

previously before the Board.¹ In a March 11, 2002 decision, the Board found that appellant received a \$4,037.38 overpayment for the period March 1, 1998 through June 19, 1999 because he received dual benefits from the Office of Personal Management (OPM) and the Office. The facts and finding of that decision are hereby incorporated.

In an April 21, 2003 letter, the Office notified appellant that a preliminary overpayment in the amount of \$750.60 was found for the period of October 11, 1997 to March 1, 1998. The overpayment occurred because appellant elected to receive OPM benefits effective October 11, 1997, but compensation was paid by the Office from October 11, 1997 through February 28, 1998.² The Office also found that appellant was at fault in creating the overpayment as he knew or should have known that payments received after October 11, 1997 were not due.

In response, appellant contended that he had no idea how the overpayment occurred and he objected to being found with fault for its creation. In a June 3, 2003 decision, the Office finalized the overpayment determination.³

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during, which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances such as for services actually performed or related to previous services performed in the armed services.⁴

Section 8129(a) of the Act⁵ 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.⁶ 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 not defeat the purpose of this

¹ Docket No. 01-1642 (issued March 11, 2002).

² The gross amount of the overpayment was \$1,269.00, less \$106.92 for life insurance premiums and further reduced by \$411.48 an amount determined by subtracting 27 monthly reimbursements of \$15.24 that OPM reimbursed the Office from March 1999 through May 2001.

³ In an August 13, 2003 letter from OPM to appellant, it was determined that \$36.30 would be deducted monthly from appellant's monthly annuity to repay the first overpayment.

⁴ 5 U.S.C. § 8116(a).

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 5 U.S.C. § 8129(a).

subchapter or would be against equity and good conscience.”⁷ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

ANALYSIS -- ISSUE 1

In the present case, appellant received compensation for the period of October 11, 1997 through February 28, 1998, despite the fact that he was not entitled to compensation for this period. The overpayment occurred because appellant elected OPM benefits effective October 11, 1997, but wage-loss compensation was paid from October 11, 1997 through February 28, 1998. The record contains evidence which shows that appellant received \$1,162.08 in compensation while also receiving benefits from OPM for the same period. From this amount, \$411.48 was reimbursed to the Office by OPM leaving an unpaid balance of \$750.60. Therefore, the Office properly determined that appellant received an overpayment in the amount of \$750.60.⁸

LEGAL PRECEDENT -- ISSUE 2

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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
- (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....”⁹

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

⁷ 5 U.S.C. § 8129(b).

⁸ The Board notes that none of these exceptions provided in U.S.C. § 8116(a) applies in the present case.

⁹ 20 C.F.R. § 10.433(a).

Section 10.433(c) of the Office's regulations provides:

“Whether or not [the Office] determines that an individual was 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 realize that he or she is being overpaid.”¹⁰

ANALYSIS -- ISSUE 2

In determining whether appellant was at fault in the creation of the overpayment, the Office found that appellant accepted a payment, which he or she knew or should have known to be incorrect. The record establishes that appellant elected to receive OPM benefits on March 10, 1998 effective as of October 11, 1997. There is no indication that, when appellant accepted wage-loss compensation payments, which was months before his March 1998 election of OPM benefits, he would or should have known that he was not going to be entitled to them. Therefore, the Board finds that the Office erred in finding appellant with fault in creating the overpayment.¹¹

CONCLUSION

Since it has been determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act, if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹² The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$750.60 overpayment.

¹⁰ 20 C.F.R. § 10.433(c).

¹¹ See *Joseph Jimenez*, Docket No. 98-1494 (issued June 19, 2000).

¹² The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.322, 10.323.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2003 is affirmed with respect to the fact and amount of the overpayment, set aside with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member