

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

D.S., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
LANGLEY AIR FORCE BASE, VA, Employer**

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**Docket No. 09-2199
Issued: June 8, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 31, 2009 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 7, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether the Office properly found that an overpayment in compensation in the amount of \$3,243.39 had been created for the period July 1, 2004 through October 1, 2005 because appellant continued to receive wage-loss compensation after his return to part-time work; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and therefore the overpayment was not subject to waiver. On appeal appellant asserts that the amount of the overpayment and fault finding are incorrect.

FACTUAL HISTORY

This case has previously been before the Board.¹ By letter dated August 2, 2007, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$7,437.41 for the period July 1, 2004 through October 2, 2005 because he continued to receive disability compensation during a period in which he had part-time employment. It found him at fault in the creation of the overpayment because he should have been aware he was not entitled to wage-loss compensation after his return to work. An overpayment worksheet provided information on appellant's pay rate, both before and after a November 3, 2005 wage-earning capacity determination,² but did not indicate how the overpayment was calculated. Appellant thereafter requested a telephone conference and submitted an overpayment questionnaire. By decision dated March 24, 2008, the Office reduced the amount of the overpayment to \$3,243.39 and finalized the preliminary determination that appellant was at fault in creating the overpayment because he continued to receive full wage-loss compensation after his return to part-time work.

Appellant filed an appeal with the Board and, by order dated May 5, 2009, the Board remanded the case to the Office because appellant had timely requested a telephone conference to address the fact, amount and fault issues and to request waiver of the overpayment. The Board found that the Office had inappropriately issued a final overpayment decision without considering appellant's request for a conference.³ The law and facts of the previous Board order are incorporated herein by reference.

A telephone memorandum dated July 21, 2009 indicated that a claims examiner called appellant that day to set up a conference call and was told by appellant that he did not intend to participate in a conference and terminated the call. By letter dated July 21, 2009, the Office advised appellant that it was important that a conference be held to resolve the outstanding issues regarding the overpayment in compensation. He was given 15 days to respond so that a conference could be conducted and was provided a telephone number to call. On July 27, 2009 appellant wrote the Clerk of the Board, enclosing the July 21, 2009 letter, asking that he explain the case. In an August 7, 2009 telephone call with an Office contact representative, appellant indicated that he did not understand the reason for a conference call. He was advised to reread the Board's remand instructions. Appellant indicated that he wished to speak with a claims examiner and to have a conference. In a second telephone call that day, appellant informed the claims examiner that he did not agree to participate in a telephone conference.

¹ On June 5, 2000 appellant, then a 58-year-old insulator mechanic, sustained an employment-related lumbosacral strain with radiculopathy. The claim was later expanded to include permanent aggravation of lumbosacral disc disease, and appellant was placed on the periodic rolls. Appellant underwent spinal surgery on February 15 and October 22, 2001 and incisional hernia repairs on April 11, 2002 and April 11, 2003. On March 24, 2004 he began a nonfederal clerical position for 10 hours per week and informed the Office of his employment on EN1032 forms signed on August 5, 2004, September 25, 2005 and July 25, 2006. By decision dated November 3, 2005, the Office determined that his actual earnings as a clerk fairly and reasonably represented that his wage-earning capacity was 10 percent and reduced his compensation accordingly.

² *Id.*

³ Docket No. 08-1342 (issued May 5, 2009).

By decision dated August 7, 2009, the Office noted that appellant would not agree to participate in a telephone conference and finalized the preliminary determination that appellant was at fault in creating the \$3,243.39 overpayment because he continued to receive monetary compensation which he knew or should have known to be incorrect because he had returned to part-time work.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁴ 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.⁵ Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.⁶

ANALYSIS -- ISSUE 1

The Board initially notes that by order dated May 5, 2009, it remanded the case to the Office because appellant had timely requested a telephone conference regarding the preliminary overpayment finding. The Office then contacted appellant by telephone on July 21, 2009 to schedule the conference and was told by appellant that he did not intend on participating. It then wrote him on July 21, 2009, advising him of the importance of the conference and gave him 15 days to respond. Appellant did not respond to the Office and, in an August 7, 2009 telephone call, he again indicated that he did not wish to participate in a telephone conference.

Office procedures note that the Act is social legislation intended to benefit entitled employees and that every effort should be made to accommodate the claimant's best interests and to ensure that all due process actions are completed in a timely and fair manner when specific collection actions must be enforced. To ensure due process, the Office is required to issue a preliminary decision in all overpayment cases. Pursuant to *Califano v. Yamasaki*, 422 U.S. 682 (1979), the Office has established procedures for handling overpayment cases under section 8129 of the Act that include the opportunity for a prerecoupment hearing.⁷ The Board finds that, based on the circumstances of this case, appellant was presented with adequate opportunities to be heard prior to the Office's August 7, 2009 decision, finalizing the preliminary determination that he was at fault in creating an overpayment in compensation in the amount of \$3,243.39.

The Board also finds that appellant received an overpayment in compensation. The record supports that he began part-time work on March 28, 2004 and continued to work and also received wage-loss compensation for total disability through October 1, 2005. As described

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁷ *A.G.*, 58 ECAB 625 (2007).

above, both the Act and Office regulations provide that a claimant may not receive wage-loss compensation concurrently with private earnings.⁸ The record in this case supports that appellant received earnings in private employment beginning on March 24, 2004 and continued to receive wage-loss compensation for total disability. An overpayment in compensation was therefore created.

The Board, however, finds this case is not in posture for decision regarding the amount of the overpayment. The Office explained that appellant continued to receive total disability compensation but the record does not clearly explain how the amount was calculated. The record contains an Office print out entitled “worksheet,” but does not explain how an overpayment in compensation in the amount of \$3,243.39 was calculated. Because there is no indication in the record as to how the amount of the overpayment was calculated, the case must be remanded to the Office to provide a clear explanation regarding this issue and, if necessary, to recalculate the overpayment.

Based on the Board’s determination in the first issue in this case, the second issue is not in posture for decision at this time. The Board, however, notes that, even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.⁹

CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation had been created. The case is not in posture for decision regarding the amount of overpayment, whether appellant was at fault and, if found without fault, whether he would be entitled to waiver.

⁸ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

⁹ *William E. McCarty*, 54 ECAB 525 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2009 be affirmed in part, vacated in part, and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: June 8, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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