United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 08-1942**
	)	**Issued: September 3, 2009**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Fort Worth, TX, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 31, 2007, May 14 and June 18, 2008 merit decisions concerning the termination of his compensation, modification of a wage-earning capacity determination and an overpayment of compensation. 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 met its burden of proof to terminate appellant's disability compensation and modify its determination of his wage-earning capacity effective March 9, 2007; (2) whether the Office properly determined that appellant received a $853.80 overpayment of compensation; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment such that it was not subject to waiver.

FACTUAL HISTORY

The Office accepted that on July 8, 1994 appellant, then a 32-year-old air traffic controller, sustained a concussion with brief loss of consciousness and multiple contusions (including a knee contusion) when a flower pot landed on his head and he fell down some stairs. It also accepted that he sustained an unspecified anxiety state due to the July 8, 1994 injury. Appellant stopped work on July 8, 1994 and received wage-loss compensation from the Office. He returned to work on a part-time basis for the employing establishment on September 17, 1995 and eventually returned to work on a full-time basis in his regular job as an air traffic controller. On June 29, 1999 the employing establishment took him off work due to the medications he was taking.

On October 23, 2001 appellant returned to work at the employing establishment as a secretary. In a January 17, 2002 decision, the Office adjusted appellant's compensation to reflect that his wage-earning capacity effective January 17, 2002 was represented by his actual wages as a secretary.[1]

Appellant received treatment for his psychological condition from several physicians, including Dr. John M. Wilson, a Board-certified psychiatrist, who first treated appellant in May 2004. In a November 16, 2004 report, Dr. Thomas Holley, a Board-certified psychiatrist, who served as an Office referral physician, indicated that appellant's work-related emotional condition did not prevent him from performing his usual work as an air traffic controller. He noted, however, that appellant was taking mediations for an adjustment disorder that would prevent such a return.[2]

The Office referred appellant to Dr. Mark L. Berger, a Board-certified neurologist, to determine whether the physical injuries related to the July 8, 1994 employment injury had resolved. In a November 29, 2004 report, Dr. Berger discussed the July 8, 1994 injury and appellant's medical treatment since that time. He indicated that neuropsychological testing performed on September 9, 1994 by Dr. Stephen J. Chiulli, an attending clinical psychologist, showed that appellant had immediate and recent memory disturbance and difficulties with complex problem solving, findings which were consistent with a closed head injury. Repeat neuropsychological testing performed by Dr. Chiulli on November 15, 1995 revealed improved cognitive performance (especially with memory) without identifiable cognitive impairment due to a traumatic brain injury. Appellant reported to Dr. Berger that his memory disturbance had disappeared but that he continued to have stress and frequently woke up after dreaming about the July 8, 1994 accident.[3]

Dr. Berger indicated that appellant had limited findings on examination. He reported that examination of the cranial nerves showed full visual fields, intact sensation and no evidence of

[1] After the July 8, 1994 accident, appellant continued to work in conjunction with his home building business. He contended that his involvement in this business was very limited.

[2] After beginning to see Dr. Wilson, appellant sought medical treatment for his emotional condition on a much less frequent basis than he previously had.

[3] Dr. Berger indicated that evaluation of appellant's emotional condition was beyond his expertise.

facial weakness. Motor examination revealed normal tone, bulk and 5/5 strength throughout. Appellant was alert and oriented times three. He was able to recall three out of three objects in three minutes, do simple calculations well, and interpret proverbs appropriately. Appellant followed commands well, his speech was normal and there was no evidence of dysarthria or dysphasia. Sensation was intact to sharp object, vibration and position throughout, gait was normal and cerebellar testing, including finger-to-nose and heel-to-shin testing, was normal bilaterally. Dr. Berger indicated that appellant had suffered a post-traumatic or postconcussional syndrome as a result of his July 9, 1994 head trauma but noted that his symptoms had improved. He stated that this was supported by the repeat neuropsychological testing performed by Dr. Chiulli on November 15, 1995 in which there was no identifiable cognitive impairment due to a traumatic brain injury. Dr. Berger noted that no further neurological diagnostic studies or neurological treatment were necessary. He stated, "There is no permanent neurologic impairment or neurologica1 disability." Dr. Berger provided responses to several questions posed by the Office:

> "Have the physical injuries of the July 8, 1994 injury resolved? Yes, they have completely resolved. The post-traumatic or postconcussional syndrome has improved.
>
> "If they have not resolved, why do you believe they are still medically active and disabling? The postconcussional syndrome has improved.
>
> "If there are still residuals from the physical injuries, what are your recommendations for ongoing treatment and when do you believe the injuries will resolve? The postconcussional or post-traumatic syndrome is improved. No further neurological diagnostic studies or treatment are necessary at this time. The patient is able to return to work as an air controller from a neurological standpoint."[4]

In a February 15, 2005 report, Dr. Wilson noted that appellant reported that his emotional condition was much better and that he was less irritable with fewer racing thoughts. In a May 10, 2006 Form OWCP-5c, he checked "yes" boxes indicating that appellant could perform his usual job and that he could work eight hours per day. Dr. Wilson checked a "no" box indicating that maximum medical improvement had not been met but did not list any work restrictions in the portion of the form for identifying such restrictions. In the portion of the form for listing medical facts to be considered in identifying a position for appellant, Dr. Wilson stated, "Minor back problems, back pain."[5]

In a February 8, 2007 letter, the Office advised appellant of its proposed termination of his compensation on the grounds that he no longer had residuals of his July 8, 1994 employment

[4] In an October 29, 2004 work restrictions form (OWCP-5c), Dr. Berger checked a "yes" box indicating that appellant could return to his usual job. He noted that appellant could walk for six hours per day and perform various tasks for eight hours per day including sitting, standing, reaching above his shoulders, lifting, pushing, pulling, squatting and operating a motor vehicle.

[5] Prior to May 2006, the last report in the record indicating that appellant sought medical care for his emotional condition was produced in February 2005.

injury. It indicated that the November 29, 2004 report of Dr. Berger established that he no longer had disability due to his July 8, 1994 employment injury with respect to his physical condition. The May 10, 2006 report of Dr. Wilson showed that he no longer had disability due to his July 8, 1994 employment injury with respect to his psychiatric condition. The Office informed appellant that he had 30 days to submit evidence and argument challenging the proposed termination.

In a February 28, 2007 letter, appellant's attorney contended that the Office inappropriately attempted to modify a wage-earning capacity decision issued by the Office on January 17, 2002 through a notice of proposed termination. He asserted that the Office did not present sufficient medical evidence to show that appellant's medical condition had improved since the wage-earning capacity decision was issued. Counsel indicated that Dr. Wilson's report did not contain adequate medical rationale and posited that it is unclear whether Dr. Wilson had a proper understanding of appellant's "usual job" at the time the form was completed. Appellant was working in a limited-duty job as a secretary and Dr. Wilson might have concluded that was his usual job. Counsel indicated that it was not surprising that Dr. Berger did not find that appellant had a neurological condition because the Office had not accepted that he sustained a neurological condition due to the July 8, 1994 accident. Therefore Dr. Berger's opinion was irrelevant to appellant's medical condition.

In a March 9, 2007 decision, the Office terminated appellant's wage-loss compensation effective that date.[6] It found that the reports of Dr. Berger and Dr. Wilson established that he did not have any disability due to his July 8, 1994 employment injury. The Office discussed the standards for modifying a wage-earning capacity determination and asserted that the medical evidence supported that appellant's "medical condition had changed, where work tolerance limitations were no longer necessary."

Appellant requested reconsideration of his claim before an Office hearing representative, which was held on October 10, 2007. Counsel indicated that appellant saw an advertisement for an agency job which required medical clearance and he took a Form OWCP-5c to Dr. Wilson to be completed for the purpose of obtaining such clearance.

In a November 7, 2007 letter, an employing establishment official stated that appellant requested a Form OWCP-5c because he wished to receive medical certification from his attending physician so that he could apply for an air traffic controller position with the employing establishment.

In a December 31, 2007 decision, the Office hearing representative affirmed the March 9, 2007 decision finding that the termination of appellant's disability compensation effective March 9, 2007 was proper because the medical evidence showed he did not have wage loss after that date due to his July 8, 1994 employment injury. The Office again discussed the standards for modifying a wage-earning capacity determination and stated that there was a material change in the nature and extent of appellant's injury-related condition when his own physician indicated that he could return to work in his "usual job" for eight hours a day.

[6] The Office stated that its decision did not terminate appellant's medical treatment benefits which remained open for necessary treatment of his accepted conditions.

In a February 29, 2008 letter, counsel submitted a February 18, 2008 report from Dr. Michael J. Sievart, an attending Board-certified psychiatrist, who stated, "It is my medical opinion that [appellant's] current inability to work is directly related to his post-traumatic stress disorder caused by his work injury of July 8, 1994." In a January 18, 2008 report, Dr. Sievart indicated that appellant could not perform his usual job or work eight hours per day due to his closed head injury, post-traumatic stress disorder and anxiety. Appellant's anxiety condition affected his complex decision making.

In an April 8, 2008 letter, the Office advised appellant of its preliminary determination that he received an $853.80 overpayment of compensation. It asserted that the overpayment occurred because he received full compensation for the period February 18 to March 17, 2007 when he was only entitled to compensation for the period February 18 to March 8, 2007 given that his compensation was terminated effective March 9, 2007.[7] The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. It advised him that he had 30 days to contest the overpayment before a final determination would be issued.

In an April 18, 2008 letter, counsel argued that appellant was not at fault in the creation of the overpayment because the termination of his compensation was being appealed when the check in question was received. Moreover, appellant did not know that the check was improper when received because it was electronically deposited into his account.

In a May 14, 2008 decision, the Office determined that appellant received an $853.80 overpayment of compensation. It further found that appellant was at fault in the creation of the overpayment such that it was not subject to waiver. The Office noted that the fact that the termination of appellant's compensation was being appealed would not affect the fact that he knew or should have known at the time of receipt that the compensation check was improper.[8]

In a June 18, 2008 decision, the Office affirmed its December 31, 2007 decision regarding the terminations of appellant's disability compensation and modification of a wage-earning capacity determination. It found that the opinion of Dr. Sievart was not well rationalized.

[7] The Office explained that it had calculated that the nine days of unwarranted compensation appellant received in conjunction with this check payment equaled $853.80. The record contains a worksheet detailing this calculation as well as a payment record showing that a $2,779.00 check covering the period February 18 to March 17, 2007 was electronically deposited into appellant's bank account on March 17, 2007.

[8] Appellant had been asked to complete a financial information questionnaire but he did not do so. As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the method of recovery of the overpayment. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

LEGAL PRECEDENT -- ISSUE 1

Under the Act,[9] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[10] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[11] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[12]

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[13] The burden of proof is on the party attempting to show the award should be modified.[14]

ANALYSIS -- ISSUE 1

The Office accepted that on July 8, 1994 appellant, then an air traffic controller specialist, sustained multiple contusions (including a knee contusion) and a concussion when a flower pot fell on his head. It later accepted that appellant sustained an unspecified anxiety state due to the July 8, 1994 injury. In a January 17, 2002 decision, the Office adjusted appellant's compensation to reflect its determination that his wage-earning capacity was represented by his actual wages as a secretary.

The Office terminated appellant's disability compensation and modified its determination of his wage-earning capacity effective March 9, 2007. It found that the November 29, 2004 report of Dr. Berger, a Board-certified neurologist who served as an Office referral physician, showed that appellant no longer had disability due to his July 8, 1994 employment injury with respect to his physical condition. The Office determined that the May 10, 2006 report of Dr. Wilson, an attending Board-certified psychiatrist, showed that he no longer had disability due to his July 8, 1994 employment injury with respect to his psychiatric condition.

The Board finds that the Office presented sufficient medical evidence to justify its termination of appellant's disability compensation and its modification of its determination of his wage-earning capacity effective March 9, 2007.

In a November 29, 2004 report, Dr. Berger concluded that appellant no longer had disabling residuals of the physical injuries he had sustained more than 10 years earlier on July 8,

[9] 5 U.S.C. §§ 8101-8193.

[10] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[11] *Id.*

[12] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[13] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[14] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

1994, a concussion and several contusions. He found that those conditions had resolved. Dr. Berger reported that examination of the cranial nerves showed full visual fields, intact sensation and no evidence of facial weakness. Motor examination revealed normal tone, bulk and 5/5 strength throughout. Appellant was alert and oriented times three, was able to recall three out of three objects in three minutes, do simple calculations well, and interpret proverbs appropriately. He followed commands well, his speech was normal and there was no evidence of dysarthria or dysphasia. Sensation was intact to sharp object, vibration and position throughout, gait was normal and cerebellar testing, including finger-to-nose and heel-to-shin testing, was normal bilaterally.

Appellant contended that Dr. Berger's report was irrelevant because he was a neurologist and the Office had not accepted that appellant sustained a neurological condition due to the July 8, 1994 accident. However, the Office had accepted that appellant sustained a concussion and such a condition has neurological association. Therefore Dr. Berger's opinion was relevant to the status of appellant's medical condition. It was also asserted that Dr. Berger's opinion lacked medical rationale and was too old to support the termination of appellant's compensation. The Board finds that the opinion of Dr. Berger is well rationalized and notes that there is no medical evidence from the period after Dr. Berger's report showing that appellant was disabled due to the physical injuries accepted as caused by the July 8, 1994 work injury.

Dr. Berger explained his opinion by noting that it was supported by the repeat neuropsychological testing performed on November 15, 1995 by Dr. Chiulli, an attending clinical psychologist, in which it was reported that appellant exhibited no identifiable cognitive impairment due to a traumatic brain injury.[15] He also explained that his conclusion that appellant had no work-related disability on a physical basis was supported by the fact that appellant had very limited findings on examination and other diagnostic testing. Dr. Berger could find no sign that appellant had a disabling concussion or contusion. His opinion shows that appellant ceased to have disability due to a work-related physical injury and the Office properly relied on it with respect to appellant's physical condition.

In a May 10, 2006 Form OWCP-5c, Dr. Wilson checked "yes" boxes indicating that appellant could perform his usual job and that he could work eight hours per day. He checked a "no" box indicating that maximum medical improvement had not been met but did not list any work restrictions in the portion of the form for identifying such restrictions. In the portion of the form for listing medical facts to be considered in identifying a position for appellant, Dr. Wilson stated, "Minor back problems, back pain." However, the Office has not accepted any back condition and Dr. Wilson did not indicate that these conditions were work related.

Appellant argued that Dr. Wilson's opinion did not contain adequate medical rationale and that it is unclear whether Dr. Wilson had a proper understanding of appellant's usual job at the time the form was completed.[16] The Board finds that the opinion of Dr. Wilson is sufficient to show that appellant no longer had disability due to his work-related anxiety condition. In the

[15] An earlier study by the same physician had shown some memory and reasoning problems.

[16] Mr. Reiselt indicated that appellant was working in a limited-duty job as a secretary in 2006 and Dr. Wilson might have concluded that was his usual job rather than the job of air traffic controller.

two years preceding the period of the May 10, 2006 report, Dr. Wilson was the only physician who treated appellant for his emotional condition and therefore was in a position to evaluate his emotional condition. There is no indication that Dr. Wilson was not aware that the position of air traffic controller was appellant's usual job. After beginning to see Dr. Wilson in May 2004, appellant sought medical treatment for his emotional condition on a much less frequent basis than he previously had. It appears from the record that, prior to May 2006, the last time appellant sought medical care for his emotional condition was in February 2005 when he saw Dr. Wilson. At that time, Dr. Wilson noted that appellant reported that his emotional condition was much better and that he was less irritable with fewer racing thoughts.[17] He provided a clear opinion that appellant ceased to have disability due to a work-related emotional condition and the Office properly relied on it when terminating appellant's disability compensation.

For these reasons, the medical evidence of record was sufficient to terminate appellant's wage-loss compensation effective March 9, 2007. Because the medical evidence showed that appellant no longer had disability due his July 8, 1994 employment injury, the Office established that there was a material change in the nature and extent of his employment-related condition. Therefore, the Office met its burden of proof to modify its January 17, 2002 wage-earning capacity determination.[18]

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act 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 his duty.[19] 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."[20]

Section 8116(a) of the Act provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not

[17] Counsel argued that reports of Dr. Sievart, an attending Board-certified psychiatrist, were sufficient to show that appellant was entitled to disability compensation. In a February 18, 2008 report, Dr. Sievart stated, "It is my medical opinion that [appellant's] current inability to work is directly related to his post-traumatic stress disorder caused by his work injury of July 8, 1994." In a January 18, 2008 report, he indicated that appellant could not perform his usual job or work eight hours per day due to his closed head injury, post-traumatic stress disorder and anxiety. However, Dr. Sievart's reports are of limited probative value because it has not been accepted that appellant sustained work-related post-traumatic stress disorder and Dr. Sievart did not describe the cause of appellant's anxiety or adequately explain why it was disabling.

[18] *See supra* notes 13 and 14 and accompanying text.

[19] 5 U.S.C. § 8102(a).

[20] *Id.* at § 8129(a).

receive salary, pay or remuneration of any type from the United States, except in limited specified instances.[21]

ANALYSIS -- ISSUE 2

The Board finds that appellant received an $853.80 overpayment of compensation because he received full compensation from February 18 to March 17, 2007 when he was only entitled to compensation from February 18 to March 8, 2007 as his compensation was terminated effective March 9, 2007.[22] The case file contains a payment record showing that a $2,779.00 check covering the period February 18 to March 17, 2007 was electronically deposited into appellant's bank account on March 17, 2007. It also contains a worksheet in which a proper calculation was made to show that the nine days of unwarranted compensation appellant received in conjunction with this check payment (*i.e.*, the period March 9 to 17, 2007) equaled $853.80. Therefore, the record shows that appellant received an $853.80 overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.[23] The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."[24] No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (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

[21] *Id.* at § 8116(a).

[22] For these reasons explained above, this termination of disability compensation was proper.

[23] 5 U.S.C. § 8129(a).

[24] *Id.* at § 8129(b).

(3) Accepted a payment which he or she knew or should have known to be incorrect…."[25]

Section 10.433(c) of the Office's regulations provide:

"Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on 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]

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt, *i.e.*, it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.[27]

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he knew or should have known to be incorrect.[28] The Board has found the claimant to be at fault in cases where he is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.[29] It is not appropriate, however, to make a finding that a claimant has accepted an overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.[30]

ANALYSIS -- ISSUE 3

Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite

[25] 20 C.F.R. § 10.433(a).

[26] *Id.* at § 10.433(c).

[27] *Tammy Craven*, 57 ECAB 689 (2006).

[28] *William E. McCarty*, 54 ECAB 525 (2003).

[29] *See Karen K. Dixon*, 56 ECAB 145 (2004).

[30] *See K.H.*, Docket No. 06-191, issued October 30, 2006.

knowledge is lacking at the time of deposit. The Board so finds in this case as there is no evidence of record to show that appellant knew, at the time of electronic deposit into his bank account on March 17, 2007, that he was not entitled to compensation for a portion of the period covered by the direct deposit (*i.e.*, nine days out of the month-long compensation period covered by the check).[31] This is not a case where the claimant received a series of checks and should have been aware of receipt of improper compensation. Only one compensation check was involved in the present case (a small portion of which provided unwarranted compensation) and the check was electronically deposited just days after the termination of appellant's compensation.

A finding of no fault does not mean, however, that a claimant may keep the money, only that the Office must consider eligibility for waiver of an overpayment, and the case must be remanded for the Office to determine whether appellant is entitled to waiver of the $853.80 overpayment.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's disability compensation and modify its determination of his wage-earning capacity effective March 9, 2007. The Board further finds that the Office properly determined that appellant received an $853.80 overpayment of compensation but that appellant was not at fault in the creation of the overpayment. The case is remanded to the Office regarding the subject of waiver. After such development it deems necessary, the Office should issue an appropriate decision regarding the overpayment.

[31] *See Karen K. Dixon, supra* note 29.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 18, 2008 and December 31, 2007 decisions are affirmed. The Office's May 14, 2008 decision is affirmed with respect to the fact and amount of overpayment and modified with respect to fault as described above. The case is remanded to the Office for further development of the overpayment matter to be followed by an appropriate decision.

Issued: September 3, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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