

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

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 13-2029
Issued: September 10, 2014**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 3, 2013 appellant filed a timely appeal from a July 2, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly found that an overpayment of \$111,523.92 was created; (2) whether it properly found that appellant was at fault in creating the overpayment; and (3) whether OWCP properly determined that the overpayment should be recovered by deducting \$2,043.94 from continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 19, 1989 appellant, then a 36-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a low back injury while pulling a container. OWCP accepted the claim for sprain of the back and shoulders on June 23, 1989. Appellant stopped working and began receiving compensation for wage loss. In a March 23, 1998 decision, OWCP indicated that it had also accepted aggravation of spondylolisthesis, L5-S1 disc protrusion and substance induced mood disorder with depression.

The record contains a travel voucher request for dates from January 2 to 9, 2006 for "PT" and mileage of 150 miles roundtrip. The record also contains a January 7, 2008 Form OWCP-957 (medical travel refund request) for "PT" at a medical facility "Central Office" with an Oakland, CA address. In addition, there is a June 12, 2012 OWCP-957 claiming travel reimbursement to "Eastbay Intergroup" at the same Oakland address.

In a report dated February 3, 2006, Dr. Roger Shortz, a Board-certified neurosurgeon, indicated that appellant continued to be treated for lumbar spondylosis and spondylolisthesis at L5-S1. As part of the development of the medical evidence, OWCP found a conflict in the medical evidence with respect to the need for surgery. Appellant was referred by OWCP to Dr. Archimedes Ramirez, a Board-certified neurosurgeon. In a report dated November 28, 2006, Dr. Ramirez noted that appellant reported concern regarding his back, depression and dependency or addition to medication. He indicated that appellant needed to have a pain specialist manage his "chronic pain problem and dependency/addiction to Vicodin ES and Soma."

Appellant was again referred to a referee physician with respect to a conflict in the medical evidence. In a report dated May 1, 2008, Dr. Robert Fink, a Board-certified neurosurgeon, provided a history and results on examination. He stated that there was a complicating factor with respect to surgery, as there was "the strong possibility that [appellant] is medically addicted to opiates" and such addition rendered evaluation of pain levels unreliable.

In a report dated March 24, 2009, Dr. Shortz noted that appellant currently used opiate medicine for pain relief. He stated that appellant did not abuse the medication or take it in excessive amounts and that he did not exhibit behavior typical of opiate addiction. By report dated April 7, 2009, Dr. Gary Martinovsky, a Board-certified pain management specialist, stated that he was switching appellant from short lasting opioids to long lasting opioids. He stated that he would discontinue appellant from Vicodin, Lortab and Soma. By report dated July 9, 2009, Dr. James House, a psychologist, diagnosed major depressive disorder. He stated that appellant "admitted no current nor past substance abuse problems or dependency and no evidence of such was found during the course of this evaluation."

In a letter dated June 25, 2012, OWCP advised appellant that it had received a medical travel refund request form (OWCP-957) for travel expenses to East Bay Intergroup in Oakland, CA. It stated that the evidence was insufficient to establish reimbursement, as it was not clear what services were performed related to an employment-related condition.

On August 2, 2012 OWCP received evidence from the employing establishment's Office of Inspector General (OIG). According to a memorandum dated June 30, 2012, the East Bay Intergroup identified by appellant was a division of Alcoholics Anonymous (AA). In an affidavit dated July 16, 2012, an OIG special agent stated that from 2007 he had requested travel reimbursement for travel to an AA office, although he had written PT on the form. The special agent stated that the Department of Labor advised that travel to AA is not medically-related travel covered by FECA. The agent stated that, for the dates of surveillance from June 8 to 30, 2012, appellant was never observed going to East Bay Intergroup.

On December 3, 2012 OWCP received additional evidence from the OIG. The evidence included a list a transportation reimbursements from January 2, 2006 to June 20, 2012 that were not accompanied by a claim for other medical service. The total transportation reimbursements for these dates was \$111,523.92.

By letter dated December 7, 2012, OWCP advised appellant of a preliminary determination that an overpayment of \$114,611.82 existed. An accompanying memorandum stated that the overpayment consisted of \$111,523.92 for transportation expenses paid on dates with no other medical services claimed and \$3,087.90 for "questionable" transportation reimbursements related to receipt of medical supplies. OWCP found that appellant was at fault in creating the overpayment.

On December 28, 2012 appellant requested a prerecoupment hearing on the issues presented. He submitted evidence with respect to monthly income and expenses. On an OWCP-20 overpayment questionnaire, appellant reported \$8,300.00 in monthly income and \$8,296.00 in monthly expenses.

A telephonic hearing was held on April 18, 2013. Appellant stated that he had been told by a claims examiner he could attend AA support group meetings and write PT on the reimbursement forms. Following the hearing, he submitted a 2012 W-2 wage and tax statement indicating his spouse had annual wages of \$49,789.44. On May 21, 2013 appellant submitted some expense receipts and on June 3, 2013 he indicated that he received \$3,152.00 per month in Veterans Administration (VA) benefits.

By decision dated July 2, 2013, an OWCP hearing representative found that an overpayment of \$111,523.92 was created.² She found that appellant was at fault in creating the overpayment and the overpayment would be recovered by deducting \$2,043.94 every 28 days from continuing compensation. The hearing representative found appellant had \$9,232.72 in monthly household income and \$5,115.03 in expenses.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8103(a) provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or

² OWCP's hearing representative deducted the \$3,087.90 in reimbursements related to medical supplies.

aid in lessening the amount of monthly compensation.³ Under this section, reasonable transportation and expenses incident to the securing of such services may be authorized. In interpreting section 8103(a), 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.⁴

ANALYSIS -- ISSUE 1

In the present case, OWCP found an overpayment of compensation occurred from January 2, 2006 to June 20, 2012. The evidence from the OIG investigation indicated that OWCP had made \$1,350.00 transportation reimbursements during that period in the amount of \$111,523.92. All of these reimbursements were made on dates that appellant did not seek treatment from a physician. Appellant had claimed reimbursement for “PT” or physical therapy transportation expenses. He acknowledged at the April 18, 2013 hearing that he had claimed PT on the forms but the expenses were not for authorized physical therapy, but for AA support group meetings.

The Board finds the evidence establishes an overpayment of \$111,523.92 was created from January 2, 2006 to June 20, 2012. The evidence indicates that during this period appellant made claims for travel reimbursement that were for expenses not authorized under 5 U.S.C. § 8103(a). OWCP had not authorized services from an AA support group and the payments made for travel reimbursement represent an overpayment of compensation. The investigation documents establish that during the period January 2, 2006 to June 20, 2012 OWCP issued \$111,523.92 in transportation expense reimbursements and this represents an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁵ provides: “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.”⁶ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁷

³ 5 U.S.C. § 8103(a).

⁴ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8129(b).

⁷ *Gregg B. Manston*, 45 ECAB 344 (1994).

On the issue of fault, 20 C.F.R. § 10.433 provides in pertinent part:

“A recipient who has done any of the following will be found to be at fault with respect to 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 the recipient knew or should have known was incorrect. (This provision applies only to the overpaid individual).”

ANALYSIS -- ISSUE 2

In the present case, the evidence of record indicates, as noted above, that appellant had claimed on travel expense reimbursement forms that he was travelling for PT or physical therapy. Appellant, however, acknowledged that the address on the forms was not associated with physical therapy services, but an AA support group facility. The reference to physical therapy was an incorrect statement. In addition, the incorrect statement related to a material fact. Authorization for visits to an AA support group had not been provided in this case. Although appellant briefly refers to a claims examiner as providing verbal authorization, no supporting evidence was provided. Moreover, he knew that the assertion that he was travelling for physical therapy was incorrect. Appellant knew that the address he provided was for an AA support group meetings and not physical therapy services.

The Board accordingly finds that appellant made an incorrect statement as to a material fact which he knew or should have known to be incorrect. Pursuant to 20 C.F.R. § 10.433, appellant is properly found to be at fault in creating the overpayment. Since he is at fault, no waiver of the overpayment is possible.

LEGAL PRECEDENT -- ISSUE 3

OWCP regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁸

⁸ 20 C.F.R. § 10.441.

ANALYSIS -- ISSUE 3

In the present case, an OWCP's hearing representative took into account appellant's financial circumstances in determining the overpayment should be recovered by deducting \$2,043.94 every 28 days from continuing compensation. As to monthly income, the hearing representative noted the evidence of record regarding VA benefits, OWCP compensation and spousal income, finding appellant had household monthly income of \$9,232.72. In addition, the hearing representative reviewed the claimed expenses, noting appellant had submitted only limited receipts or other documents.⁹ She accepted the claimed expenses for mortgage and other expenses, such as food. It was noted that some credit card payments are not included if the expense is already included in the ordinary and necessary living expenses.¹⁰ According to the hearing representative, appellant's monthly household expenses were \$5,115.03.

The Board accordingly finds that OWCP's hearing representative took into account the relevant financial circumstances to minimize hardship. The monthly income exceeded expenses by \$4,117.69 and the recovery was set at \$2,043.94 from continuing compensation. The Board finds that OWCP properly followed its regulations in this case.

On appeal, appellant briefly stated that he was mentally incompetent, unable to comprehend the proceedings and was taking medication. He did not provide any probative evidence of mental incompetence with respect to overpayment issues. Appellant attended the April 18, 2013 hearing before an OWCP hearing representative and his testimony indicated that he clearly understood the issues presented. For the reasons noted above, the Board finds that he was at fault in creating a \$111,523.92 overpayment of compensation.

CONCLUSION

The Board finds that an overpayment of \$111,523.92 was created, appellant was at fault in creating the overpayment and therefore not entitled to waiver and OWCP properly determined the overpayment could be recovered by deducting \$2,043.94 from continuing compensation.

⁹ It is appellant's responsibility to submit the necessary relevant financial information with respect to recovery of the overpayment. 20 C.F.R. § 10.438.

¹⁰ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.600.2(e) (June 2009), which notes that the hearing representative should avoid counting an ordinary and necessary expense twice if a credit card payment is for expenses previously documented.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2013 is affirmed.

Issued: September 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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