecoupment hearing.

On November 17, 2005 appellant requested a hearing which was held on June 29, 2006. At this hearing, appellant's representative argued, in relevant part, that the preliminary determination sent to appellant did not advise him that he had a right to inspect and copy government records relating to the overpayment as required by 20 C.F.R. § 10.431(c).

By decision dated October 11, 2006, the hearing representative affirmed the Office's decision finding that appellant received an overpayment in the amount of \$61,975.57 and the finding that appellant was with fault in the creation of the overpayment. The hearing representative returned the case to the Office for collection of the overpayment. The hearing representative rejected appellant's argument that the finding of the overpayment was improper as he was never advised of his right to inspect the government's documents. The hearing representative noted that the preliminary determination specifically cites the documents used in consideration of the overpayment and that all documents were previously sent to appellant. He further stated, "I do not find that these were records that were not available to the claimant as the letters had been addressed to the claimant. Additionally, a claimant has a right to request copies of his file records at any time; no such request was made to the Office. I do not find that claimant was denied due process."

LEGAL PRECEDENT

Pursuant to 20 C.F.R. § 10.431 of the Code of Federal Regulations:

"Before seeking to recover an overpayment or adjust benefits, [the Office] will advise the beneficiary in writing that:

- (a) The overpayment exists; and the amount of the overpayment;
- (b) A preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment;

¹ The Office noted that this overpayment occurred because appellant was entitled to compensation benefits from October 21, 2000 to April 18, 2004 at a rate of "66.6" (66 2/3) percent but that appellant received pay at the augmented rate of 75 percent. The Office also noted that appellant began to work part time as a modified clerk for four hours a day on April 13, 1987 but that his benefits were not appropriately reduced.

(c) He or she has the right to inspect and copy [g]overnment records relating to the overpayment; and

(d) He or she has the right to present evidence which challenges the fact or amount of the overpayment, and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived.”²

ANALYSIS

In the instant case, the Office issued a preliminary determination of overpayment which informed appellant that an overpayment existed in the amount of \$61,975.57, that appellant was at fault in the creation of the overpayment and that appellant could challenge the overpayment. However, the Office did not inform appellant that he had the right to inspect and copy government records with regard to the overpayment. The hearing representative stated that appellant had not been denied due process because all of these documents had previously been sent to appellant and an appellant has a right to request a copy of file records at any time. However, the language in the regulation is specific -- it states that the Office “*will* advise the beneficiary in writing ... [that] he has the right to inspect and copy [g]overnment records related to the overpayment...”³ (Emphasis added.) Accordingly, the requirement that the Office inform appellant of his right to inspect and copy [g]overnment records is mandatory and the failure of the Office to inform appellant of this right in writing mandates that the Board reverse the Office’s decision with regard to the overpayment as the Office did not follow appropriate procedures with regard to informing appellant about the overpayment.

CONCLUSION

The Office did not follow proper procedures with regard to informing appellant about his overpayment.

² 20 C.F.R. § 10.431.

³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 11, 2006 is reversed.

Issued: August 17, 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