

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

V.P., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Ashland, KY, Employer**

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**Docket No. 08-1914
Issued: March 9, 2009**

Appearances:
Appellant, pro se
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 June 30, 2008 appellant filed a timely appeal of the April 11, 2008 merit decision of the Office of Workers' Compensation Programs, finding that she abandoned her request for a prerecoupment hearing and that she received an overpayment in the amount of \$1,741.45 for which she was at fault. 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 found that appellant abandoned her request for a prerecoupment hearing; (2) whether appellant received an overpayment of compensation in the amount of \$1,741.45 during the period April 28 through May 12, 2007; and (3) whether the Office properly found that appellant was at fault in creating this overpayment and, therefore, ineligible for waiver of the recovery of the overpayment.

FACTUAL HISTORY

On April 23, 2004 appellant, then a 40-year-old training instructor, sustained an acute contusion of the left foot and right elbow, bruised left ribs and hip and back pain while on a business trip.¹ The Office accepted the claim for a contusion of the right elbow, left leg and foot and aggravation of degenerative disc disease at L4-5. It paid appellant appropriate compensation beginning on November 28, 2004.

By letter dated February 6, 2007, the Office issued a notice of proposed termination of compensation based on a March 23, 2006 medical report of Dr. Robert W. Lowe, an impartial medical specialist, who opined that appellant's accepted employment-related conditions had resolved.

By decision dated April 27, 2007, the Office terminated appellant's compensation for wage-loss and medical benefits effective that date. The decision was sent to appellant's address of record.

The Office paid appellant compensation for total disability during the period April 28 through May 12, 2007. On May 24, 2007 it made a preliminary determination that appellant received an overpayment in the amount of \$1,741.45, during the period April 28 through May 12, 2007 because she knew or should have known that she was not entitled to compensation following the termination of her benefits. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On June 26, 2007 the Office received an OWCP-20 form completed by appellant on June 18, 2007. Appellant noted that she did not have any of the incorrectly paid checks or payments in her possession. She contented that, in September 2006, Ramona Brown, an Office claims examiner, advised her during a telephone conversation that she would receive payment for 30 days after the termination decision was issued. Appellant alleged that the Office never fully explained the conditions under which she would receive payments. She reported monthly income of \$2,860.21 and monthly expenses of \$2,594.50. Appellant had \$260.00 in a checking account. The OWCP-20 form listed her a new home address.

On June 28, 2007 the Office received appellant's June 18, 2007 request for a prerecoupment hearing with the Branch of Hearings and Review. The envelope which contained the request, listed her former address.

In a January 28, 2008 letter sent to the address on the envelope of appellant's prerecoupment hearing request, the Office advised her that a telephonic hearing with an Office

¹ In May 2005, appellant's employment was terminated by the employing establishment due to her inability to perform her work duties.

hearing representative would take place on March 5, 2008 at 3:30 p.m. eastern standard time. It instructed her to call the provided toll free number a few minutes before the hearing time and enter the pass code to gain access to the conference call.

By decision dated April 11, 2008, the Office found that appellant had abandoned her request for a precoupment hearing. It noted that she had received written notification of the hearing 30 days in advance of the hearing and had failed to appear. The Office found that there was no evidence of record that appellant contacted it, either prior or subsequent to the scheduled hearing, to explain her failure to appear. It finalized the determination that appellant was at fault in the creation of the \$1,741.45 overpayment for the period April 28 through May 12, 2007. The Office directed her to repay the overpayment in the amount of \$200.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests.

(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving precoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.”²

ANALYSIS -- ISSUE 1

The Office scheduled a precoupment hearing with an Office hearing representative on March 5, 2008 at 3:30 p.m. eastern standard time. The record shows that it mailed appropriate notice to appellant at the address listed on her request for a precoupment hearing. The record also supports that appellant did not request postponement, that she failed to appear for the scheduled hearing by making herself available *via* telephone and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Board finds that

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

it properly found that appellant abandoned her request for a hearing before an Office hearing representative.³

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of the Act provide that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office, by decreasing later payments to which the individual is entitled.⁶

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,741.45 for the period April 28 through May 12, 2007.

The Office accepted that appellant sustained a contusion of the right elbow and left leg and foot and aggravation of degenerative disc disease at L4-5 due to an April 23, 2004 fall. It paid her compensation for disability beginning on November 28, 2004. By decision dated April 27, 2007, the Office terminated her entitlement to compensation benefits effective that date. However, it continued to pay appellant wage-loss compensation in the amount of \$1,741.45 from April 28 through May 12, 2007. Since appellant was not entitled to receive compensation from the Office after the termination of her compensation, the Office properly determined that she received an overpayment of compensation in the amount of \$1,741.45.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act⁷ provides that an overpayment of compensation shall be recovered by the Office unless 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.⁸ Thus, the Office may not waive the overpayment of compensation

³ See also *Claudia J. Whitten*, 52 ECAB 483, 485 (2001).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129.

⁷ *Id.* at § 8129(b).

⁸ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

unless appellant was without fault.⁹ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁰

On the issue of fault, section 10.433 of the Office regulations, provide that an individual will be found at fault if he or she has done any of the following:

“(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 was incorrect.”¹¹

With respect to whether an individual is without fault, section 10.433(b) of the Office regulations provide in relevant part:

“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 or she is being overpaid.”¹²

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in creating the overpayment because she knew or should have known that she was not entitled to compensation for total disability during the period April 28 through May 12, 2007 after her compensation benefits were terminated. In order for it to establish that she was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.¹³

By decision dated April 27, 2007, the Office terminated appellant’s wage-loss compensation and medical benefits effective that date. The record reflects that a copy of the Office’s decision was properly mailed to appellant at her address of record in the ordinary course of business.¹⁴ Accordingly, appellant was on notice that her benefits had been terminated and that she was not entitled to receive any compensation payments subsequent to April 27, 2007.

⁹ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁰ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b); *Diana L. Booth*, *supra* note 10.

¹³ *Diana L. Booth*, *supra* note 10.

¹⁴ The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. Under the “mailbox rule,” evidence of a properly addressed letter, together with evidence of proper mailing may be used to establish receipt. *Joseph R. Giallanza*, 55 ECAB 186, 191 (2003).

She accepted compensation payments for the period April 28 through May 12, 2007, in the amount of \$1,741.45. As appellant was aware that her entitlement to benefits had been terminated, she accepted payments that she knew or should have known to be incorrect.

Appellant contended that she was advised by an Office claims examiner that she would continue to receive compensation for 30 days following the April 27, 2007 termination decision. She also contended that the Office failed to properly explain the conditions under which she would receive payments. The Office regulations provide that an individual may not be at fault if he or she relied on misinformation given in writing by the Office (or by another government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations.¹⁵ There is no evidence that appellant relied on misinformation given in writing by the Office. She accepted payments that she knew or should have known to be incorrect. As the evidence establishes that appellant is at fault in the creation of the overpayment in compensation that occurred in this case, the Board finds that she is not entitled to waiver of recovery of the overpayment.¹⁶ The fact that the Office may have erred in issuing the payments does not mitigate this finding.¹⁷

With respect to the recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁸ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁹

CONCLUSION

The Board finds that the Office properly found that appellant abandoned her request for a prerecoupment hearing. The Board further finds that she received an overpayment of compensation in the amount of \$1,741.45 during the period April 28 through May 12, 2007. The Board also finds that the Office properly found that appellant was at fault in creating this overpayment and, therefore, ineligible for waiver of the recovery of the overpayment.

¹⁵ 20 C.F.R. § 10.435(b).

¹⁶ *D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007).

¹⁷ *See* 20 C.F.R. § 10.435(a); *D.R.*, *supra* note 16; *William E. McCarty*, 54 ECAB 525 (2003).

¹⁸ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁹ *Cheryl Thomas*, *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2009
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