

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

A.G., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Seattle, WA, Employer**

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**Docket No. 07-626
Issued: July 16, 2007**

Appearances:
John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2007 appellant, through his attorney, filed a timely appeal from the June 5, 2006 decision of the Office of Workers' Compensation Programs denying waiver of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied waiver of an overpayment. On appeal, appellant contends that notice of the preliminary determination of overpayment was not properly sent because it was not mailed to his attorney.

FACTUAL HISTORY

On January 29, 1997 appellant, then a 58-year-old mechanical engineer, filed a traumatic injury claim alleging that he injured his back and right shoulder that day when he slipped on black ice. On June 19, 1997 the Office accepted his claim for lumbar sprain, aggravation of degenerative disc disease and impingement of right sciatic nerve. On October 27, 1997 appellant

authorized Attorney John Goodwin to represent him in his claim before the Office. The Office recognized Mr. Goodwin as appellant's representative and sent him copies of correspondence and documents related to appellant's claim. On October 22, 2002 the Office accepted his claim of depression.

On June 29, 2005 the Office made a preliminary determination that appellant had been overpaid by the amount of \$1,641.43 because health insurance premiums had not been deducted from his compensation from September 1, 2004 to March 19, 2005. The Office informed appellant that he was not at fault in the creation of the overpayment and was, therefore, eligible to receive a waiver of recovery of the overpayment. It explained the options for seeking a waiver, including a prerecoupment hearing. The Office sent an identical determination to appellant on December 2, 2005. Neither determination was sent to his representative.

By decision dated April 29, 2006, the Office notified appellant that the overpayment would not be waived. It proposed that the overpayment be repaid by deducting \$100.00 from his continuing compensation every 28 days from June 11, 2006 to September 1, 2007.

On May 25, 2006 Mr. Goodwin contacted the Office to inquire why a preliminary determination of overpayment had not been sent to him. He requested a copy of the letter and the opportunity to participate in a prerecoupment hearing. On May 30, 2006 the Office sent Mr. Goodwin a copy of the December 2, 2005 preliminary determination.

On June 5, 2006 the Office issued a second decision denying waiver of the overpayment. Though it stated that, the reason for the decision was explained in an enclosed memorandum, the record does not contain any memorandum. The Office again proposed that the overpayment be repaid by deducting \$100.00 from appellant's compensation every 28 days from June 11, 2006 to September 1, 2007. On July 25, 2006 the Office informed appellant that if he did not indicate whether he would cooperate in the repayment within 30 days, interest and administrative charges would be added to his debt. On September 3, 2006 the Office began deducting \$250.00 each 28 days to recover the overpayment.

LEGAL PRECEDENT

Office regulations provide that a properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on the facts or the law and obtaining information from the case file, to the same extent as the claimant.¹ Any notice requirement contained in the regulations or the Federal Employees' Compensation Act² is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.³ The Board has held that decisions under the Act are not deemed

¹ 20 C.F.R. § 10.700(c).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.700 (c); *see also Sara K. Pearce*, 51 ECAB 517, 518 (2000).

to have been properly issued unless both appellant and the authorized representative have been sent copies of the decision.⁴

Office procedures note that the Act is social legislation intended to benefit entitled employees and that every effort should be made to accommodate the claimant's best interests and to ensure that all due process actions are completed in a timely and fair manner when specific collection actions must be enforced.⁵ To ensure due process, the Office is required to issue a preliminary decision in all overpayment cases.⁶ Pursuant to *Califano v. Yamasaki*, 422 U.S. 682 (1979), the Office has established procedures for handling overpayment cases under 5 U.S.C. § 8129 that include the opportunity for a prerecoupment hearing.⁷ Office procedures state:

“If the claimant is determined to be without fault, [the Office must send a letter advising] the claimant of the fact and amount of the overpayment and of the preliminary finding that the claimant is without fault in the creation of the overpayment. [The letter must inform] the claimant of the right to submit additional evidence and argument, if the claimant disagrees with the fact or amount of the overpayment and if the claimant feels the overpayment should be waived. Additional evidence and arguments must be submitted by the claimant within 30 days of the date of the letter.”⁸

ANALYSIS

On October 27, 1997 appellant notified the Office that he had authorized Mr. Goodwin to act as his representative. Thereafter, the Office mailed the designated representative copies of relevant correspondence. The record establishes, however, that the Office did not send

⁴ See *Travis L. Chambers*, 55 ECAB 138 (2003) (holding that 20 C.F.R. § 10.127 requires that a copy of an Office decision be sent to the authorized representative and that any other interpretation of the language of the regulation would be inconsistent with the clear language of its initial provisions). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications*, Chapter 2.300.4e (February 2000) (“where the employee has an attorney or other legal representative, the original of any letter to the claimant should be sent to that person, with a copy to the claimant. Similarly, where the claimant is sent a copy of a letter, the attorney or other representative should receive a copy as well”); Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3c(1) (April 1993) (“the [Office] must provide information about procedures involved in establishing a claim, including detailed instructions for developing the required evidence to all interested parties the claimant, the employing establishment and the representative, if any”); *Sara K. Pearce*, *supra* note 3 at 518-19 (holding that failure to notify appellant's authorized representative “effectively denied appellant the opportunity to have [the representative] assist her in remedying the deficiencies of her claim and the full opportunity to exercise her appeal rights in a timely fashion”); and *Thomas H. Harris*, 39 ECAB 899, 899-900 (1988).

⁵ Federal (FECA) Procedure Manual, Chapter 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (May 2004).

⁶ *Billie C. Rae*, 44 ECAB 604, 611 (1993).

⁷ *Earl D. Long*, 50 ECAB 464, 469 (1999); Federal (FECA) Procedure Manual, Chapter 6 -- Debt Management, *Overpayment Overview*, Chapter 6.100.3k (May 2004).

⁸ Federal (FECA) Procedure Manual, Chapter 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a(2) (May 2004).

appellant's representative a copy of either the June 29 or December 2, 2005 preliminary overpayment determinations, which explained the processes for seeking a waiver. On April 29, 2006 the Office issued a final overpayment determination. The Office sent the final decision to appellant's representative. Following receipt of this decision, appellant's representative requested a copy of the preliminary determination and the opportunity for a prerecoupment hearing. The Office did not respond to this request. On June 5, 2006 it reissued its final determination that the overpayment should not be waived.

The Board finds that the Office did not properly serve the June 29 and December 2, 2005 preliminary overpayment determinations because it did not mail them to appellant's representative. Similar to decisions issued pursuant to 20 C.F.R. § 10.127, preliminary overpayment determinations carry time-limited hearing rights.⁹ Because appellant's representative did not receive a copy of these determinations, he was unable to make a timely request for a prerecoupment hearing or present evidence as to whether recovery of the overpayment should be waived.¹⁰

The Board finds that Office's failure to timely provide the June 29 and December 2, 2005 preliminary determinations to the authorized representative interfered with appellant's due process rights to a prerecoupment hearing. As proper notice of the overpayment and the right to a prerecoupment hearing were not given, the final decisions denying waiver, dated April 29 and June 5, 2006 were not properly issued.¹¹ Therefore, the Board finds that the case must be remanded to the Office so that the preliminary overpayment determination may be properly issued.

CONCLUSION

The Board finds that the Office did not properly determine that appellant's overpayment should not be waived.

⁹ See 20 C.F.R. § 10.431(d).

¹⁰ See *Thomas H. Harris*, *supra* note 4 at 899 (the Board noting in a case involving 20 C.F.R. § 10.127 that appellant's representative was unable to timely request a hearing before Office hearing representative because he was not notified of the decision denying reconsideration).

¹¹ See *Billie C. Rae*, *supra* note 6 at 611 (holding that the Office was required to issue a preliminary decision "explaining the grounds on which an overpayment was found, to which appellant could respond prior to issuance of a final decision").

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 5, 2006 is set aside and the case is remanded for further action consistent with this decision.

Issued: July 16, 2007
Washington, DC

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

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

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