

FACTUAL HISTORY

On October 25, 2001 appellant, then a 53-year-old tax examiner clerk, sustained injury when she slipped and fell in the employing establishment cafeteria injuring her left hand, shoulder, hip, thigh and foot. The Office accepted her claim for left hip and thigh contusion and left shoulder strain.

Appellant requested compensation for leave without pay beginning December 10, 2001. On the reverse of the claim form, her supervisor indicated that appellant earned \$28,043.00 per year. The Office calculated appellant's weekly pay rate as \$539.29. The Office paid compensation from December 10, 2001 to March 13, 2002 in the amount of \$4,629.75 at the basic rate based on this pay rate. Appellant completed a form on March 21, 2002 and indicated that her weekly salary was \$1,414.00, that she received \$721.00 in night differential pay. In a letter dated March 21, 2002, she reported her yearly salary as \$30,758.00, her bi-weekly salary as \$1,414.00 and her night differential as \$721.00. On April 4, 2002 the employing establishment stated that appellant's yearly base salary was \$32,314.00 and that she received weekly night differential of \$721.00. The Office corrected appellant's prior compensation payment and calculated her weekly pay rate as \$1,342.42 on April 16, 2003. The Office paid compensation from March 14 to April 6, 2002; April 7 to 20, 2002; and April 21 to May 18, 2002 based on a weekly salary of \$1,342.42. The Office entered appellant on the periodic rolls at the basic rate based on a weekly rate of pay of \$1,342.42 on April 16, 2002.

On October 23, 2003 the Office of Personnel Management approved appellant's application for disability retirement.

Appellant submitted a report dated June 30, 2003 from Dr. Rashid Ayyub, a Board-certified surgeon, who noted her history of injury and performed a physical examination. Dr. Ayyub diagnosed postconcussion syndrome, herniated cervical disc, spinal stenosis, left brachial plexus neuralgia ulnar entrapment syndrome of the left elbow, tendinitis of the shoulder with impingement syndrome, ganglion cyst on the right hand, depression and anxiety reaction and sprain in the lumbosacral spine. He provided work restrictions.

In a report dated July 1, 2003, Dr. Edward Hoffman, a psychologist, examined appellant and noted her history of injury. He diagnosed adjustment disorder with depressed mood, borderline intellectual functioning and hypertension. Dr. Hoffman stated that appellant was able to manage her funds independently.

The Office completed an overpayment calculation on February 10, 2004 and found that appellant was paid at an incorrect pay rate. The Office noted that appellant's supervisor advised that her annual salary was \$33,321.00 and that she was entitled to night differential for 35 hours a week at 10 percent. Appellant's weekly pay rate was \$640.62 per week with an additional \$56.05 for night differential totaling \$696.67 per week. She was paid compensation in the amount of \$100,352.30 for the period December 10, 2001 to January 24, 2004. Appellant was entitled to receive \$52,073.30 for that period resulting in an overpayment of \$48,279.00.

On February 11, 2004 the Office provided appellant with a preliminary finding of overpayment in the amount of \$48,279.00. The Office found that she was at fault in the creation

of the overpayment as she received payments she knew or reasonably should have known to be incorrect due to a higher pay rate than that provided for her grade and step. The Office stated: "Nevertheless, you failed to return the compensation payments made to you or advise this Office that the compensation payments were or seemed to be in excess of your bi-weekly salary of \$828.61." Appellant responded on February 12, 2004 and stated that she had only worked in the date-of-injury position for a few months, that the employing establishment provided the pay calculations to the Office and that she did not know how the night differential was calculated. She requested waiver of the overpayment. Appellant requested a telephone conference on February 12, 2004.

Dr. Antonio Flores, a Board-certified neurologist, examined appellant on April 26, 2004 and noted her employment injury on October 25, 2001. He diagnosed a left brachial plexus injury and left ulnar neuropathy. Dr. Flores stated that appellant was disabled.

On May 10, 2005 the Office referred appellant for a second opinion evaluation with Dr. Isaac Cohen, a Board-certified orthopedic surgeon. In a report dated May 26, 2005, Dr. Cohen noted that he had reviewed the statement of accepted facts and described appellant's employment injury and accepted conditions. Appellant reported severe cervical symptoms, numbness in the left hand, pain in the left shoulder and difficulty performing all normal activities. Dr. Cohen examined appellant and diagnosed status post left hip contusion, left shoulder contusion and left thigh contusion, improved. He also diagnosed a preexisting degenerative cervical spine condition. Dr. Cohen found that appellant's cervical spine condition was not related to her employment injury, but a preexisting condition, "progressing in a natural fashion with progressive degenerative changes." He found that appellant was totally disabled due to this cervical condition.

Appellant submitted a January 19, 2006 report from Dr. H.P. Sinha, a Board-certified internist, finding that she was totally disabled due to pain in her left shoulder, pain in the elbow and left hand and neck.

The Office found a conflict of medical opinion evidence between Dr. Sinha and Dr. Cohen regarding appellant's diagnosed condition and the causal relationship to her accepted employment injury. The Office referred appellant for an impartial medical examination with Dr. Leon Sultan, a Board-certified orthopedic surgeon. In a report dated July 13, 2006, Dr. Sultan noted appellant's history of injury and medical history as well as reviewing the statement of accepted facts. On physical examination, he found that appellant's left shoulder contusion had resolved and that she demonstrated preexisting unrelated degenerative acromioclavicular arthrosis. Dr. Sultan found that appellant's left hip and thigh contusions had also resolved. He diagnosed preexisting cervical spine arthrosis with severe degenerative disc disease at C5-6 and C6-7 and opined that these conditions were not related to the October 25, 2001 employment injury. Dr. Sultan could not confirm any left ulnar neuropathy. He opined that appellant could perform light or sedentary work with limitations. Dr. Sultan also completed a work restriction evaluation dated July 13, 2006 and in response to the question "What condition is the claimant now suffering from and how is it related to her on-the-job injury?" stated that appellant had advanced cervical spine degenerative disc disease at C5-6 level and to a lesser extent at C6-7. He stated that appellant could work four to six hours a day with avoidance of prolonged sitting in one position to lessen the strain on appellant's degenerative disc disease

of the cervical spine. Dr. Sultan then indicated that appellant should not push, pull or lift more than 5 to 10 pounds.

By decision dated September 27, 2006, the Office affirmed the February 11, 2004 preliminary finding of overpayment. The Office stated that it would withhold \$300.00 from appellant's continuing compensation benefits effective October 28, 2006. Appellant requested that the Board review this decision. In an order remanding case dated May 18, 2007,¹ the Board found that the Office failed to respond to appellant's request for a telephonic conference prior to finalizing the overpayment finding. The Board remanded the case for the Office to conduct a telephonic conference and issue an appropriate decision.

The Office proposed to terminate appellant's compensation benefits by letter dated May 23, 2007 based on Dr. Sultan's report. In a letter dated June 11, 2007, appellant objected to the proposed termination.

The Office conducted a telephonic conference with appellant on July 13, 2007. Appellant asserted that she was not at fault in the creation of the overpayment as the employing establishment provided incorrect pay rate information to the Office. The claims examiner stated that appellant reasonably should have been aware that her compensation payments were based on a pay rate that was almost twice that of her earnings in the date-of-injury position. Appellant stated that a reasonable person should have been aware of the discrepancies in her earnings and her compensation payments but that she was not aware due to her emotional upset and depression following her injury. The Office allowed appellant 30 days to submit evidence that she was not competent at the time the overpayment occurred. Appellant resubmitted the July 1, 2003 report from Dr. Hoffman. On August 6, 2007 the Office requested additional information regarding appellant's current financial situation. Appellant submitted financial information on August 22, 2007.

By decision dated September 19, 2007, the Office terminated appellant's medical and wage-loss compensation effective that date. The Office relied on the impartial medical report from Dr. Sultan.

By decision dated September 19, 2007, the Office finalized the February 11, 2004 preliminary finding of overpayment. The Office found that appellant was at fault in the creation of the overpayment and that the medical evidence was not sufficient to establish that she was not capable of understanding her finances. The Office noted that, as appellant's compensation benefits were terminated by a separate concurrent decision, recovery would be made from her Office of Personnel Management benefits.²

¹ Docket No. 07-86 (issued May 18, 2007).

² Following the Office's September 19, 2007 decision, appellant submitted additional new evidence on appeal to the Board. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof in termination compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.⁶

The Federal Employees' Compensation Act provides that, if there is a 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.⁷ 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 of an Office medical adviser or consultant, 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 had no prior connection with the case.⁸ It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.⁹

ANALYSIS -- ISSUE 1

The Office found that there was a conflict of medical opinion evidence between appellant's physician, Dr. Sinha, a Board-certified internist, who stated that appellant was totally disabled due to her left shoulder, elbow, left hand and neck conditions and the Office's second opinion physician, Dr. Cohen, a Board-certified orthopedic surgeon, who found that appellant's current disability was due to a nonemployment-related cervical condition. The Office properly referred appellant to Dr. Sultan, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence.

³ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁵ *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

⁶ *Mary A. Lowe*, *supra*, note 4.

⁷ 5 U.S.C. §§ 8101-8193, 8123.

⁸ 20 C.F.R. § 10.321.

⁹ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

In Dr. Sultan's July 13, 2006 report, he reviewed the statement of accepted facts, examined appellant and opined that her accepted work-related conditions of left shoulder, left hip and thigh contusions had resolved. He opined that appellant had severe degenerative disc disease and preexisting cervical spine arthrosis which were not related to her employment. Dr. Sultan stated that appellant could perform light or sedentary work with limitations. He did not explain why these work restrictions were necessary.

On the work restriction evaluation completed on the same date, in response to a question regarding appellant's current conditions and how these conditions were work related, Dr. Sultan stated that appellant had advanced cervical spine degenerative disc disease at C5-6 and C6-7. He then provided work restrictions.

Dr. Sultan's reports are not consistent. In his narrative report, he clearly opined that appellant's cervical condition was not caused or aggravated by her fall at work on October 25, 2001. In the form report, Dr. Sultan listed appellant's cervical degenerative disc disease in response to a question regarding her current condition and its relationship to the employment. In both reports, he provided work restrictions. Dr. Sultan did not clearly state that appellant's cervical condition was not due to her employment and that any work restrictions were due to nonemployment-related conditions. Appellant's report is not sufficient to establish that she had no continuing disability or medical residuals as a result of her accepted employment injury of October 25, 2001. The Office has failed to meet its burden of proof to terminate appellant's compensation and medical benefits based on Dr. Sultan's July 13, 2006 report.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act¹⁰ 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 his duty." Compensation benefits are computed based on an employee's pay rate during the relevant timeframe.¹¹ In computing one's pay rate, section 8114(e) of the Act provides for the inclusion of certain premium pay received.¹² As pay rate is a critical component in the determination of the amount of compensation to which one is entitled, an incorrect pay rate may result in either the underpayment or overpayment of compensation. In cases where compensation payments were based erroneously on a pay rate greater than that to which the employee was entitled, the difference between the compensation the employee should have received and did receive constitutes an overpayment of compensation.¹³

¹⁰ 5 U.S.C. §§ 8101-8193, 8102(a).

¹¹ 5 U.S.C. § 8101(4); 8114; *see Marco Padilla*, 51 ECAB 202, 207 (1999).

¹² 5 U.S.C. § 8114(e).

¹³ *Monte Fuller*, 51 ECAB 571, 575 (2000) (Discussion of proper determination of pay rate); *A.O.*, (Docket No 07-65, issued October 11, 2007).

ANALYSIS -- ISSUE 2

The Office relied on the employing establishment to provide appellant's correct pay rate including her night differential. The employing establishment provided appellant's base yearly salary as \$32,314.00 and stated that she received weekly night differential of \$721.00. The Office utilized these figures in determining that appellant's weekly rate of pay was \$1,342.42. The Office provided appellant's wage-loss compensation based on this pay rate from December 10, 2001 to January 24, 2004 for a total of \$100,352.30. The employing establishment then corrected appellant's pay rate and established that her yearly salary was \$33,321.00 and that she earned 35 hours a week of night differential or \$56.05 for a total weekly pay rate of \$696.67. The Office determined that appellant was entitled to receive wage-loss compensation in the amount of \$52,073.30 resulting in an overpayment of \$48,279.00.

Appellant has not alleged that she did not receive an overpayment of compensation. She has not disputed the amount of the overpayment. The Office has provided the method it used to determine appellant's correct pay rate for compensation purposes and its calculations of the overpayment. Therefore, the Board finds that appellant has received an overpayment of compensation in the amount of \$48,279.00 for the period December 10, 2001 to January 24, 2004.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹⁴ provides: "Adjustment or recovery by the United States may not be made when 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."

The Office may 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 received 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 with respect to 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; (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).¹⁵

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

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ 20 C.F.R. § 10.433(a).

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.¹⁶

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in the creation of the overpayment under the third standard listed above, that she accepted payments that she knew or should have know were incorrect. Appellant admitted at the telephonic conference that a reasonable person should have known that she was being overpaid due to the increased compensation benefits paid by the Office and her much lesser earnings while working at the employing establishment. However, she alleged that she should not be held to this standard as she was upset and depressed due to her work-related conditions. In support of her claim, appellant submitted the July 1, 2003 report from Dr. Hoffman, a psychologist, who stated that she had borderline intellectual functioning.

The Board finds that the circumstances surrounding this overpayment were not such that appellant was incapable of realizing that she was being overpaid. While Dr. Hoffman stated that appellant's intellectual function was borderline, he also concluded that she was capable of managing her own financial affairs. Based on this assessment, the evidence establishes that appellant knew or should have known that the payments she received were incorrect based on compensation benefits that were almost double her salary. The Board finds that appellant was at fault in the creation of the overpayment and that this overpayment was not subject to waiver. The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered from appellant's Office of Personnel Management benefits. The Board jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹⁷

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and medical benefits. The Board further finds that the Office properly determined that appellant had receive an overpayment of compensation in the amount of \$48,279.00 and that she was at fault in the creation of this overpayment.

¹⁶ *Id.* § 10.433(b).

¹⁷ *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2007 decision of the Office of Workers' Compensation Programs terminating appellant's compensation and medical benefits is reversed. The September 19, 2007 overpayment decision of the Office is affirmed.

Issued: May 2, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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