

On January 29, 2001 appellant, then a 46-year-old nursing assistant, filed a recurrence of disability claim alleging that on that date he sustained a back injury while lifting a patient out of bed, thereby aggravating a previous injury which occurred on September 3, 1992 while in the

performance of duty. The Office accepted the claim for lumbar strain and appellant was placed on the periodic rolls.

On December 6, 2002 the Office notified appellant that he had to choose between the Federal Employees' Compensation Act benefits and annuity benefits paid by the Office of Personnel Management (OPM). The Office's letter indicated that compensation benefits for each four-week period were \$1,636.28. On December 27, 2002 appellant advised the Office that he elected to receive retirement benefits rather than the Act benefits effective December 1, 2002. By letter dated January 24, 2003, the Office advised OPM that appellant had elected to receive retirement benefits in lieu of compensation benefits and requested reimbursement in the amount of \$3,270.16 for compensation paid to appellant from December 1, 2002 through January 25, 2003. On June 17, 2003 appellant received notification from OPM that he had been placed in interim pay status until a determination could be made as to the exact amount to which he was entitled and a check in the amount of \$4,381.75 for the period December 1, 2002 through May 30, 2003.¹

On June 17, 2003 the Office was advised by OPM that it could take no action on the debt alleged by the Office until the Office had certified that due process was given and what "installments" needed to be taken.

On November 12, 2003 the Office made a preliminary finding that appellant had been overpaid in the amount of \$3,270.16 due to the fact that he had been paid full compensation up to January 25, 2003 although he had elected to retire effective December 1, 2002. The Office further found that appellant was at fault in the matter because he received and kept a check that he knew or should have known he was not entitled to keep. The Office advised appellant of his right to disagree and to elect within 30 days a telephone conference, a decision based on written evidence only or a prerecoupment hearing.

On December 18, 2003 appellant submitted an overpayment questionnaire reflecting that he had three dependent children living with him, as well as a child for whom he paid state-ordered child support, and monthly expenses of \$1,400.00 per month

On December 19, 2003 the Office received a document dated December 5, 2003 in which appellant requested a telephone conference and a hearing and stated that he was not at fault because he did not receive an overpayment. He indicated that he received no retirement benefits until July 2003, when he received the difference between what he was owed by OPM and his overpayment debt to the Office. Appellant also stated that repayment would create hardship because his salary was \$800.00 per month.

The record reflects a memorandum to the file dated January 15, 2004 from Claudia Cornejo, claims examiner, referencing a telephone conference held with appellant on December 1, 2003 and his written statement dated December 5, 2003 but received December 19, 2003 requesting a hearing.

¹ The payment breakdown is as follows: gross payment, \$4,993.75; less federal income tax, \$612.00; net payment, \$4,381.75.

By decision dated January 15, 2004, the Office finalized its preliminary finding that an overpayment existed in the amount of \$3,270.16 and that appellant was at fault.²

LEGAL PRECEDENT -- ISSUE 1

The Act³ 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.⁴ When an overpayment has been made to an individual 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 the individual is entitled.⁵ Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁶

Section 8116(a) of the Act states that, while an employee is receiving compensation under the Act, he may not receive salary, pay or remuneration of any type from the United States, except in return for services actually performed or for certain payments connected with service in the armed forces.⁷

Section 10.313(a) of the implementing federal regulations specifically prohibits as a dual benefit the concurrent receipt of compensation and retirement annuity.⁸

ANALYSIS -- ISSUE 1

It is well established that an injured employee must make an election between compensation for disability and retirement pay. The employee may not receive both.⁹ The Board finds that appellant received an overpayment because he received full compensation benefits from December 1, 2002 through January 25, 2003 although he elected to and did receive disability retirement benefits effective December 1, 2002. However, this case is not in posture for a decision regarding the amount of overpayment. On January 15, 2004 the Office found that an overpayment existed in the amount of \$3,270.16, but the evidence of record is inconclusive as to the amount of the overpayment.

² The Board notes documents in the file which were submitted after the Office rendered its January 15, 2004 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995). Therefore, the documents submitted after January 15, 2004 cannot be considered by the Board.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ See *Michael A. Grossman*, 51 ECAB 673, 676-78 (2000), citing *Califano v. Yamasaki*, 442 U.S. 682 (1979).

⁷ 5 U.S.C. § 8116(a).

⁸ 20 C.F.R. § 10.313(a). See *Michael A. Grossman*, *supra* note 6 at 676.

⁹ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.313(a).

On December 27, 2002 appellant elected to terminate his Act benefits and to commence receiving disability retirement benefits effective December 1, 2002. The Office's letter to appellant dated December 6, 2002 indicated that compensation benefits at that time were \$1,636.28 for each four-week pay period. On January 24, 2003 the Office requested reimbursement from OPM in the amount of \$3,270.16¹⁰ for payments made to appellant for that period. On June 17, 2003 OPM responded that no action would be taken until the Office had certified that due process had been followed with regard to appellant's benefits. The record contains no response to the June 17, 2003 letter and no indication of whether any reimbursement was ever made. Also on June 17, 2003 appellant received his first pension payment in the amount of \$4,381.75, representing an interim payment for the period from December 1, 2002 through May 30, 2003. At that point appellant was erroneously in receipt of dual benefits in that he had received compensation benefits and retirement benefits for the same period of time. Thus, the Office properly determined that appellant received an overpayment.

Although appellant alleged that he believed he did not receive an overpayment because his debt to the Office was deducted from his June 17, 2003 pension payment, he has presented no evidence in support of his allegation. Additionally, the evidence reveals that, at appellant's request, a schedule of monthly payments was established pursuant to which appellant made several payments. However, the record is unclear exactly how many payments were made by appellant. Therefore, this case must be remanded to the Office for development of the evidence and clarification of the amount of the overpayment and payments made by appellant.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ Whether or not the Office determines that an individual is 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 understand that he is being overpaid.¹² To make this determination, the Board applies a "reasonable person" test.¹³

Section 10.433 of the Office's implementing regulations provides that 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

¹⁰ According to the figures provided by the Office, appellant's compensation for an eight-week period from December 1, 2002 through January 25, 2003 should have been \$3,272.56. Therefore, the Office's finding that an overpayment existed in the amount of \$3,270.16 is in conflict with the evidence of record.

¹¹ 20 C.F.R. § 10.433(a).

¹² 20 C.F.R. § 10.433(b).

¹³ *Ralph P. Beachum, Sr.*, 55 ECAB ____ (Docket No. 03-2142, issued April 1, 2004).

“(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.”¹⁴

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard under section 10.433 of the regulations in determining that appellant was at fault in creating the overpayment, finding that he knew or should have known he was not entitled to receive compensation benefits for the period of time he received retirement benefits. In finding appellant to be at fault, the Office precluded the possibility of a waiver.¹⁵ The Board finds, however, that appellant was not at fault in his receipt of the overpayment.

The Board has held that a determination of fault must be made considering the circumstances surrounding the overpayment while applying a “reasonable person” standard.¹⁶ At the time appellant received the December benefits, he was legally entitled to them. The Office gave him the option of electing to receive retirement benefits retroactively, thereby producing a situation in which an overpayment was created immediately upon appellant’s election to retire. At that point appellant had to decide whether or not to return the money he had received from the Office for the applicable period. There is no evidence that appellant had been advised to return the Act checks immediately following the election of benefits or that the election of benefits had been approved. The Board finds that a reasonable person could have assumed under the circumstances that he was not required to return the compensation benefits until he was notified that he would receive benefits from OPM.

The record reflects that appellant did not receive his first payment from the OPM until June 17, 2003. Therefore, had appellant returned the benefit checks to the Office immediately upon receipt, he would have had no income from December 1, 2002 until June 17, 2003. It was reasonable for him to believe that he was entitled to retain the benefits, at least until his retirement benefits were established. Furthermore, appellant received a copy of a letter dated January 24, 2003 from the Office to OPM asking for reimbursement for money paid to appellant in the amount of \$3,270.16. Again, it was reasonable for appellant to believe that he was intended to keep the payments he received from the Office, thinking that the Office would be reimbursed by OPM. There is no evidence in the record of any communication in that regard after the aforementioned letter of January 24, 2003 and before appellant’s receipt of his first pension check dated June 17, 2003. The first evidence in the record that OPM did not intend to reimburse the Office was its letter of June 17, 2003 requiring evidence that due process had been followed. On that same date appellant received a pension check and a letter stating that he had been placed in interim pay status until a determination could be made regarding his exact

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Ralph P. Beachum, Sr., supra* note 13.

entitlement. The Board finds that it was reasonable for appellant to assume that he was supposed to retain the compensation benefits and that the OPM had already adjusted or would adjust his future payments in order to reimburse the Office for any overpayments made.

The Board finds that the Office failed to meet its burden of proof in establishing that appellant was at fault in creating the overpayment in that it failed to establish that appellant knew or should have known that he was not entitled to compensation benefits for the period December 1, 2002 through January 25, 2003.

CONCLUSION

The Board finds that an overpayment was created for the period December 1, 2002 through January 25, 2003 for which appellant was without fault. The case will be remanded for a determination of the amount of overpayment and an appropriate decision on whether appellant is entitled to a waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2004 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact of overpayment; the case is remanded for further development on the issues of the amount of overpayment and the issue of waiver.

Issued: January 28, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member