

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

C.F., Appellant)

and)

DEPARTMENT OF THE NAVY, CAMP)
SMEDLEY D. BUTLER, Okinawa, Japan,)
Employer)

**Docket No. 10-2163
Issued: March 18, 2011**

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

Oral Argument January 5, 2011

DECISION AND ORDER

Before:

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

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from the February 23, 2010 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$12,074.08; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$150.00 from each of appellant's continuing compensation payments.

At oral argument held before the Board on January 5, 2011, appellant alleged that he was not given proper notice of the preliminary determination of overpayment as it was mailed to an incorrect address. He also noted that he did not contest that he received an overpayment but rather challenged the amount of the overpayment.

FACTUAL HISTORY

On March 3, 2003 appellant, then a 46-year-old athletic director, filed an occupational disease claim alleging that he suffered from a respiratory illness due to poor air circulation in his office. He noted that an airborne survey confirmed the presence of Cladosporium, Trichoderma and Trichosporon cutaneum. On April 14, 2003 the Office accepted appellant's claim for hypersensitive pneumonitis. It paid compensation for wage loss and medical benefits.

Appellant's initial address of record was located in Springdale, Maryland 20774. However, on February 19, 2006 he returned to the Office an "Authorization to Obtain Earnings Data from the Social Security Administration" form. On that form, appellant changed his address to one located in Upper Marlboro, Maryland 20774. On the same date, he listed the Upper Marlboro address on his Form EN1032. In a February 2007 Form EN1032, appellant also listed his address in Upper Marlboro, Maryland and requested that his home address be updated to reflect information written on the form. He indicated that he previously requested this change, but that documents were still being sent to the old address. Appellant's address is also properly listed by the vocational rehabilitation counselor in the assessment test of January 26, 2007.

Appellant returned to work part time at Ritz Camera on August 10, 2007 making \$7.00 per hour. He also worked in the summer of 2007 as a part-time athletic assistant, earning \$8.21 per hour, for the Maryland National Park and Planning Commission.

On May 27, 2009 the Office noted that appellant returned to work as an imaging specialist with wages of \$210.00 per week effective August 10, 2007 and stated that it was reducing appellant's monetary compensation effective June 7, 2009 based on appellant's actual earnings in the position. The pay rate was adjusted on June 3, 2009.¹

On September 30, 2009 the Office issued a preliminary determination of an overpayment. It calculated that for the period August 9, 2007 through May 29, 2009 appellant received a total of \$55,008.08 whereas he was only entitled to \$42,933.10, resulting in an overpayment of \$12,074.08. The Office also made a preliminary determination that he was with fault in the matter of the overpayment. Along with the preliminary determination, it sent appellant an overpayment action request. The preliminary determination and the overpayment action request were sent to him at his former address in Springdale, Maryland.

In a Form EN1032 completed by appellant on February 6, 2010, he again listed his address in Upper Marlboro, Maryland. He indicated that he worked from June 2007 through January 2009 part time as an imaging specialist for Ritz Camera, earning approximately \$225.00 per month. Appellant also noted that from May 1 through June 30, 2009 he worked part time as a recreation assistant for Age Group Track and Field and earned approximately \$292.00 for the year from this seasonal part-time job.

By decision dated February 23, 2010, the Office finalized its preliminary determination that appellant was overpaid in the amount of \$12,074.98. It found that he was with fault in the

¹ The Board notes that there is no time limit for appellant to submit a request for modification of a wage-earning capacity determination. *Gary L. Moreland*, 54 ECAB 638 (2003); *F.B.*, Docket No. 10-99 (issued July 21, 2010).

creation of the overpayment and therefore not entitled to waiver. The Office further found that the overpayment would be collected by deducting \$150.00 from each of appellant's continuing compensation payments.

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act² 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.³ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.”⁴

A final decision of the Office shall contain findings of fact and a statement of reasons.⁵ With respect to overpayment decisions, the Office must provide clear statements showing how the overpayment was calculated.⁶ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁷ Office procedures provide that an overpayment of compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁸

The Office regulations on the recovery of overpayments provide that before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.⁹

ANALYSIS

The Office found that appellant received an overpayment for the period August 9, 2007 through May 29, 2009 as he received wages for part-time work during this time period and received total disability payments at the same time. It found that he should have received

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ 20 C.F.R. § 10.126 (1999).

⁶ *James Tackett*, 54 ECAB 611 (2003); *Sandra K. Neil*, 40 ECAB 924 (1989).

⁷ 5 U.S.C. § 8116(a).

⁸ *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁹ 20 C.F.R. § 10.431.

\$42,933.10 for the period but actually received \$55,008.08, resulting in an overpayment of \$12,074.08. The Office further found that appellant was not entitled to a waiver as he was with fault in the creation of the overpayment and stated that the overpayment would be collected by deducting \$150.00 from each of his continuing compensation checks.

The Board finds, however, that the Office failed to follow its procedures in issuing its overpayment decision. The Office's regulations provide that before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that he received an overpayment.¹⁰ The Office must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of overpayment and the right to request a waiver of recovery of the overpayment.¹¹ In this case, it did issue a preliminary determination of overpayment; however, this notice was sent to appellant's old address. In this regard, on September 30, 2009 the Office mailed the preliminary determination to appellant's former address in Springdale, Maryland. However, appellant had informed the Office at least by February 2007 that he had moved and had provided the Office with his new address in Upper Marlboro, Maryland. The Upper Marlboro, Maryland address was used on all of appellant's EN1032 forms filed since February 2007. The new address was also noted when he signed the form authorizing the Office to obtain social security information. Appellant's proper address is also noted on vocational rehabilitation reports. However, the Office sent his preliminary notice of overpayment to the old address, despite the fact that it had the correct address in its files for at least two and one-half years.

Accordingly, the Board finds that the Office never provided appellant with proper preliminary determination of the overpayment nor provided him with the right to challenge the amount of overpayment, thereby infringing upon his procedural rights under its own regulations.¹² The Board has previously determined that failure to inform him in writing of his or her rights is reversible error.¹³ Therefore the Office violated appellant's due process rights and improperly issued the February 23, 2010 overpayment decision. The Board will remand the case for the Office to reissue its preliminary determination of overpayment with proper notice of the rights mandated by 20 C.F.R. § 10.431(c). After such further action as may be necessary, the Office shall issue an appropriate final decision on the issue of overpayment.

The Board further notes that the record indicates that appellant returned to part-time work on August 10, 2007 for Ritz Camera and that he had further earnings from his part-time employment with the Maryland National Park and Planning Commission in the summer of 2007. Accordingly, the Board finds that he improperly received compensation for total disability for the period August 9, 2007 through May 20, 2009. The Board notes that while there was some degree of overpayment of compensation for the period August 9, 2007 through May 29, 2009 due to the fact that appellant had received wages from part-time employment while he was concurrently receiving compensation benefits for total disability, the record does not contain

¹⁰ 20 C.F.R. § 10.431(a).

¹¹ *Id.* at § 10.431(d).

¹² *Id.* at §§ 10.431, 10.432.

¹³ *F.C.*, 59 ECAB 666 (2008).

evidence sufficient to find that the Office properly determined the amount of the overpayment. The record, at the time the Office issued its February 23, 2010 decision, is devoid of official records regarding the wages he earned during this time period, such as tax forms or social security earning statements neither is it clear how the Office arrived at the amount of the overpayment. As the Office never provided a full and clear statement showing how the overpayment was calculated supported by proper records, the February 23, 2010 overpayment decision was also deficient for this reason.¹⁴ Further development is necessitated.

CONCLUSION

The Board finds that this case is not in posture for decision.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2010 is set aside and the case is remanded for further consideration consistent with this decision.

Issued: March 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *James Tackett*, *supra* note 6.

¹⁵ In light of the Board's disposition of this case, the remaining issues are moot.