

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN T. NEHER and DEPARTMENT OF THE ARMY,
DEPARTMENT OF FLIGHT TRAINING, Fort Rucker, AL

*Docket No. 00-2138; Submitted on the Record;
Issued January 23, 2002*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$56,305.46 from December 10, 1995 through September 12, 1998; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On December 2, 1980 appellant, then a 59-year-old flight instructor, filed a claim alleging that he sustained hearing loss while in the performance of duty. The Office accepted appellant's claim for binaural hearing loss. Appellant stopped work in August 1979 and returned to work on October 31, 1995.¹

By letters dated April 9 and July 17, 1998, the Office notified appellant that he was receiving wage-loss benefits from OWCP and retirement benefits provided by the Office of Personnel Management (OPM) but that employees entitled to both OWCP and OPM benefits must elect between them. The Office offered appellant an election of benefits. The record indicated that from October 1994 through 1998 appellant received OPM benefits and that from December 10, 1995 to September 12, 1998 he also received OWCP benefits.

By letter dated September 25, 1998, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$56,305.46, covering December 10, 1995 through September 12, 1998. The Office found that appellant was at fault in creating the overpayment because he did not respond to its April 4 or July 17, 1998 letters and thus violated the dual benefits prohibition.

¹ The Office determined that appellant had no actual physical work restrictions and referred appellant for vocational rehabilitation. On October 14, 1994 the employing establishment offered appellant a position as a training instructor. Appellant accepted the position effective October 31, 1995. In documents from the OPM dated March 1998, it was indicated that appellant had been paid retirement benefits retroactive to October 1994. The OPM further indicated that appellant had been working at this time, however, because of his age he was able to work and receive his retirement annuity.

In a October 6, 1998 response, appellant requested a prerecoupment hearing. Appellant indicated that, on April 17, 1998, he responded to the Office's April 4, 1998 letter regarding the election of benefits and declined to sign the form. Appellant did not submit any financial information.

In a letter dated December 3, 1998, the Office again offered appellant an election of benefits between OPM and OWCP. The Office again indicated that annuity benefits paid by OPM and benefits for wage loss paid by the OWCP were not payable for the same period of time and that employees entitled to both OWCP and OPM benefits must elect which benefit to receive.

In a December 28, 1998 letter, appellant stated that his supplemental OWCP check ceased. He noted that OWCP agreed to make supplemental payments to him because he returned to work at a grade lower than when he left. Appellant indicated that OPM began making annuity payments to him two and a half years after he returned to work and that the payments were retroactive to his first day of reemployment. He added that he never made any request to OPM for benefits. Appellant did not make an election of benefits.

At the prerecoupment hearing on May 24, 1999, appellant testified that he returned to work in October 1995 and received a supplemental check from the employing establishment. Appellant indicated that he received both OPM and OWCP checks for some time and informed representatives of the employing establishment of the checks. He did not return the checks but deposited them. Appellant stated that he never made an election of benefits because he had unanswered questions. Appellant was advised that he needed to make an election of benefits between OPM and OWCP benefits and to complete an overpayment questionnaire.

In a letter dated July 22, 1999, appellant elected to receive benefits from OPM.

In a decision dated March 8, 2000, the hearing representative found that appellant was at fault in creating the overpayment of compensation from December 10, 1995 through September 12, 1998. The hearing representative noted that appellant was sent two letters from the Office specifically informing him that he was not entitled to receive both OPM and OWCP benefits. The hearing representative stated that appellant had, therefore, accepted payments which he either knew or reasonably should have been expected to know were incorrect and was, therefore, at fault in creating the overpayment of compensation. The hearing representative further found that, because appellant was at fault, recovery of the overpayment could not be waived. The hearing representative because he did not have the necessary financial information to develop an equitable repayment directed the Office to collect the overpayment in its entirety because appellant had provided no financial information.

The Board finds that appellant received an overpayment of compensation in the amount of \$56,305.46 from December 10, 1995 through September 12, 1998.

The record reflects that from December 10, 1995 through September 12, 1998 appellant received both OPM and OWCP benefits and that an overpayment occurred in the amount of \$56,305.46. Appellant did not dispute the fact and amount of the overpayment. The record

indicated that from 1998 retroactively to October 1994 appellant was receiving OPM benefits and beginning December 1995 appellant began receiving OWCP benefits.

The Board further finds that has not met its burden of proof with respect to fault in creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment must be recovered unless "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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.³

The implementing regulation⁴ provides that a claimant is at fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Appellant testified that the OPM checks started two and a half years after he returned to work in 1995, approximately mid-1998 and were retroactive to his starting date of reemployment.

The record reflects that up until approximately March 1998 appellant only received Office benefits for which he was duly entitled. At this point in time, according to the documents from OPM⁵ appellant was issued OPM benefits retroactive to 1994. The Board finds that from the period of October 1994 up to an including the date of the retroactive payment, appellant was not at fault as dual benefits had not yet been paid to him. At the time of the retroactive payment, the date of which is unclear from the record, until his OWCP benefits ceased on September 12, 1998, it appears that appellant did receive dual benefit payments from both OWCP and OPM. However, the record is unclear as to the exact dates of the dual payment.

The Board finds that the fault finding in this case should be reversed and eligibility for waiver should be considered for the period of October 1994 up to the date of the retroactive payment. The Board further finds that the Office should determine the exact dates of when the OPM payments commenced and ceased and determine whether appellant was at fault in creating an overpayment during this period.

² 5 U.S.C. § 8129(a)(b).

³ See *Bonnye Mathews*, 45 ECAB 657 (1994).

⁴ 20 C.F.R. § 10.433(a).

⁵ *Supra* note 1.

The decision of the Office of Workers' Compensation Programs dated March 8, 2000 and is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
January 23, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member