

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAINEY H. PAIGE and DEPARTMENT OF THE NAVY,
NAVAL CONSTRUCTION BATTALION CENTER, Gulfport, MS

*Docket No. 02-616; Submitted on the Record;
Issued September 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment was created in the amount of \$7,914.04; and (2) whether appellant was at fault in the creation of the overpayment.

The Office accepted that on May 6, 1996 appellant, then a 52-year-old motor vehicle operator, sustained a herniated disc at L4-5 with subluxation while delivering a parcel in the performance of his duties. Appellant stopped work on May 7, 1996 and surgery was authorized for decompression and fusion at L4-5 on February 26, 1997. He later accepted a full-time light-duty clerk position with the employing establishment on March 30, 1998 after his physician determined that he could return to work with restrictions.

In a decision dated July 30, 1998, the Office found that the modified position was suitable and represented appellant's wage-earning capacity. He was paid appropriate compensation for disability.¹

On May 8, 2000 the Office received a CA-1032 form from appellant concerning his federal benefits or payments, which indicated that he had received disability retirement compensation. On May 15, 2000 the Office requested that appellant confirm whether he was receiving both disability benefits from the Office of Personnel Management (OPM) and

¹ Appellant stopped work on December 7, 1998 and filed a claim for recurrence of disability on December 16, 1998. By decision dated May 7, 1999, the Office denied the recurrence of disability claim on the grounds that the evidence was insufficient to establish a worsening of the accepted employment-related condition. Following an oral hearing at appellant's request, an Office hearing representative remanded the case for further development on January 6, 2000. Following development of the evidence, the Office issued a June 27, 2000 decision denying the recurrence of disability. The Office found that no medical evidence had been submitted that explained any objective, material worsening of appellant's injury as the cause of the claimed recurrent disability. The Office found, however, that appellant would still be entitled to medical benefits for treatment of the accepted condition and to compensation for disability based upon his wage-earning capacity. Appellant thereafter appealed the June 27, 2000 decision to the Board and in a decision issued September 26, 2001, the Board affirmed the decision of the Office. Docket No. 01-185.

compensation benefits and further informed him that dual benefits by the Office and OPM were not payable. The Office then advised appellant that if he were in receipt of both benefits, he must make an election.

In a letter dated May 20, 2000, appellant responded that he believed his Office disability benefits were in the form of a schedule award due to his employment injury. He indicated, however, that he would elect OPM benefits and attached his election form dated May 20, 2000 to the letter.

In a letter to appellant dated June 8, 2000, the Office confirmed that all disability benefits with the Office, including disability were considered dual to those provided by OPM. The Office advised that appellant had been receiving OPM benefits since June 18, 1999 and that as a result, effective June 23, 2000 his compensation for disability would be terminated in order to avoid a greater overpayment.

In a preliminary determination dated August 21, 2000, the Office found that appellant received an overpayment in the amount of \$7,914.04 during the period June 23, 1999 to June 17, 2000. A determination was made that appellant received both compensation benefits and disability benefits from OPM during the above-stated period. The Office found that appellant was at fault in the matter of the overpayment, since he had been advised in a June 30, 1998 letter, that receipt of compensation benefits for loss of wage-earning capacity and receipt of an annuity from OPM constituted a dual benefit. The Office informed appellant that, if he disagreed with the fact or the amount of the overpayment or that he was at fault in the creation of the overpayment and wanted the overpayment to be waived, he had the right to submit new evidence to support his contention or he could request a waiver or recoupment within 30 days of receipt of the letter and submit appropriate evidence to justify his request. The Office enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived.

By decision dated November 8, 2001, the Office finalized its preliminary determination of an overpayment in the amount of \$7,914.04 from June 23, 1999 through June 17, 2000. The Office found that appellant was at fault in the creation of the overpayment, stating that, he was advised by the Office that an individual must report any retirement income because receipt of such in addition to compensation benefits under the Federal Employees' Compensation Act is considered a dual benefit and not permitted. The Office stated that, despite his knowledge of that fact, appellant failed to notify the Office of the dual benefit. In the memorandum attached to the decision, the Office stated that the evidence of record and any additional evidence or arguments submitted had been studied and given full consideration. The Office determined that the evidence failed to support that further recovery of the overpayment would create a financial hardship, thereby defeating the purpose of the Federal Employees' Compensation Act. Therefore, the Office determined that the circumstances of the case did not warrant a waiver.

The Board finds that appellant received an overpayment in the amount of \$7,914.04.

The Act provides at section 8116² that, generally while an employee is receiving the Act's disability compensation, he may not receive salary, pay or remuneration of any type from the United States. The Office's regulations specifically provide at section 10.421(a) as follows:

“5 U.S.C. § 8116(a) provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive and the election, once made, is revocable”³

As the record substantiates that appellant received OPM retirement benefits, as well as disability benefits under the Federal Employees' Compensation Act during the time period June 23, 1999 through June 18, 2000, an overpayment was created in this case in the amount of \$7,914.04.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of compensation and, therefore, the overpayment is not subject to waiver and has to be recovered.

The Act at 5 U.S.C. § 8129(b) states that 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. Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.⁴

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations states in pertinent part:

“A recipient who has done 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 he or she knew or should have known to be incorrect....”⁵

In the present case, the Office applied the third standard -- acceptance of a payment which the payee either knew or should have known was incorrect -- in finding appellant at fault in creating the overpayment. The circumstances of the case support the Office's finding that

² 5 U.S.C. § 8116.

³ 20 C.F.R. § 10.421(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(b).

appellant knew or should have known that he was not entitled to both the Act disability and OPM retirement benefits. He indicated in his letter dated May 20, 2000 that he believed that the Office disability payments that he received were in the form of a schedule award due to his employment-related condition. The record does not indicate, however, that appellant was in receipt of a schedule award during this time period. Because appellant accepted payments that he knew or should have known were incorrect, the Office properly found that he was at fault in the creation of the overpayment that occurred from June 23, 1999 through June 18, 2000. Once the Office learned of the possibility that appellant was in receipt of dual benefits, it notified appellant by letter dated May 15, 2000, that he must make an election. Following appellant's election of OPM benefits on May 20, 2000, the Office on June 8, 2000 terminated compensation for disability effective June 18, 2000, in an effort to avoid a greater overpayment. As the Office properly found that appellant was at fault in the creation of the overpayment, this overpayment may not be waived.

With respect to the issue raised on appeal regarding the amount of recovery determined by the Office, the Board's jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act.⁶ As appellant's wage-loss compensation benefits were terminated prior to the Office's November 8, 2001 decision, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.⁷

The decision of the Office of Workers' Compensation Programs dated November 8, 2001 is hereby affirmed.

Dated, Washington, DC
September 17, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

⁶ *Lewis George*, 45 ECAB 144 (1993).

⁷ With appellant's request for an appeal, he submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).