

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, REMOTE ENCODING
CENTER, East Syracuse, NY, Employer**

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**Docket No. 08-418
Issued: September 9, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 21, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated July 18, August 28 and October 25, 2007 pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's compensation benefits effective October 25, 2007 on the grounds that she failed to complete a Form EN-1032 as requested on June 6, 2007; (2) whether the Office properly denied modification of the January 6, 2000 wage-earning capacity determination; (3) whether appellant received an overpayment in the amount of \$25,898.48; (4) whether the overpayment should be waived as appellant was not at fault; and (5) whether the Office properly determined to collect the overpayment by withholding \$400.00 from appellant's compensation benefits every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On March 25, 1998 the Office accepted that appellant, a 45-year-old data entry clerk, sustained bilateral carpal tunnel syndrome due to factors of her federal employment. By decision dated January 6, 2000, it reduced appellant's compensation benefits based on her actual earnings as a data transcriber working 30 hours a week, finding that the duties of this position corresponded to her work restrictions.

Following the January 6, 2000 decision, appellant filed a recurrence of disability claim on February 15, 2002. She noted that the employing establishment terminated her appointment on January 31, 2002 as the facility closed. Appellant refused the involuntary reassignment offered by the employing establishment. She submitted medical evidence in support of her claim for recurrence of disability. The Office accepted appellant's claim for recurrence of total disability beginning on January 25, 2002 and entered her on the periodic rolls by decision dated June 6, 2002. It authorized compensation benefits due to the recurrence of total disability from January 25, 2002 through September 19, 2003. The Office rescinded the acceptance of this claim by decision dated September 19, 2003, finding that the medical evidence did not establish a change in the nature and extent of appellant's injury-related condition and that she was subject to a noncompensable reduction-in-force. The rescission decision constituted the basis for the Office's August 19, 2004 preliminary finding an overpayment of compensation and the hearing representative's May 2, 2006 decision affirming that an overpayment had in fact occurred.¹ Appellant appealed this decision to the Board. By order dated May 21, 2007,² the Board found that the Office's September 19, 2003 decision had improperly stated the legal issue in appellant's claim. The case was remanded for determination of whether the January 6, 2000 wage-earning capacity determination should be modified. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

In a letter dated June 6, 2007,³ the Office requested information from appellant needed to determine if she was entitled to benefits under the Federal Employees' Compensation Act. It directed appellant to complete the enclosed EN-1032 form within 30 days. The Office informed appellant that if she failed to submit the completed form within the allotted time period her compensation benefits would be suspended in accordance with 20 C.F.R. § 10.528.

In a letter dated June 12, 2007, the Office requested additional factual and medical evidence in support of appellant's request for modification of the January 6, 2000 wage-earning capacity determination. Appellant did not respond. By decision dated July 18, 2007, the Office declined to modified the January 6, 2000 wage-earning capacity determination. It noted that appellant had filed a claim for recurrence on January 25, 2002, which was accepted on June 6, 2002. The Office further stated that this claim was rescinded by decision dated September 19, 2003. It stated, "By letter dated June 12, 2007 and were [sic] thereby afforded the

¹ In an overpayment decision, the Board must first determine whether an overpayment occurred by examining the underlying decision of the Office. *Russell E. Wageneck*, 46 ECAB 653, 659 (1995).

² Docket No.06-1828 (issued May 21, 2007).

³ This letter was properly addressed to appellant at her address of record: 26 Woodworth Drive, Central Square, NY 13036.

opportunity to provide supportive evidence. You were advised of the time frame within which this evidence was to be submitted. No additional evidence was received.” The Office then found that appellant had not established that she was entitled to compensation for total disability. It concluded, “In your case, the employing agency provided you with limited duty effective January 2, 1999 and a formal LWEC [loss of wage-earning capacity] decision was issued on September 23, 1999. That decision will stand unless one of the criteria for modification as outlined above has been met.”

The Office again issued a preliminary finding of overpayment on July 18, 2007 finding that appellant was without fault in the creation of an overpayment in the amount of \$28,698.48 due to the rescission of her claim for recurrence of disability. Appellant responded on August 17, 2007 requesting a decision on the written evidence and waiver of the overpayment. She completed an overpayment recovery questionnaire.

By decision dated August 28, 2007, the Office finalized its preliminary overpayment decision finding that appellant had received an overpayment of compensation in the amount of \$25,898.48, that she was without fault in the creation of the overpayment and that the overpayment would be recovered by withholding \$400.00 from appellant’s continuing compensation benefits.

By decision dated October 25, 2007, the Office suspended appellant’s compensation benefits effective November 25, 2007 on the grounds that she failed to complete a Form CA-1032 mailed to her on June 6, 2007.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to section 10.528 of the Office’s regulations, it will periodically require each employee who is receiving compensation benefits to complete an affidavit as to any work or activity indicating an ability to work, which the employee has performed for the prior 15 months.⁴ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until the Office receives the requested report. At that time the Office will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.⁵

ANALYSIS -- ISSUE 1

On June 6, 2007 the Office sent appellant a correctly addressed request for completion of an EN-1032 form. It requested a response within 30 days from the date of the CA-1032 and EN-1032 forms. The record does not contain a response from appellant to this request. As she did not respond to the Office’s request for completion of the EN-1032 form, the Board finds that the Office properly suspended her wage-loss compensation pursuant to 20 C.F.R. § 10.528 effective November 25, 2007.

⁴ 20 C.F.R. § 10.528.

⁵ *Id.*; see also 20 C.F.R. § 10.525; *Robert A. Robbins*, Docket No. 05-728, (issued July 15, 2005); *Eugene S. Moye*, Docket No. 04-2072 (issued February 25, 2005).

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.⁶

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by its statute, regulations and Board precedent to make findings of fact.⁷ Section 8124(a) of the Act provides: “The [Office] shall determine and make a finding of fact and make an award for or against payment of compensation....”⁸ Section 10.126 of Title 20 of the Code of Federal Regulations provides: “The decision shall contain findings of fact and a statement of reasons.”⁹

The Office’s procedure manual specifies additional requirements for a final Office decision denying a claim for benefits. In the subsection titled, “Discussion of Evidence” the procedure manual states, “[T]he [Office] should identify and discuss all evidence which bears on the issue at hand, including any unsuccessful attempts to obtain significant evidence ... [and] should summarize the relevant facts and medical opinions....” In the subsection titled, “Basis for Decision” the procedure manual states, “The reasoning behind the [Office’s] evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.”¹⁰ In the section titled, “How to Write Notices of Decisions” the procedure manual states, “A finding that claimant failed to meet the burden of proof is properly made from the evidence or lack of it and not simply because the claimant did not respond to a request for information from the [Office].”¹¹

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision. The July 18, 2007 decision of the Office does not fully comply with the Board’s remand order to consider appellant’s claim as a request for modification of a loss of wage-earning capacity decision. The Board’s May 21, 2007 order clearly set aside the September 19, 2003 decision rescinding appellant’s recurrence claim and remanded the case for adjudication on whether modification of a loss of wage-earning capacity decision was warranted. On remand, the Office found that appellant failed to establish that modification of a loss of wage-earning capacity decision was warranted without providing any rationale or discussion of the factual and medical evidence of record. Its decision did not

⁶ *Harley Sims, Jr.*, 56 ECAB 320, 323-24 (2005).

⁷ *Avalon C. Bailey*, 56 ECAB 223 (2004).

⁸ 5 U.S.C. § 8124(a).

⁹ 20 C.F.R. § 10.126.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4e (March 1997).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5a(2)(b) (March 1997).

contain any discussion of the factual or medical evidence submitted by appellant in conjunction with her recurrence of disability claim or specify the precise defect of the claim so that she would know the kind of evidence needed to overcome it.¹² This decision therefore is not sufficient for a finding of overpayment beginning on January 25, 2002 on the grounds that appellant was not entitled to compensation, as the Office has not properly adjudicated whether her loss of wage-earning capacity decision should be modified.

CONCLUSION

The Board finds that the Office met its burden of proof to suspend appellant's compensation benefits effective November 25, 2007 on the grounds that she failed to complete the requested Form EN-1032. The Board further finds that the Office's July 18, 2007 decision regarding modification of appellant's January 6, 2000 wage-earning capacity determination is not in posture for decision.¹³

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2007 decision of the Office of Workers' Compensation Programs is affirmed. The August 28 and July 18, 2007 decisions of the Office are set aside and remanded for further development consistent with this decision of the Board.

Issued: September 9, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² *Avalon C. Bailey, supra* note 7; *P.N.*, Docket No. 06-662 (issued September 14, 2006).

¹³ Due to the disposition of this issue it is not appropriate for the Board to address the issues of the August 28, 2007 final overpayment decision.