

In a decision dated September 28, 2005, the Office suspended appellant's compensation for refusing to submit to a medical examination as directed. It advised: "Therefore, under 5 U.S.C. § 8123(d), your compensation is suspended effective October 2, 2005. Your benefits may be reinstated only after verification that you attended and fully cooperated with the examination." Notwithstanding this decision, the Office continued to pay compensation on the periodic rolls.

On November 27, 2006 the Office made a preliminary finding that appellant received a \$19,035.00 overpayment from October 2, 2005 to November 25, 2006. It also made a preliminary finding that appellant was at fault in creating this overpayment because he knowingly accepted compensation to which he was not entitled.

On December 21, 2006 appellant, through his attorney, requested a final decision from the district Office based on the written evidence. He argued that he was not at fault because he notified the Office in advance that he would not attend the scheduled medical examination. Appellant completed an overpayment recovery questionnaire showing no monthly income, monthly expenses of \$969.00 and an outstanding hospital debt of \$129,000.00.

In a decision dated February 7, 2007, the Office finalized its preliminary findings on the overpayment. It notified appellant that his only right of appeal was to the Board.

On March 8, 2007 the Office advised appellant that it had received no payment in response to its first demand. The Office encouraged him to provide some indication within 30 days that he intended to make payment. On March 13, 2007 appellant, through his attorney, again disputed the Office's determinations on the overpayment. He argued that recovery would create a hardship and be against equity and good conscience: "Your revisiting these issues is requested."

On March 26, 2007 the Office received a request for a prerecoumment hearing before an Office hearing representative. Appellant simply submitted a copy of his original December 21, 2006 request corrected to ask for a prerecoumment hearing. The Office gave him a prerecoumment hearing on October 12, 2007. Appellant submitted medical billing statements showing total charges exceeding \$300,000.00.

In a decision dated January 22, 2008, an Office hearing representative affirmed the Office's November 27, 2006 preliminary determination.¹ The hearing representative found appellant at fault in creating the overpayment because he was aware or should have been aware that he was not entitled to wage-loss compensation from the date his benefits were suspended. Because appellant was at fault in creating the overpayment, the hearing representative found that he was not entitled to waiver. The hearing representative compromised a portion of the debt and returned the case to the district Office for recovery.

¹ The hearing representative noted, without explanation, that appellant's request for a prerecoumment hearing was timely. The hearing representative therefore vacated the Office's February 7, 2007 decision as premature.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he 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 knew or should have known to be incorrect; or (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect (this provision applies only to the overpaid individual).³

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 is being overpaid.⁴ The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁵ 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.

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁶ The Board's jurisdiction to review the collection of an overpayment is limited to cases in which the Office decreases later payments of compensation.⁷

ANALYSIS

On appeal, appellant's attorney does not contest the fact or amount of overpayment or the Office's finding of fault. "The sole issue," he argues, "is whether recovery by the government would be against equity and good conscience," but the Board has no jurisdiction to review the issue of recovery. The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled. Because the Office in this case cannot collect the overpayment by decreasing later payments of compensation -- appellant's compensation remains suspended under

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.433(a) (1999).

⁴ *Id.* at § 10.433(b).

⁵ *Id.* at § 10.433(a).

⁶ 5 U.S.C. § 8129(a).

⁷ *Levon H. Knight*, 40 ECAB 658 (1989).

5 U.S.C. § 8123(d) -- it must recover the debt by other means. The Board therefore lacks jurisdiction to review the Office's recovery efforts.

The Board finds that appellant received an overpayment from October 2, 2005 to November 25, 2006. The Office suspended his compensation effective October 2, 2005 but mistakenly continued to pay compensation. At \$1,269.00 every 28 days for a period of 420 days, or 15 payments of compensation, the overpayment amounted to \$19,035.00. The Board will affirm the Office's January 22, 2008 decision on the issues of fact and amount of overpayment.

The Board will also affirm the Office's finding of fault. The Office notified appellant on September 28, 2005 that his compensation was suspended effective October 2, 2005 and would be reinstated only after verification that he attended and fully cooperated with the examination. Appellant therefore knew or should have known that compensation for periods on or after October 2, 2005 were incorrect, so he is at fault in creating the overpayment by accepting such. It is no defense that the Office erred in making the overpayment and because appellant is at fault in creating the overpayment, he is not eligible for waiver.

CONCLUSION

The Board finds that appellant was at fault in creating a \$19,035.00 overpayment of compensation from October 2, 2005 through November 25, 2006. Appellant is therefore not eligible for waiver.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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