

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FERNANDO CHAVEZ and DEPARTMENT OF ENERGY,
OPERATIONS CENTER, Albuquerque, NM

*Docket No. 98-459; Submitted on the Record;
Issued July 7, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that an overpayment was created in the amount of \$70,363.42 for the period November 1, 1991 through December 9, 1995.

On August 14, 1978 appellant, a 43-year-old security inspector, injured his lower back when he fell backward from a bench. Appellant filed a claim for compensation benefits, which the Office accepted for contusion of the lumbosacral spine, temporary aggravation of preexisting condition and herniated nucleus pulposus at L4-5. The Office paid appellant compensation for temporary total disability and placed him on the periodic rolls.

Appellant, who was also receiving benefits from the Department of Veterans Affairs (VA) for a 20 percent disability, indicated on a Form CA-1032 dated September 17, 1995 that his VA compensation had increased. The Office noted in a form dated November 15, 1995 that VA had placed him on temporary total disability, which increased appellant's compensation to benefits based on a 100 percent disability. VA had initially increased the percentage of appellant's disability from 20 percent to 40 percent on November 1, 1991.

By letter dated December 20, 1995, the Office advised appellant that, although he was receiving benefits from VA for a 20 percent disability when the Office initially accepted his claim, VA had increased his compensation rate to 40 percent on November 1, 1991 and to 100 percent as of January 1, 1993. The Office advised appellant that he needed to make an election of benefits and choose between the disability compensation he received from the Office under the Federal Employees' Compensation Act and the amount of the increase which he had recently received from VA. The Office informed appellant that he could either continue to receive benefits from the Office in addition to the 20 percent disability compensation from VA, or he could receive the 100 percent disability from VA, but that he could not receive benefits from the Office in addition to the 100 percent disability from VA.

By statements dated April 19 and May 3, 1996, appellant completed the election form, choosing to receive a disability retirement annuity from the Office of Personnel Management (OPM) as of December 9, 1995.

In an undated Office disability claims worksheet, an Office claims examiner calculated that appellant had received an overpayment in the amount of \$70,363.42, the total of all payments made to appellant by the Office from November 1, 1991, the date VA increased his disability rating from 20 to 40 percent, through December 9, 1995, the date appellant elected to receive OPM benefits.

On July 29, 1997 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$70,363.42 for the period November 1, 1991 through December 9, 1995. The Office found that appellant was without fault in the matter because it had failed to take action, *i.e.*, by either adjusting appellant's compensation or requesting a timely election of benefits, when it was notified by appellant of the increase in his VA benefits. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. The Office further advised appellant that, since he was found without fault in the creation of the overpayment, recovery might not be made if it can be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that he could request a prerecoupment hearing with the Branch of Hearings and Review, or he could make his request directly with the Office.

In response to the Office's preliminary finding, appellant checked the box requesting a waiver of the overpayment and a decision by the district Office based on the written evidence. Appellant completed and submitted the attached Form OWCP-20 in which he listed his income, assets and expenses. The Office received appellant's response on August 28, 1997.

By letter dated September 2, 1997, the Office advised appellant that it required additional information regarding his income and his wife's income, in addition to the value of two commercial buildings he owned. The Office further requested a copy of his bank statement; receipts for his expenses; income statements showing the amount of his monthly payments from OPM and VA; and amounts in his checking accounts and credit union accounts.

By letter to the Office dated September 15, 1997, appellant asserted that he had already provided the Office with sufficient information and contested the amount of the overpayment claimed by the Office.¹

In a decision dated October 23, 1997, the Office finalized its preliminary finding that appellant was without fault in the creation of the overpayment, but found that he was not entitled to waiver of the overpayment, as he had not made any argument or presented any evidence that he relinquished a valuable right or changed his position for the worse based on the receipt of the overpayment. The Office further found that recovery of the overpayment would not cause undue hardship, as it calculated that appellant had sufficient monthly income and assets with which to

¹ In response to this letter from appellant, the Office by letter dated September 25, 1997 reiterated that it required the documents it had requested in its preliminary finding and stated that appellant had yet to submit these documents. The Office also reiterated that appellant's overpayment was in the amount of \$70,363.42.

repay the overpayment. The Office waived interest on appellant's repayment schedule and determined that he should repay the overpayment in monthly allotments of \$500.00.

The Board finds that the Office's determination that appellant received an overpayment of compensation in the amount of \$70,363.42 for the period November 1, 1991 through December 9, 1995 was improper.

The Office found that appellant received an overpayment due to the receipt of compensation benefits under the Act in the amount of \$70,363.42 from November 1, 1991, the date VA increased his disability rating from 20 to 40 percent, through December 9, 1995, the date appellant elected to receive OPM benefits. However, pursuant to section 8116(a)(3) of the Act,² there is no provision which prevents a claimant from receiving benefits from both VA and compensation benefits under the Act unless such benefits are payable for the "same injury." The Office, in seeking appellant to elect between benefits from the VA and compensation under the Act, did not make sufficient findings of fact as to whether appellant was receiving benefits payable from VA for the "same injury" for which compensation was being paid by the Office. Without such a determination, it was error for the Office to find that an overpayment had occurred. The Board will reverse the Office's October 23, 1997 determination that an overpayment had occurred in the amount of \$70,363.42.

The decision of the Office of Workers' Compensation Programs dated October 23, 1997 is, therefore, reversed.

Dated, Washington, D.C.
July 7, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

² 5 U.S.C. § 8116(a)(3) provides a limitation on the right to receive compensation under the Act with benefits administered by the Department of Veterans Affairs payable for the same injury or same death.