

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT B. HUTCHINS and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 99-2273; Submitted on the Record;
Issued April 11, 2001*

DECISION and ORDER

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

The issue is whether appellant received an overpayment of compensation in the amount of \$1,634.15 and, if so, whether the Office of Workers' Compensation Programs properly refused to waive recovery of this overpayment.

The Office accepted appellant's occupational disease claim for bilateral carpal tunnel syndrome with surgical releases, left lateral epicondylitis and adhesive capsulitis of the left shoulder. He stopped work on April 2, 1992 and the Office began payment of compensation for temporary total disability on that date. By decision dated January 10, 1995, the Office waived recovery of two overpayments of compensation: one in the amount of \$1,564.26 that arose because of incorrect deductions for health benefits and one in the amount of \$1,694.80 that arose because of incorrect deductions for life insurance.

Appellant retired from his position at the employing establishment effective May 31, 1996 under a special option under which he received a separation incentive in the amount of \$25,000.00. The employing establishment reported that this separation incentive was "equivalent to severance pay and at [appellant's] current rate of pay of \$18.53 per hour, the pay equals 33.73 weeks of pay." On July 10, 1996 appellant elected, effective June 1, 1996, to receive benefits under the Federal Employees' Compensation Act in lieu of those under the Civil Service Retirement Act.

On October 30, 1996 the Office issued appellant a schedule award for a 22 percent permanent loss of use of the left arm and for a 10 percent permanent loss of use of the right arm. The period of the award was from October 7, 1996 to September 5, 1998. By decision dated September 17, 1998, the Office reduced appellant's compensation effective that date based on his capacity to earn wages as an accounting clerk.

On May 13, 1999 the Office issued a preliminary finding that appellant received an overpayment of compensation in the amount of \$1,634.15 that arose because he received compensation for temporary total disability and severance pay from June 1 to 22, 1996. The

Office found that these were dual benefits, that appellant was not entitled to both and that he was without fault in the creation of the overpayment. The Office allotted appellant 30 days to request a telephone conference, final decision on the written record or prerecoupment hearing; and advised him that to waive the overpayment he needed to submit the Office's form detailing his income and expenses. He submitted a reply, received by the Office on June 1, 1999, stating, "It is my understanding the money has been taken care of, according to this letter." This response was written on a December 21, 1998 Office letter to the Office of Personnel Management requesting that it forward a check in the amount of \$1,563.06 as reimbursement for compensation paid from May 31 through June 22, 1996.

By decision dated July 6, 1999, the Office found that appellant received an overpayment of compensation in the amount of \$1,634.15 that arose because he received compensation for temporary total disability and severance pay from June 1 to 22, 1996. The Office advised appellant that the Office of Personnel Management stated that he did not elect their benefits, so there was nothing to withhold pay from to send to the Office. The Office refused to waive recovery of the overpayment.

The Board finds that appellant received an overpayment of compensation in the amount of \$1,634.15.

Section 8116(a) of the Act¹ states that while an employee is receiving compensation under the Act, he or she "may not receive salary, pay or remuneration of any type from the United States," except in return for service actually performed or for certain payments connected with service in the Armed Forces. Section 10.421(c) of the Office's regulations² states: "An employee may not receive compensation for total disability concurrently with severance pay or separation pay. However, an employee may concurrently receive compensation for partial disability or permanent impairment to a schedule member, organ or function with severance pay or separation pay."

In the present case, appellant retired from the employing establishment effective May 31, 1996 and received separation pay in the amount of \$25,000.00, which was equivalent to 33.73 weeks of salary. During a portion of these 33.73 weeks, from May 31 through October 6, 1996, appellant was receiving compensation for total disability. The Office properly determined that this constituted a dual benefit prohibited by the statute and regulations and suspended appellant's compensation effective June 23, 1996, reinstating it at the beginning of his schedule award on October 7, 1996. However, for the period May 31 to June 22, 1996, appellant received the prohibited dual benefit. The amount of compensation he received during this period, \$1,634.15, constituted an overpayment.

The Board finds that the Office properly refused to waive recovery of the overpayment of compensation.

¹ 5 U.S.C. § 8116(a).

² 20 C.F.R. § 10.421(c).

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 [the Act] or would be against equity and good conscience.”³ 20 C.F.R. § 10.438 states:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

In the present case, appellant, in response to the Office’s preliminary finding of an overpayment on May 13, 1999, did not submit any of the requested information on income, expenses and assets within 30 days or at any time prior to the Office’s issuance of its July 6, 1999 decision denying waiver of the overpayment.⁴ This decision was proper under the regulation cited above.

³ 5 U.S.C. § 8129.

⁴ On August 3, 1999 and on appeal, appellant submitted information on his income and expenses. While this information could be considered by the Office in a request for waiver, it cannot be considered by the Board on appeal, as the Board’s review is limited by 20 C.F.R. § 501.2(c) to “the evidence in the case record which was before the Office at the time of its final decision.”

The decision of the Office of Workers' Compensation Programs dated July 6, 1999 is affirmed.

Dated, Washington, DC
April 11, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member