United States Department of Labor
Employees' Compensation Appeals Board

W.A., Appellant	)	
and	)	**Docket No. 14-350**
	)	**Issued: October 28, 2014**
U.S. POSTAL SERVICE, NORTH MIAMI BRANCH POST OFFICE, Miami, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 2, 2013 appellant filed a timely appeal from June 28 and July 29, 2013 merit decisions and a September 17, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.[2]

ISSUES

The issues are: (1) whether OWCP abused its discretion by recovering travel reimbursement for the period May 2, 2004 through May 1, 2013; (2) whether appellant received a $45,316.35 overpayment of compensation for the period May 2, 2004 through May 1, 2013 because he received reimbursement for travel expenses to the ocean at Miami Beach which was approved by OWCP; (3) whether OWCP properly found appellant at fault in the creation of the

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that appellant submitted medical evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

overpayment; and (4) whether it properly refused to reopen the claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant asserts that swimming at Miami Beach was recommended by his attending orthopedic surgeon and there was no overpayment of compensation. He further asserts that recovery would be against equity and good conscious and he would suffer severe financial hardship in trying to repay the debt.

FACTUAL HISTORY

This case has previously been before the Board. In a September 5, 1990 decision, the Board reversed OWCP decisions dated April 28 and December 6, 1989, finding that a conflict in medical opinion arose regarding whether appellant continued to be disabled.[3] The Board also vacated a July 29, 1989 OWCP decision that denied a claimed April 14, 1988 work injury. In a June 8, 1998 decision, the Board affirmed August 1 and December 8, 1995 OWCP decisions, finding that it properly terminated appellant's monetary compensation, effective August 20, 1995.[4] Further, appellant had not established any continuing disability after that date. He remained entitled to medical benefits for his cervical condition. The facts of the previous Board decisions are incorporated herein by reference.

Appellant came under the care of Dr. Dennis B. Zaslow, an osteopath, in August 1995. In reports dated July 9, 1996 and August 28, 2000, Dr. Zaslow generally advised that appellant should continue an aquatic therapy program.

On February 14, 2000 an OWCP hearing representative affirmed a May 12, 1999 OWCP decision finding that appellant had not sustained a recurrence of disability on June 22, 1998. In September 2003, OWCP found that a conflict in medical opinion had been created regarding whether appellant had any disability as a result of the May 28, 1987 and April 14, 1988 work injuries. It referred him to Dr. Bernard Gran, a Board-certified neurologist. In an October 13, 2003 report, Dr. Gran reviewed the medical record and provided findings on examination. He determined that any abnormality in appellant's cervical spine was age related and not related to trauma. Dr. Gran advised that appellant had no restriction on sitting, standing, walking or use of hands and lower extremities, and while lifting was restricted to 40 to 50 pounds, the restriction was not due to the 1987 and 1988 work injuries.

In reports dated June 9, 2003 to February 16, 2005, Dr. Zaslow described physical findings. He advised that appellant should continue with home exercises and massage therapy. On August 9, 2005 Dr. Zaslow recommended aquatic therapy at home. He continued to submit reports recommending home exercises. On March 28, 2006 Dr. Zaslow again recommended

[3] Docket No. 90-578 (issued September 5, 1990).

[4] Docket No. 96-644 (issued June 8, 1998). On May 28, 1987 appellant, a letter carrier, filed a traumatic injury claim that was accepted for thoracic strain and subluxations at T4, T6 and T7. The claim was adjudicated by OWCP under file number xxxxxx809. On April 14, 1988 appellant filed a second traumatic injury claim, adjudicated under file number xxxxxx291 that was accepted for subluxations at C1 and L4-5. He stopped work at the employing establishment in 1989 and was placed on the periodic compensation rolls. The files were doubled on October 7, 1991.

aquatic exercises and therapy.[5] On May 28, 2006 he noted that appellant had been swimming as much as possible, per his instructions. On October 30, 2006 Dr. Zaslow requested authorization for physical therapy. On April 20, 2007 he noted that appellant advised him that swimming was very helpful. Dr. Zaslow also requested authorization for H-wave electrotherapy treatments in April, on June 21 and September 12, 2007. On September 29, 2007 he stated that appellant would be evaluated as needed. On January 10, 2008 Dr. Roberto A. Moya, a Board-certified orthopedic surgeon and an associate of Dr. Zaslow, noted appellant's complaints of bilateral arm and leg radiculopathy. He stated that appellant was using a transcutaneous electrical nerve stimulation (TENS) unit.[6] Appellant submitted no further medical reports after this date.

In a December 10, 2009 letter to the Office of Personnel Management (OPM) regarding his request for disability retirement, appellant contended that OWCP wrongfully refused to pay benefits. He noted that the only therapy that he was "able to do prescribed by Dr. Zaslow are the ones I do at home and when I travel to Miami Beach to swim. These are the only therapies I can afford because they are free; none of these therapies are paid by OWCP or OPM."

After appellant requested authorization for a bed, the employing establishment contacted OWCP. In an April 2, 2010 telephone memorandum, OWCP noted reviewing his submitted bills and found that they were travel reimbursements pertaining to the same address every few days for 55 miles. It was unclear where appellant was going.

On June 5, 2012 a special agent with the employing establishment's Office of Inspector General (OIG) submitted an investigation report for the period July 6, 1993 to December 31, 2011 with supporting documentation. The investigation determined that, during this period, appellant submitted 1,352 medical travel refund requests when he only had 90 medical or rehabilitation appointments. The report noted that the refund requests for 1993 through 2003 seemed legitimate; but beginning in 2004, appellant submitted excessive travel refund requests. The special report stated that appellant knowingly and willfully falsified a material fact, made false, fictitious, fraudulent statements and representations, and used a report knowing that it contained false, fictitious, or fraudulent statements or entries in connection with the receipt of compensation benefit payments in violation of United States statutes regarding fraud to obtain federal employee's compensation, theft of government money and mail fraud. On the travel refund request forms, (OWCP-957), appellant attested that he was receiving treatment at a medical facility identified as "Miami Ocean Front" at 1700 Ocean Front, Miami Beach, FL 33139, which was a 55-mile roundtrip from his residence.[7] The report noted that no medical facility existed at the address. Appellant was interviewed by an employing establishment OIG agent on April 24, 2012 and stated that he travelled to Miami Beach to go swimming. A medical travel refund request form completed by appellant on May 9, 2011 was attached in which he listed that the medical facility was "Miami Ocean Front" with an address at 1700 Ocean Front,

[5] By decision dated January 31, 2006, an OWCP hearing representative affirmed a May 28, 2004 OWCP decision that denied appellant's June 19, 2003 schedule award claim.

[6] Dr. Zaslow died in 2008.

[7] The medical travel refund request form contains a payee's certification clause for signature that the information provided is true and correct. It further provides that any knowing false statement or misrepresentation to obtain reimbursement from OWCP as subject to civil penalties and prosecution.

Miami Beach, Florida 33139. Also attached was a 27-page printout of appellant's submitted travel request from 1996 through 2011.

In correspondence dated May 13, 2013, OWCP requested that appellant submit updated medical information. After a review of his record, it noted multiple pharmacy charges and excessive travel reimbursements had been paid. On April 18, 20 and 21, 2013 appellant requested reimbursement for 55-mile roundtrips for travel to the Miami ocean front each day. OWCP requested that he identify the physician or medical office at this location and which physician prescribed the treatments he received. Appellant responded on June 4, 2013 and stated that he traveled from his house to Miami Beach for swimming therapy, which Dr. Zaslow had prescribed. Appellant attached the March 28, 2006 report from Dr. Zaslow, who recommended ongoing aquatic exercises and therapy.

By decision dated June 28, 2013, OWCP recovered appellant's claims for travel reimbursement from his home to the Miami ocean front at 1700 Ocean Front, Miami Beach, Florida 33139 commencing May 2, 2004. It determined that there was no medical or physical therapy office at such address. For the period May 2, 2004 through May 1, 2013, excluding dates when he received medical treatment, a total of $45,316.35 had been paid for travel to swim at Miami Beach. OWCP noted that such therapy had never been approved and, while Dr. Zaslow had generally recommended aquatic therapy, he did not recommend such therapy in Miami Beach or address how it would be likely to cure or give relief to the accepted conditions. It noted that OWCP-957 forms submitted by appellant identified medical facilities as a hospital, office/clinic or laboratory.

On June 28, 2013 OWCP made a preliminary finding that appellant received a $45,316.35 overpayment of compensation because he received travel expense reimbursement from May 2, 2004 through May 1, 2013 for swimming at Miami Beach which was not approved by OWCP. It found him at fault in the creation of the overpayment because he knew or should have known that OWCP had not approved swimming at Miami Beach as a form of therapy. Appellant was provided an overpayment questionnaire, an overpayment action request, and a 27-page printout of the travel reimbursements made to him from May 2, 2004 through May 1, 2013, which totaled $45,316.35. He was provided 30 days to respond. The record also includes a 300-page printout of appellant's bill payment history from January 1, 2004 to May 13, 2013. Appellant did not respond to the preliminary overpayment letter.

By decision dated July 29, 2013, OWCP finalized the overpayment decision, finding that he was at fault in the creation of an overpayment of compensation in the amount of $45,316.35. Appellant was instructed to forward payment in full or contact OWCP.

On August 2, 2013 appellant telephoned OWCP. He contended that he did not receive the overpayment decision because he was out of the country from June 29 through July 29, 2013. On August 8, 2013 appellant requested reconsideration with OWCP. He stated that the June 28, 2013 preliminary decision was not contested within 30 days because his mail was being held. Appellant attached a letter from the post office indicating that his mail was held beginning June 29 to July 29, 2013, when he picked up accumulated mail.

In a nonmerit decision dated September 17, 2013, OWCP denied appellant's reconsideration request, with regard to the June 28, 2013 decision on the grounds that he did not raise any substantive legal questions or submit new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[8] While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[9]

Section 10.310(a) of the implementing regulations provide that employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.[10] OWCP procedures provide that nonmedical equipment such as waterbeds, saunas, weight-lifting sets, exercise bicycles, etc., may be authorized only if recommended by the attending physician and if OWCP finds that the item is likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.[11]

Section 2.810.18 of OWCP procedures specifically addresses health club membership and indicates that such memberships may be authorized if rationalized medical evidence establishes that such membership would be therapeutic to treat the effects of an accepted injury. It provides the specific information needed from the compensationer and from his or her physician. The physician is to describe the specific therapy and exercise routine needed to address the effects of the employment injury, the anticipated or actual effects of the regimen, the treatment goals sought or attained, and whether the recommended exercise routine can be performed at home or in a public facility such as a community recreation center or pool.[12]

Section 10.315 of OWCP regulations provide, in relevant part that the employee is entitled to reimbursement of reasonable and necessary expenses, including transportation needed to obtain authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, OWCP will consider the availability of services, the employee's condition and the means of transportation. Generally, 25 miles from the place of injury, the work site or the employee's home, is considered a reasonable distance to travel.[13]

In interpreting section 8103(a) of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. OWCP has

[8] 5 U.S.C. § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003).

[9] *Kennett O. Collins, Jr*., 55 ECAB 648 (2004).

[10] 20 C.F.R. § 10.310(a).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(5) (October 1995).

[12] *Id*. at Chapter 1.810.18 (September 2010).

[13] 20 C.F.R. § 10.315; *see W.J*., Docket No. 10-1944 (issued June 1, 2011).

administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[14] It has broad discretion in considering whether to reimburse or authorize travel expenses.[15] Proof of causal relationship must include supporting rationalized medical evidence.[16]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a thoracic strain and subluxations at T4, T6 and T7 due to a 1987 employment injury and subluxations at C1 and L4-5 due to a 1988 injury. Following the termination of benefits in 1995, appellant remained entitled to medical benefits for his cervical condition.

Appellant submitted numerous medical travel refund request forms. As found in the record, he listed the travel roundtrip from his home to a medical facility "Miami Ocean Front" at 1700 Ocean Front in Miami Beach, Florida, 33139. Appellant checked boxes on the claim form indicating that he was travelling from his home to an "office/clinic." On the forms, he certified with his signature that the information he provided in connection with the travel refund request was true and correct and that he was aware that any misrepresentation to obtain reimbursement from OWCP was subject to penalties.

The OIG investigation established that the facility identified by appellant, "Miami Ocean Front," did not exist and that the address was fictitious. There is no medical facility or physical therapy clinic at the address where he parked in Miami Beach.

Appellant asserted on appeal that aquatic therapy was recommended by his physician Dr. Zaslow. The record indicates that on July 9, 1996 and August 28, 2000, Dr. Zaslow advised that appellant could engage in physical therapy or swimming at home. On March 28, 2006 he stated that he was recommending ongoing aquatic exercises and therapy, and on May 28, 2006 noted that appellant had been swimming as much as possible, per his instructions. On April 20, 2007 Dr. Zaslow noted that appellant told him that swimming had been very helpful. The record does not establish that Dr. Zaslow or any other physician prescribed aquatic therapy to be obtained at a medical or physical therapy facility in Miami Beach. Rather, appellant of his own volition chose to swim at Miami Beach and misrepresented to OWCP that it was therapy at a medical facility or clinic.

While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[17]

OWCP has broad discretion in considering whether to reimburse or authorize travel expenses.[18] As the only limitation on OWCP's authority is reasonableness, abuse of discretion is

[14] *R.L.*, Docket No. 08-855 (issued October 6, 2008).

[15] *See W.T.*, Docket No. 13-197 (issued June 3, 2013).

[16] *M.B.*, 58 ECAB 588 (2007).

[17] *Kennett O. Collins, Jr.*, *supra* note 8.

[18] *W.J.*, *supra* note 12.

generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from known facts.[19] The Board finds that the expenses appellant incurred for travel from May 2, 2004 through May 1, 2013 for 55 miles of round-trip travel to swim in the ocean are fraudulent. Thus, OWCP's recovery of his requests for reimbursement was properly within its discretion.[20]

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation had been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets tests set forth as follows in section 8129(b) which provides that adjustment or recovery 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 FECA or would be against equity and good conscience.[21]

ANALYSIS -- ISSUE 2

Appellant argued on appeal that he did not timely receive the June 28, 2013 preliminary overpayment letter because he was out of the country and had submitted a hold mail request with the post office. He did not notify OWCP that he was leaving the country. Under the mailbox rule, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course.[22] Thus, it is presumed that appellant received the preliminary overpayment notification at his mailing address of record absent any evidence that he timely notified OWCP that he would be out of the country and unavailable to receive mail. Appellant, as a recipient of compensation, has the general responsibility to timely notify OWCP of such conditions as could affect his receipt of benefits. OWCP did not abuse its discretion in finding that appellant received the preliminary overpayment notice.[23]

OWCP reimbursed appellant $45,316.35 for claimed travel expenses for the period May 2, 2004 through May 1, 2013. The record includes a 27-page printout of travel reimbursements made to him from May 2, 2004 through May 1, 2013. An overpayment of compensation was created because appellant fraudently received reimbursements for travel expenses totaling $45,316.35 that he was not entitled to receive.

[19] *See William B. Webb*, 56 ECAB 156 (2004).

[20] *See W.T., supra* note 14.

[21] 5 U.S.C. § 8129(a), (b); *see Robert Craw*, 38 ECAB 253 (1986).

[22] *D.C.*, Docket No. 09-1460 (issued April 19, 2010).

[23] *See R.H.*, Docket No. 09-1981 (issued June 11, 2010). *Compare D.M.*, Docket No. 10-1539 (issued June 14, 2011) (a medical management nurse informed OWCP that appellant would be deployed).

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."[24]

Section 10.433(a) of OWCP regulations provides that OWCP:

> "[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (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 to be incorrect. (This provision applies only to the overpaid individual)."[25]

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.[26]

ANALYSIS -- ISSUE 3

The Board finds that appellant is at fault in creating the $45,316.35 overpayment because he made an incorrect statement as to a material fact which he knew or should have known to be incorrect. The record establishes that on numerous occasions from May 2, 2004 through May 1, 2013 appellant submitted medical travel refunds in which he misrepresented that he was travelling to a medical facility "Miami Ocean Front" at 1700 Ocean Front, Miami Beach, Florida. As noted, no medical clinic or physical therapy office existed at that address. Based on these falsified claim forms, OWCP reimbursed him for travel expenses from his home to Miami Beach for nonapproved medical services. Under the circumstances of this case, the Board finds that appellant misrepresented a material fact in order to obtain reimbursement from OWCP which makes him at fault in the creation of the overpayment. Appellant is therefore not eligible for waiver of the overpayment.[27]

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[24] 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

[25] 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

[26] 20 C.F.R. 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

[27] *See generally Randall M. Thompson*, Docket No. 05-1090 (issued November 2, 2005).

LEGAL PRECEDENT -- ISSUE 4

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[28] Section 10.608(a) Title 20 of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).[29] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[30] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[31]

ANALYSIS -- ISSUE 4

With his August 8, 2013 reconsideration request, appellant maintained that he did not receive the overpayment decisions because he was out of the country from June 29 through July 29, 2013. He attached a letter from the post office listing that his mail was being held for this period. The only review of a final decision concerning an overpayment is an appeal to the Board. The provisions of 5 U.S.C. §§ 8124(b) and 8128(a) regarding hearings and reconsideration do not apply to a final overpayment decision.[32] Thus, to the extent that appellant sought reconsideration of the overpayment finding, this is precluded by OWCP regulations and appellant has no further recourse before OWCP in regard to that matter.[33]

With regard to the travel reimbursement issue, the Board finds that appellant's assertions regarding an inability to contest the preliminary overpayment finding do not show that OWCP erroneously applied or interpreted a specific point of law, and also do not advance a relevant legal argument not previously considered. Appellant's assertions are not relevant to the travel reimbursement misrepresentation issue. His reconsideration made no specific argument with regard to why OWCP improperly denied his claim for travel reimbursement. Appellant also did not otherwise submit any new and relevant evidence with regard to whether OWCP properly disallowed travel reimbursement beginning May 2, 2004.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence

[28] 5 U.S.C. § 8128(a).

[29] 20 C.F.R. § 10.608(a) (2011).

[30] *Id*. at § 10.606(b)(3) (2011).

[31] *Id.* at § 10.608(b) (2011).

[32] 20 C.F.R. § 10.440(b).

[33] *See id*.; *M.C.*, Docket No. 07-702 (issued September 26, 2007).

not previously considered by OWCP, OWCP properly denied his reconsideration request with regard to the June 28, 2013 decision that denied his claim for travel reimbursement.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by disallowing travel reimbursement for the period May 2, 2004 through May 1, 2013 and that appellant was at fault in creating a $45,316.35 overpayment of compensation for the period May 2, 2004 through May 1, 2013 because he received reimbursement for travel expenses which OWCP never approved. The Board further finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 17, July 29 and June 28, 2013 are affirmed.

Issued: October 28, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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