U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHLEEN M. HIGGINS and U.S. POSTAL SERVICE,
POST OFFICE, Toms River, NJ

*Docket No. 99-1657; Submitted on the Record;*
*Issued October 27, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation benefits on the grounds that the disability causally related to her February 4, 1997 employment injury had ceased; (2) whether the Office properly found that appellant was at fault in the creation of an overpayment of $10,377.64, thus precluding waiver of the overpayment; and (3) whether the Office abused its discretion by denying appellant's May 4, 1999 request for reconsideration under 5 U.S.C. § 8128.

The Board has duly reviewed the case and finds that the Office properly terminated appellant's wage-loss compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization of medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[4]

In the present case, on July 1, 1997 appellant, then a 46-year-old letter carrier, filed a claim for occupational disease Form CA-2, alleging that on February 4, 1997 she fell into a hole

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[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

[3] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *Id.*

and injured her ankle. Subsequently, appellant developed back pain, which she attributed to a combination of her February 4, 1997 fall and her employment duties. On October 6, 1997 the Office accepted appellant's claim for a herniated disc at L5-S1 causally related to a February 4, 1997 employment injury and entered appellant on the daily rolls.[5] Appellant's attending physician, Dr. David H. Clements, III, a Board-certified orthopedic surgeon, completed a work capacity evaluation on November 25, 1997 and indicated appellant was totally disabled but was expected to be able to return to work, eight hours a day on January 2, 1998. Dr. Clements indicated that appellant could sit for two hours and could walk, stand, reach and climb for one hour. He further indicated that appellant could not push, pull, or lift more than 10 pounds and was completely restricted from squatting and kneeling.

On December 30, 1997 the employing establishment offered appellant a limited-duty job, to start January 3, 1998, which was within the restrictions outlined by Dr. Clements in his November 25, 1997 report.

By letter dated January 2, 1998, the Office advised appellant that the employing establishment had offered her suitable work within her medical restrictions. The Office noted that appellant had 30 days in which to accept the offered position, or "provide an explanation of the reason(s) for refusing it," including copies of relevant medical reports in support of a refusal. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.[6]

Appellant accepted the position and on January 3, 1998 she returned to work, eight hours a day within the restrictions provided by her physician.

By letters dated February 4 and 17, 1998, the Office forwarded a copy of appellant's regular-duty job description to Dr. Clements and asked when he felt appellant could return to her regular duties as a letter carrier. In a work capacity evaluation report dated February 17, 1998, Dr. Clements indicated that appellant was restricted from lifting more than 20 pounds but was not restricted in any other physical activities. Dr. Clements stated that he expected the lifting restriction to last eight weeks. In a letter to Dr. Clements dated May 28, 1998, the Office noted that appellant continued to perform only light duty, despite the physician's estimate that appellant's restrictions would only last eight weeks and asked the physician to comment on whether appellant's restrictions were still appropriate. Dr. Clements submitted a duty status report, Form CA-17, which was received by the Office on July 17, 1998 in which the physician released appellant to full, unrestricted duty. On August 10, 1998 the Office referred appellant, together with a statement of accepted facts and a copy of appellant's full-duty position description, to Dr. Joseph C. Tauro, a Board-certified orthopedic surgeon, for a second opinion evaluation.

[5] After the February 4, 1997 employment-related fall, appellant continued to work until March 24, 1997. Appellant returned to work on May 19, 1997. On September 15, 1997 appellant underwent a micro lumbar discectomy and stopped work again.

[6] 5 U.S.C. § 8106.

In a report dated August 28, 1998, Dr. Tauro noted appellant's history of injury and performed a physical examination and concluded:

> "My overall impression is that this patient suffered a lumbar sprain. If the patient's history is correct, it is related to the February 4, 1997 injury. I did not have the [magnetic resonance imaging] (MRI) scan to review personally. Based on the report, there did not appear to be a true disc herniation, although the [electromyogram] EMG was positive for a left S1 radiculopathy. Based on the minimal findings on [the] MRI, I would not have initially recommended lumbar diskectomy. However, since at this time it is done, the patient will have some permanent back pain as the result of the loss of normal dis[c] function at this level. She is able to perform her normal duties at work on a full-time basis. The only persistent neurologic finding is the loss to deep tendon reflex, which I believe will be permanent. No further treatment for this patient is necessary at this time. She is at a plateau of medical therapy."

In a decision dated October 29, 1998, the Office terminated appellant's wage-loss compensation benefits on the grounds that the medical evidence of record established that appellant was no longer disabled due to her February 4, 1997 employment injury.

By letter dated April 15, 1999, appellant, through counsel, requested reconsideration of the Office's October 29, 1998 decision terminating compensation benefits. Appellant asserted that the Office's termination was flawed as Dr. Tauro's report does not establish that appellant has no residuals of her accepted condition and the Office further failed to afford appellant proper notice that her compensation benefits would be terminated.

In a decision dated May 4, 1999, the Office found appellant's arguments insufficient to warrant modification of the October 29, 1998 decision. The Office noted that by its October 29, 1998 decision it had found only that appellant no longer had any injury-related disability and that it had not found that she no longer had any residuals of her injury-related condition and had not denied appellant further medical care. The Office further stated that it had not made a determination as to whether to approve appellant's prior surgery, but rather had requested that appellant submit the operative report, which had not yet been received. Finally, the Office stated that as appellant was working eight hours per-day at the time of the October 29, 1998 decision and was not in receipt of wage-loss compensation, the Office was not required to issue a pretermination notice.

By letter dated May 4, 1999, appellant, though counsel, requested reconsideration of the Office's prior decision. In a decision dated May 21, 1999, the Office denied appellant's request for reconsideration on the grounds that she failed to either raise substantive legal questions or include new and relevant evidence.

As there is no medical evidence supporting continuing disability after October 29, 1998, the date of the Office's decision, and as Dr. Tauro provided a well-rationalized report finding that appellant had no disability causally related to her accepted herniated disc and as this opinion is supported by the November 1998 report of Dr. Clements, appellant's treating physician, releasing appellant to full duty, the Office met its burden of proof to terminate appellant's wage-

loss compensation benefits. In addition, as appellant had been on the daily compensation rolls and as appellant had also returned to full-time work on January 3, 1998, without loss of wages and was, therefore, no longer entitled to wage-loss compensation benefits, the Office was not required to issue a pretermination in this case.[7] Finally, as the Office specifically stated that it had not terminated appellant's entitlement to medical benefits and had not yet made a determination as to the necessity of appellant's September 15, 1997, micro lumbar discectomy, these issues are not properly before the Board.

With respect to the issue of overpayment, the Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of $10,377.64, thus precluding waiver of the overpayment.[8]

An overpayment of $10,377.64 was made in the present case when appellant returned to work on January 3, 1998 with no wage loss but continued to receive compensation for total disability through May 23, 1998. Section 8129 of the Act provides, however, that the Office may not adjust later compensation or recover an overpayment unless an "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."[9] Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.433 of the implementing federal regulations provides that a recipient who has done any of the following will be found to be at fault with respect to creating the overpayment:

> (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
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> (2) Failed to provide information which he or she knew or should have known to be material; or
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> (3) Accepted a payment, which he or she knew or should have known was incorrect. (This provision applies only to the overpaid individual.)"[10]

The regulations further provide that whether or not the Office determines that an individual was at fault depends on the circumstances surrounding the overpayment. The degree

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowance*, Chapter 2.1400.6(c) (March 1997); *see also Lan Thi Do*, 46 ECAB 366 (1994); *Donald Leroy Ballard*, 43 ECAB 876 (1992)

[8] The Board notes that on appeal, appellant, through counsel, did not contest either the fact of the overpayment, or the amount.

[9] 5 U.S.C. § 8129(b).

[10] 20 C.F.R. § 10.433(a).

of care to be expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.[11]

On August 18, 1998 the Office made a preliminary determination that appellant was at fault in the matter of the overpayment under the third criterion above because she should have been aware that she was not entitled to the compensation checks she continued to receive after returning to work on January 3, 1998, with no loss of wages. The record shows that when the Office placed appellant on the periodic roll, it advised her that she would be paid regular compensation until she returned to duty. The Office specifically advised appellant as follows: "To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you go back to work." (Emphasis in the original.)

The Board finds that this evidence supports that appellant knew or should have been expected to know that the payments she accepted after returning to work on January 3, 1998 were incorrect. In addition, while the Office may have been negligent in continuing to issue appellant checks for disability after the Office was notified that appellant had returned to full-time work, this did not excuse appellant's acceptance of the checks, which she knew or should have known should have been returned to the Office.[12] Therefore, the Office properly found that appellant was at fault in the creation of the overpayment in this case. The Office allowed appellant 30 days to request a telephone conference or a review of the written evidence or a prerecoupment hearing to address whether the overpayment actually occurred, the amount of the overpayment, whether she was at fault in the creation of the overpayment, or whether the overpayment should be collected. When appellant did not respond, the Office finalized its determination on January 15, 1999 and demanded repayment in full.

With respect to the issue of waiver, because the evidence supports the Office's finding that appellant was at fault in the creation of the overpayment that occurred in this case, the Office may not waive recovery of the overpayment.[13]

Finally, with respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.[14] As appellant returned to work with no wage loss and was not in receipt of continuing compensation at the time the final decision was entered in this matter, this Board lacks jurisdiction to review recovery of the overpayment.

The Board further finds that the Office properly denied appellant's May 4, 1999 request for reconsideration under 5 U.S.C. § 8128.

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[11] 20 C.F.R. § 10.433(b).

[12] *Larry D. Strickland*, 48 ECAB 669 (1997).

[13] *See Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

[14] *Lewis George*, 45 ECAB 144 (1993).

By letter dated May 4, 1999, appellant, though counsel, requested reconsideration of both the Office's October 29, 1998 decision, terminating wage-loss compensation benefits and the Office's January 15, 1999 decision on the issue of overpayment. Appellant did not submit additional evidence and, with respect to the issue of termination, raised the same arguments previously raised in appellant's April 15, 1999 request for reconsideration, which were fully considered by the Office in its May 4, 1999 decision, denying modification.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[15] Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[16]

With respect to appellant's request for reconsideration of the Office's October 29, 1998 decision terminating wage-loss compensation, the Office, in denying appellant's application for review, properly noted that appellant had not raised any substantive legal questions nor included any new and relevant evidence and, therefore, appellant's letter did not constitute a basis for reopening a case.[17] As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.[18]

[15] 20 C.F.R. § 10.606(b).

[16] 20 C.F.R. § 10.608(b).

[17] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[18] The Board finds that the Office's May 21, 1999 decision, in so far as it pertains to appellant's request for reconsideration of the Office's January 15, 1999 overpayment decision, is null and void as both the Board and the Office cannot have jurisdiction over the same issue in the same case. 20 C.F.R. § 501.2(c); *Douglas E. Billings*, 41 ECAB 880 (1990).

The decisions of the Office of Workers' Compensation Programs dated May 21, May 4, and January 15, 1999 and October 29, 1998 are hereby affirmed.

Dated, Washington, DC
October 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member