

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

S.A., Appellant)	
)	
and)	Docket No. 09-1627
)	Issued: April 5, 2010
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Chicago, IL,)	
Employer)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 10, 2009 appellant filed a timely appeal from a February 11, 2009 merit decision of the Office of Workers' Compensation Programs. 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 terminated appellant's compensation for wage-loss and medical benefits effective June 8, 2008; (2) whether the Office properly found an overpayment of \$857.14 was created from May 3 to 10, 2008; and (3) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On October 10, 2003 appellant, then a 44-year-old small parcel bundle sorter clerk, filed an occupational claim (Form CA-2) alleging that she sustained carpal tunnel and a ganglion cyst as a result of repetitive motion in her federal employment. She worked intermittently until

June 10, 2005. According to an April 11, 2007 statement of accepted facts (SOAF), the claim was accepted for bilateral wrist extensor tendinitis and dorsal ganglion cyst right hand. Appellant received compensation for wage loss.

The Office referred appellant to Dr. Hythem Shadid, an orthopedic surgeon, for a second opinion examination. In a report dated May 30, 2007, Dr. Shadid opined that the accepted conditions of extensor tendinitis and ganglion cyst had fully resolved. He noted that appellant also had shoulder conditions, such as rotator cuff impingement, tendinitis and degenerative acromioclavicular joint disease, which were not employment related.

A conflict in the medical evidence was found between Dr. Shadid and the attending physician Dr. John McClellan, an orthopedic surgeon, regarding continuing employment-related disability. Appellant was referred to Dr. Michael Vender a Board-certified orthopedic surgeon. In a report dated September 5, 2007, Dr. Vender noted that the accepted conditions were bilateral wrist extensor tendinitis and a dorsal ganglion cyst of the right hand. He found that these conditions had resolved. Dr. Vender stated that appellant's current complaints were referable to the shoulder and to conditions not related to her previous work activities.

By letter dated April 15, 2008, the Office issued a notice of proposed termination. It noted that the accepted conditions were: other tenosynovitis of hand and wrist, bilateral, ganglion of joint, right, exostosis, site unspecified, right and enesthesopathy of wrist and carpus, right.

The record indicates that appellant returned to work on May 3, 2008. Appellant received a direct deposit compensation payment on May 10, 2008, for the period April 13 to May 10, 2008, for \$2,810.90.

By decision dated May 22, 2008, the Office terminated compensation for wage-loss and medical benefits effective June 8, 2008. It found that the weight of the medical evidence was represented by Dr. Vender.

In a letter dated June 10, 2008, the Office advised appellant of a preliminary determination that an overpayment of \$857.14 was created. It found that she had returned to work on May 3, 2008 but received compensation through May 10, 2008 and that it appeared that she was at fault in creating the overpayment. Appellant was provided with an overpayment recovery questionnaire (OWCP-20) and advised it must be completed, with supported documentation, for the Office to consider the issues of fault and waiver.

On July 15, 2008 appellant submitted the OWCP-20. She reported "N/A" with respect to income. A telephonic hearing with an Office hearing representative was held on November 18, 2008. The hearing representative advised appellant that he had received an overpayment recovery questionnaire but that it did not include any income information. He indicated that such information was necessary to determine any possible entitlement to waiver and he would send another form.

By decision dated February 11, 2009, the Office hearing representative affirmed the termination of compensation. The hearing representative also finalized a the of \$857.14. On the issue of fault, he found that appellant was not at fault in creating the overpayment. Waiver of the

overpayment was denied on the grounds that appellant failed to submit the necessary information regarding income and expenses.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹

It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.²

ANALYSIS -- ISSUE 1

The factual background provided to the referee physician Dr. Vender indicated that the accepted injuries were bilateral wrist extensor tendinitis and right hand dorsal ganglion cyst. He noted those conditions and provided an opinion as to the accepted conditions. In its April 15, 2008 notice of proposed termination, the Office included among the accepted conditions exostosis and enesthesopathy of the right wrist and carpus. There had been no prior indication that these conditions were accepted and they were not noted as accepted conditions by the hearing representative. It is not clear whether the Office had mistakenly listed these conditions as employment related or whether the SOAF provided to Dr. Vender was incomplete.

The case will be remanded to the Office for clarification on the issue. The Board is unable to determine whether Dr. Vender was provided with a complete and accurate history in this case. The Office should fully explain the accepted employment-related conditions. If Dr. Vender was not provided with an accurate background regarding the accepted conditions, his report cannot resolve a conflict under 5 U.S.C. § 8123(a).³ After such further development as the Office deems necessary, it should issue an appropriate decision on the termination of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ 20 C.F.R. § 10.500 provides that "compensation for wage loss due to disability is available only for any periods during which an employee's

¹ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

² *See Patricia M. Mitchell*, 48 ECAB 371 (1997); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

³ *See Gwendolyn Merriweather*, 50 ECAB 416 (1999).

⁴ 5 U.S.C. § 8116(a).

work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

ANALYSIS -- ISSUE 2

The record establishes indicates that appellant returned to full-time work on May 3, 2008. She received a compensation payment on May 10, 2008 for the period April 13 to May 10, 2008. As noted above, appellant is not entitled to receive both wages and compensation for total disability during the same period. Since she received compensation from May 3 to 10, 2008, when she was working full time, an overpayment of compensation was created.

As to the amount, the Office calculated that for the period May 3 to 10, 2008 appellant was paid \$857.14 in compensation for wage loss. No contrary evidence was presented. The Board finds that the record establishes an overpayment in the amount of \$857.14 was created in this case.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office’s discretion pursuant to statutory guidelines.⁵ These statutory guidelines are found in section 8129(b) of the Act which states: “Adjustment or recovery [of an overpayment] 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.”⁶ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

With respect to the submission of financial evidence, the Office’s regulations provide:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of the overpayment would defeat the purpose of the [Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”⁷

⁵ *Robert Atchison*, 41 ECAB 83 (1989).

⁶ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁷ 20 C.F.R. § 10.438.

ANALYSIS -- ISSUE 3

The Office hearing representative found that appellant was not at fault in creating the overpayment. With the June 10, 2008 preliminary determination of overpayment she was provided with an OWCP-20 form and advised to submit supporting documents in order for the Office to properly consider the waiver issue. The OWCP-20 form submitted on July 15, 2008 was incomplete and did not provide an accurate basis for making a waiver determination. Appellant did not, for example, provide any information regarding her income on the form. In addition, she failed to provide any supporting financial documentation. During the November 18, 2008 hearing, the hearing representative advised appellant that the form she submitted was insufficient and she had an opportunity prior to the February 11, 2009 decision to submit additional evidence. No relevant financial information was submitted.

As noted in the Office's regulations, failure to submit the necessary financial information shall result in denial of waiver until the information is provided. The Board accordingly finds that the Office properly denied waiver in this case.

CONCLUSION

The Board finds that the case is not in posture for decision with respect to termination of compensation as the Office must clarify the accepted conditions. With respect to the overpayment, the Board finds that an overpayment of \$857.14 was created and the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 11, 2009 is set aside with respect to termination of compensation and remanded for further development. The February 11, 2009 decision is affirmed with respect to an \$857.14 overpayment and denial of waiver.

Issued: April 5, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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