

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN WOLF and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Ogden UT

*Docket No. 02-1300; Submitted on the Record;  
Issued May 16, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$11,040.00; and (2) whether appellant was at fault in the creation of the overpayment.

On December 3, 1997 appellant, then a 56-year-old motor vehicle operator, filed an occupational disease claim for tendinitis of the right shoulder, which he related to his work. He noted that his right shoulder was sore when he shifted gears. The Office of Workers' Compensation Programs accepted appellant's claim for right shoulder rotator cuff tear and authorized a February 23, 1998 surgery to repair the rotator cuff. The Office began paying temporary total disability compensation effective March 12, 1998.

In a February 17, 1999 election form, appellant elected to receive compensation from the Office for his accepted employment injury. Appellant checked a box to indicate that he had received a lump-sum annuity from the Office of Personal Management (OPM), but subsequently indicated that he had checked the wrong box and was attempting to show that he had not received a lump-sum payment.

In a March 17, 1999 letter, the Office informed appellant that it had made a preliminary determination that he had received a \$14,474.84 overpayment in compensation. The Office indicated that appellant received retirement benefits from OPM from June 1, 1998 through February 16, 1999, while he also received compensation from the Office. The Office concluded that appellant was at fault in the creation of the overpayment based on the assumption that a prudent individual would be aware or could reasonably be expected to be aware that receipt of both a retirement annuity and compensation for wage loss was not appropriate. Appellant was informed of his right to request a prereducement hearing and his right to submit additional evidence if he believed that an overpayment had not occurred, disagreed with the amount of the overpayment or believed that he was without fault in the creation of an overpayment.

In an overpayment recovery form, appellant indicated that he had \$350.00 in monthly income as well as \$1,549.00 in monthly compensation. He listed monthly expenses of \$485.00

in rent or mortgage, \$200.00 in food, \$200.00 in utilities, \$50.00 in clothing and \$200.00 in other expenses. Appellant reported that he had \$25,000.00 of debt, on which he was paying \$500.00 a month for a \$15,000.00 debt and had no payments scheduled in a \$10,000.00 debt. Appellant stated that his wife had \$2,500.00 in savings and noted that he was due a \$1,200.00 tax refund. Appellant noted that his compensation payments initially were \$832.20 a month, after receiving an initial lump-sum payment of \$2,667.00. Appellant stated that he did not know he could not receive compensation payments and retirement benefits at the same time. He commented that in his many telephone calls from February to October 1998, he thought someone would have helped him. Appellant requested a prerecoupment hearing.

The Office received a March 25, 1999 letter from OPM which requested that the Office repay the retirement benefits paid to appellant for the period June 1, 1998 to February 28, 1999, when he was also receiving compensation for his employment injury. OPM reported that the amount of the payment to be refunded was \$11,040.00.

In an undated letter, the Office informed appellant that the preliminary determination made in the March 17, 1999 letter was being "voided." It noted that OPM had requested reimbursement for the benefits paid to appellant during the period of dual coverage from June 28, 1998 to February 28, 1999. The Office stated that it would withhold \$280.00 from appellant's continuing compensation checks until the \$11,040.00 amount was recovered. It noted that there would be no interest charged on the debt to OPM. The Office began making deductions from appellant's compensation effective May 23, 1999.

Appellant subsequently indicated that he had a part-time job working for a moving company. In a January 11, 2000 letter, he requested that he be removed from the Office's compensation rolls. In a January 21, 2000 letter, the Office sent appellant election forms to choose which type of benefits he wanted. The Office indicated that appellant could not receive compensation and Civil Service Retirement benefits from OPM at the same time. In a February 2, 2000 response, appellant again elected to receive compensation benefits. The Office made a lump-sum payment to appellant for the period September 8, 1999 through February 17, 2000, deducting the amount to be paid on periodic installments to OPM.<sup>1</sup>

In a February 8, 2000 letter, appellant repeated his request for a prerecoupment hearing. He stated that he had only received \$1,078.00 a month from OPM, which totaled \$8,624.00 during the period in question. Appellant stated that at the same time he was being paid \$1,200.00 a month by the Office, which equaled \$9,600.00 for the same period. He commented that he had never received a breakdown on the amount of money he received in compensation and retirement benefits during the period in question. In a March 19, 2001 letter, appellant again repeated his request for a hearing on the issue of his overpayment, indicating that he disagreed with the amount of the overpayment. In a June 11, 2001 note, appellant changed his request to a request of a review of the written record.

In a July 12, 2001 decision, finalized July 13, 2001, an Office hearing representative noted that the Office had found that appellant had received a \$14,474.84 overpayment in

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<sup>1</sup> In a May 8, 2000 form report, appellant indicated that he had intermittent employment from August 14, 1999 to February 21, 2000. He indicated that he did not receive compensation during this period.

compensation. She also indicated that OPM had found that appellant had received \$11,040.00 during the period of double payment, which had to be reimbursed from continuing compensation payments. The hearing representative found that appellant had received an overpayment of \$11,040.00 from OPM. She further found that appellant was at fault in the creation of the overpayment because, although he claimed he did not know that he could not receive both compensation and retirement benefits at the same time, he should have been expected to know that he could not receive dual benefits. She ordered that the amount withheld from appellant's continuing compensation payments be reduced to \$150.00 a month.

The Board finds that the Office does not have jurisdiction over the issue of appellant's overpayment.

The Office has jurisdiction over overpayments made pursuant to the Federal Employees' Compensation Act under section 8129.<sup>2</sup> In this case, the Office made an initial determination that appellant had received a \$14,474.84 overpayment of compensation paid under the Act because he received compensation benefits from June 1, 1998 to February 16, 1999, while he was also receiving civil service retirement benefits from OPM.

Appellant, however, elected to receive benefits under the Act in preference to retirement benefits paid by OPM. Given this election, the \$14,474.84 paid by the Office was correct, but appellant could not also receive the \$11,040.00 paid by OPM for the same period.<sup>3</sup> The Office properly voided its preliminary determination that appellant received an overpayment of compensation in the amount of \$14,474.84. As there is no overpayment under the Act, the Office does not have jurisdiction to review the overpayment that is the subject of the present appeal.<sup>4</sup>

The Board finds that the Office also does not have jurisdiction over the rate of the repayment of the overpayment to OPM.

Under its statute and regulations, OPM has the authority to waive recovery of overpayments, such as this one, from the Civil Service Retirement and Disability Fund, and, when waiver is denied, to adjust the rate of recovery of the overpayment to avoid financial hardship to the overpaid individual.<sup>5</sup> Thus it is OPM, not the Office, that has the authority to set the rate of recovery of any overpayment to OPM.

OPM regulations also permit a debt to OPM to be offset "from other payments due the debtor or from other agencies...."<sup>6</sup> It appears that OPM is collecting its overpayment by offset of appellant's compensation benefits under the Act, although the case record contains no citation

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<sup>2</sup> 5 U.S.C. § 8129.

<sup>3</sup> 5 U.S.C. § 8116 prohibits concurrent receipt of benefits under the Act with those under OPM's retirement system.

<sup>4</sup> See *Marshall West*, 36 ECAB 490 (1985).

<sup>5</sup> 5 U.S.C. § 8346(b); 5 C.F.R. § 831.1401.

<sup>6</sup> 5 C.F.R. § 831.1306.

of the authority under which the Office is offsetting appellant's compensation to repay his overpayment from OPM and no indication of whether waiver or rate of recovery have been adjudicated by OPM.

The decision of the Office of Workers' Compensation Programs, dated July 12, 2001, finalized July 13, 2001, is hereby reversed.

Dated, Washington, DC  
May 16, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member