

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIUD E. MORFIN and DEPARTMENT OF THE AIR FORCE,
HILL AIR FORCE BASE, Utah

*Docket No. 97-1158; Submitted on the Record;
Issued February 9, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment existed in this case in the amount of \$2,066.92; (2) whether appellant was at fault in the creation of the overpayment; (3) whether the Office abused its discretion in requiring recovery of the overpayment at a rate of \$200.00 per month.

In the present case, the Office accepted that appellant, an aircraft mechanic, sustained electrical shock injuries in the performance of his federal employment on March 9, 1994. Appellant did not return to work following this injury. On January 18, 1995 the Office granted appellant a schedule award for a permanent loss of use of his right arm. The period of the award was noted to be from January 8 to July 1, 1995. Appellant was also in receipt of the Office of Personnel Management (OPM) retirement benefits during the period of the schedule award. On August 10, 1995 the Office forwarded appellant an election of benefits form, requesting that appellant advise whether he elected to receive continuing Civil Service Retirement System (CSRS) benefits of Federal Employees' Compensation Act benefits, in preference to benefits under the Civil Service Retirement Act. A memorandum of record indicates that an Office claims examiner telephoned appellant on August 11, 1995 and advised appellant that he would receive a wage-loss compensation check issued on August 19, 1995 for compensation commencing on July 1, 1995, when his schedule award ended. Appellant was advised that to avoid an overpayment of compensation he was not to cash any further checks he received from OPM. On August 14, 1995 appellant completed an election of benefits form electing receipt of the Federal Employees' Compensation Act benefits commencing August 14, 1995. On August 5, 1996 the Office issued a preliminary determination that an overpayment of compensation occurred in the amount of \$2,066.92 because appellant received dual benefits for the period August 14, 1995 through January 31, 1996 and that appellant was at fault in the creation of the overpayment. Appellant thereafter submitted financial information to the Office. By final decision dated November 5, 1996, the Office found that an overpayment existed in the case in the amount of \$2,066.92 because appellant received dual benefits from OPM and the Office for the period August 14, 1995 to January 31, 1996; that appellant was at fault in the creation of the overpayment because on August 11, 1995 the Office had informed appellant that he was not entitled to receipt of dual benefits for the same time period. The Office also found

that as appellant's monthly income was \$2,226.98 and he had only documented ordinary and necessary expenses of \$918.83, appellant would not suffer financial hardship if repayment was made in the amount of \$200.00 per month.

The Board finds that the Office properly determined that an overpayment existed in this case in the amount of \$2,066.92.

The Federal Employees' Compensation Act provides at section 8116¹ that generally while an employee is receiving the Federal Employees' Compensation Act's disability compensation, he may not receive salary, pay or remuneration of any type from the United States.² The Office's regulations specifically provide at section 10.313(a)³ as follows:

"Except as otherwise provided by law, a person may not concurrently receive compensation pursuant to the [Federal Employees' Compensation] Act and a retirement or survivor annuity under the U.S. Civil Service Retirement Act, the Federal Employees' Retirement System Act, or a retirement or survivor annuity which stands in lieu of either of these Acts.... Such beneficiary shall elect the benefit which he or she wishes to receive, and such election, once made, is revocable."

Appellant was entitled to receipt of OPM benefits during the period of his schedule award. Once his schedule award expired, he was not entitled to continued receipt of the Federal Employees' Compensation Act's disability benefits and OPM retirement benefits. As the record substantiates that appellant did receive OPM retirement benefits as well as the Federal Employees' Compensation Act's disability benefits during the time period of August 14, 1995 through January 31, 1996, an overpayment was created in this case.

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

The Federal Employees' Compensation 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

20 C.F.R. § 10.320 (b), of the regulation provides:

¹ 5 U.S.C. § 8116.

² This section of the Federal Employees' Compensation Act does allow for retirement of CSRS benefits during the period of payment of a Federal Employees' Compensation Act schedule award.

³ 20 C.F.R. § 10.313(a).

⁴ 5 U.S.C. § 8129(b).

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

In the present case, the Office applied the third standard -- acceptance of a payment which the payee either knew or should have been expected to know was incorrect -- in finding appellant at fault in creating the overpayment.

On August 14, 1995 appellant completed an election of benefits form electing to receive the Federal Employees' Compensation Act's disability benefits from that day forward in lieu of CSRS benefits. The Board has previously held that once a claimant makes an election between the Federal Employees' Compensation Act's benefits and CSRS benefits, he knew or should have known that acceptance of both compensation and retirement benefits was incorrect.⁵ The record also substantiates that appellant was advised by the Office on August 11, 1995 that he was to return any checks received by OPM as an overpayment of compensation would otherwise be created. As appellant was specifically advised that he was not entitled to both disability and retirement benefits after August 14, 1995, the record substantiates that appellant knew or should have known that he was receiving benefits to which he was not entitled. As the Office properly found that appellant was at fault in the creation of the overpayment, this overpayment could not be waived.

Appellant's wife advised the Office that appellant was not at fault in the creation of the overpayment because she had taken each of appellant's schedule award checks to his employing agency to verify that he was entitled to receive such. The time period in question, however, is after expiration of the schedule award. Appellant's verification of his entitlement to schedule award monies is not relevant to the issue at hand. Appellant also alleged that his OPM checks were never in the same amount and he felt some of the checks were “catch up” for previous time periods. Appellant's comments regarding his receipt of OPM benefits were general in nature and were not specifically addressed to the time period in question. Appellant's election of benefits on August 14, 1995 and the Office's advice to appellant on August 11, 1995 regarding continuing receipt of OPM benefits substantiates that appellant knew or should have known that he was not entitled to the receipt of the dual benefits in question.

⁵ *Henry C. Dolan*, 39 ECAB 1206 (1988).

Finally, the Board finds that the Office did not abuse its discretion by ordering repayment of the overpayment by deducting \$200.00 from each of appellant's continuing periodic compensation payments.

Section 10.321(a) the Office's regulations⁶ provides: "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."

In the present case, the Office in determining the rate of repayment by deduction from appellant's continuing compensation payments, did consider the factors set forth by this section. In particular, the Office noted that appellant's financial documentation only substantiated ordinary and necessary expenses of \$918.83 and that as appellant had monthly income exceeding \$2,000.00 per month, he would not suffer financial hardship if repayment was made in the amount of \$200.00 per compensation payment.

The decision of the Office of Workers' Compensation Programs dated November 5, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 9, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁶ 20 C.F.R. § 10.321(a).