

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM G. LOUGHREY and U.S. POSTAL SERVICE,
WASHINGTON BULK MAIL CENTER, Washington, DC

*Docket No. 99-405; Submitted on the Record;
Issued January 23, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$10,310.32 during the period August 31, 1996 to December 6, 1997; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery; and (3) whether the Office properly determined that recovery of the overpayment would be accomplished by reducing appellant's continuing compensation benefits by 100 percent.

In this case, in 1978, 1979 and 1982, appellant filed traumatic injury claims for employment-related back injuries. The Office accepted that appellant sustained employment-related lumbar strains, aggravation of preexisting lumbar disc disease and lumbar laminectomy and combined all of appellant's claims into one case file number. Since his original surgery, appellant sustained several exacerbations of his accepted conditions and has undergone repeat surgeries in 1979, 1982, 1987 and 1990. Appellant had intermittent periods of disability for which he was paid appropriate compensation benefits. By letter dated November 9, 1990, the Office fully explained the terms under which appellant was entitled to receive compensation and specifically instructed appellant that in order to avoid an overpayment of compensation, he should notify the Office immediately when he returned to work and that if he worked for any portion of the period for which a payment was made, he must return that compensation check to the Office. On November 19, 1990 appellant signed and returned a form provided by the Office indicating that he understood the terms of his compensation benefits.

On August 31, 1996 appellant returned to work for four hours a day. In a decision dated February 4, 1997, the Office reduced appellant's compensation benefits to reflect his wage-earning capacity in his new position as a modified EAS/supervisor, effective August 31, 1996. On March 29, 1997 appellant returned to work for eight hours a day.

In a decision dated December 23, 1997, the Office noted that appellant had been successfully performing his new position for approximately eight months, thereby demonstrating his ability to complete the position. The Office further found that as appellant's previous rate of

pay included a Sunday premium and his return to work position did not, he was earning less wages than the job held when injured and was, therefore, entitled to receive continuing compensation in the amount of \$144.00 every four weeks. Following appellant's August 31, 1996 return to part-time work, however, the Office did not take action to reduce compensation and appellant continued to receive and cash checks for compensation for total disability during the period he was regularly receiving pay checks from the employing establishment.

On February 18, 1998 the Office informed appellant that it had made a preliminary determination that an overpayment of compensation in the amount of \$10,310.32 had occurred and that appellant was at fault in the creation of the overpayment. The Office enclosed an election form and requested that appellant indicate whether he wished either a telephone conference with the Office, a decision by the Office based on the written evidence, or a hearing with the Branch of Hearings and Review on the issue of fault and waiver of the overpayment, if eligible. The Office also asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

In response to the February 18, 1998 preliminary overpayment determination, appellant checked a box on an Office form, requesting waiver of his overpayment and a telephone conference. The Office received the request on February 27, 1998. In addition, appellant submitted a completed overpayment recovery questionnaire, which the Office also received on February 27, 1998.

In a decision dated April 17, 1998, the Office finalized its preliminary overpayment determination, noting that no response had been received from appellant. The Office explained that pursuant to the Office's procedure manual, where an appellant who is receiving continuing compensation benefits does not respond to a preliminary overpayment decision, a final decision should be issued without conducting a conference and the debt should be recovered from such benefits as quickly as possible. Therefore, the Office informed appellant that 100 percent of his continuing compensation benefits would be withheld until the debt was repaid.

The Board finds that the Office properly found that there was an overpayment of compensation in the amount of \$10,310.32 as appellant continued to receive and cash checks for compensation for total disability during the period he was regularly receiving salary checks from the employing establishment for part-time work and later for full-time work.¹ On appeal appellant does not contest the fact or amount of the overpayment. Thus, the only questions remaining before the Board are whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery and the rate of repayment from continuing compensation set by the Office.

The Board further finds that with respect to the issues of fault and repayment, this case is not in posture for decision.

In the present case, in its April 17, 1998 decision, finalizing its preliminary determination that appellant was at fault in the creation of the overpayment and further reducing appellant's continuing compensation benefits to zero, the Office noted that appellant had failed to respond to

¹ *Charles E. Watkins, Jr.*, 33 ECAB 1451 (1982).

the February 18, 1998 preliminary decision and had not submitted the requested financial information necessary to make repayment determinations. A review of the record reveals, however, that by letter dated February 25, 1998 appellant did respond to the preliminary determination by the Office, disagreed with the Office's preliminary overpayment findings and requested a telephone conference on the issue of fault and possible waiver of the overpayment. In addition, appellant submitted the completed overpayment recovery questionnaire, as well as additional documentation in support of his request. Appellant's February 25, 1998 letter, the overpayment recovery questionnaire and the supporting documentation are all date-stamped received by the Office on February 27, 1998, which is within the 30 days allowed by the Office for response.

As the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,² it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.³ As the Board's decisions are final as to the subject matter appealed,⁴ it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office. This is particularly important in the instant appeal where, as noted above, appellant submitted a completed overpayment recovery questionnaire and requested that there be a conference call on the issues of fault and possible waiver, but where there is no indication that any of this was considered by the Office before issuing its final decision. Because it does not appear that the Office considered the evidence that it received on February 27, 1998, in reaching its April 17, 1998 decision, the Board cannot review such evidence for the first time on appeal.⁵

Consequently, the case will be remanded for the Office to consider appellant's overpayment recovery questionnaire and his request for a telephone conference.⁶ Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on this aspect of the claim.

² 20 C.F.R. § 501.2(c).

³ See *William A. Couch*, 41 ECAB 548 (1990).

⁴ See 20 C.F.R. § 601.6(c).

⁵ See 20 C.F.R. § 501.2(c).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Conferencing*, Chapter 2.500 (July 1995); Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(3) (September 1994).

The April 17, 1998 Office of Workers' Compensation Programs' decision is affirmed with regard to the fact and amount of the overpayment; the decision is set aside for further development consistent with this decision with regard to fault.⁷

Dated, Washington, DC
January 23, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁷ The Board notes that the record additionally contains a December 23, 1997 Office decision reducing appellant's compensation benefits based on his actual earnings since March 29, 1997, as a full-time modified supervisor. While this decision is within the jurisdiction of the Board, appellant, by letter postmarked October 15, 1998, specifically appealed only the Office's determination that he was at fault in the creation of the overpayment of compensation in the amount of \$10,310.32.