

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES H. EMERY and DEPARTMENT OF JUSTICE, IMMIGRATION &
NATURALIZATION SERVICE, San Ysidro, Calif.

*Docket No. 97-2505; Submitted on the Record;
Issued July 13, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant received a \$3,760.66 overpayment of compensation for the period August 28, 1988 to April 26, 1997; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$300.00 from appellant's compensation payments every four weeks.

The Board finds that the case is not in posture for decision with respect to these issues.

Office procedure provides that, when it is determined that a claimant has received an overpayment of compensation, that claimant should receive a preliminary determination letter which advises him regarding the fact and amount of overpayment, the reason for the overpayment and whether he is at fault in the creation of the overpayment. The letter should notify the claimant, *inter alia*, that he has the right to submit evidence and argument contesting the Office's preliminary determination within 30 days of the date of the preliminary determination letter. The Office should not issue a final overpayment decision before the claimant has had an opportunity to provide such evidence and argument.¹

In the present case, the Office indicated in a preliminary determination letter, dated May 12, 1997, that appellant received a \$3,760.66 overpayment of compensation for the period August 28, 1988 to April 26, 1997 because the Office deducted only \$35.10 every 4 weeks for post-retirement insurance, instead of the proper amount of \$70.20. The letter further indicated that appellant was not at fault in the creation of the overpayment and that he had 30 days to present evidence and argument if he wished to contest the fact or amount of overpayment and/or request a waiver of the overpayment. By decision dated July 17, 1997, the Office finalized its May 12, 1997 preliminary overpayment determination and found that appellant had received a \$3,760.66 overpayment which was not subject to waiver. The Office determined that the

¹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (September 1994).

overpayment would be recovered by deducting \$300.00 every 4 weeks from appellant's continuing compensation.²

On appeal, appellant indicated that he never received a copy of the May 12, 1997 preliminary overpayment determination letter and did not otherwise have an opportunity to submit evidence or argument challenging the Office's overpayment determination prior to July 17, 1997. The Board notes that the Office sent its May 12, 1997 preliminary determination to an incorrect address, "Rural Route 2, Box 9650, Carmel, ME 04419," whereas appellant's correct address of record is, "Rural Route 2, Box 6950, Carmel, ME 04419."³ Therefore, the case will be remanded to the Office so that a new preliminary overpayment determination letter can be sent to appellant which is in accordance with the above-noted Office procedure. After such proceedings it deems necessary, the Office should issue an appropriate decision on this matter.

The decision of the Office of Workers' Compensation Programs dated July 17, 1997 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
July 13, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

² The Office noted that it did not receive any response to its May 12, 1997 letter.

³ It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *George F. Gidicsin*, 36 ECAB 175, 178 (1984). This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991). However, in this case, the evidence clearly shows that the May 12, 1997 preliminary determination letter was sent to an incorrect address. Appellant only received a May 8, 1997 letter in which the Office indicated that an error had been made in his compensation and noted that he would be receiving additional information about the matter.