

FACTUAL HISTORY

This case was previously before the Board.¹ By decision dated October 21, 2002, the Board reversed the Office's March 13, 2001 decision, terminating appellant's compensation benefits. The Board's October 21, 2002 decision is herein incorporated by reference.

On January 3, 2000 appellant, then a 50-year-old claims representative, filed a traumatic injury claim alleging that he sustained injuries to his head and spine when he slipped on water in a restroom and fell and struck his head. The Office accepted his claim for a closed head injury, cervical strain, left shoulder strain and bilateral hip pain.

By letter dated April 8, 2003, the Office advised appellant of its preliminary determination that an overpayment of \$233.36 had occurred in his case for the period February 1 to 22, 2003, because he had been paid compensation at the augmented three-fourths rate for employees with dependents. The Office indicated that he did not have any qualifying dependents and was entitled to only the basic two-thirds pay rate. The Office further stated that appellant was without fault in the creation of the overpayment and should submit additional evidence if he disagreed with the fact or amount of the overpayment or sought waiver of recovery of the overpayment. The Office stated that, if he sought waiver, he needed to submit a completed overpayment recovery questionnaire and supporting documentation such as copies of income tax returns, bank account statements, bills and cancelled checks, pay slips and other records to support the claimed income and expenses.

On April 25, 2003 the Office received from appellant a completed overpayment recovery questionnaire, in which he stated that he received \$1,061.00 a month in social security benefits, had \$37.55 in cash and a checking account and monthly expenses varying between \$1,035.00 and \$1,210.00. Appellant indicated that he had no dependents.

A May 12, 2003 Office memorandum to the file indicated that appellant had elected to receive compensation benefits under the Federal Employees' Compensation Act in lieu of benefits from the Office of Personnel Management (OPM). His federal compensation payments began on February 1, 2003 and he was placed on the periodic rolls beginning March 23, 2003.

In an undated letter received by the Office on May 13, 2003, appellant stated that he had not been aware of the overpayment of \$233.36, did not cause the overpayment and it would be a hardship to repay. He requested return of the \$233.36 if it had been deducted from his compensation check.

By letter dated May 15, 2003, the Office advised appellant that on May 16, 2003 a direct deposit of \$54,253.95 would be made to his checking account. This check represented retroactive compensation for the period September 26, 2000 to January 31, 2002, along with his first payment under the periodic rolls.

¹ Docket No. 02-890 (issued October 21, 2002).

The record shows that a telephone conference was held on May 19, 2003 between the Office claims examiner and appellant's attorney, Steven E. Brown. The claims examiner noted that appellant was issued a retroactive compensation check for the period September 26, 2000 through January 31, 2003 and Mr. Brown acknowledged that appellant had received a compensation check in the approximate amount of \$54,000.00. The claims examiner advised Mr. Brown that a compensation check for the period August 15 to September 25, 2000 had not been issued and suggested that the \$233.36 overpayment be deducted from that check. Mr. Brown concurred.

By decision dated May 20, 2003, the Office finalized its determination that a \$233.36 overpayment had occurred for the period February 1 to 22, 2003, because appellant had been paid at the incorrect three-fourths compensation rate for employees with dependents. The Office stated that appellant was not at fault in the creation of the overpayment, but waiver of recovery of the overpayment was not warranted. The Office further stated that the \$233.36 would be deducted from his compensation check for the retroactive period August 15 to September 25, 2000.²

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Act³ provide, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.⁴

ANALYSIS -- ISSUE 1

The Office indicated that appellant received monthly compensation at the augmented three-fourths pay rate for employees with dependents for the period February 1 to 22, 2003. As he had no eligible dependents for this period, he was only entitled to monthly compensation at the basic two-thirds rate. The Office determined that an overpayment of \$233.36 occurred for the period February 1 to 22, 2003, the difference between the incorrect three-fourths rate and the basic two-thirds rate. However, there is no evidence of record regarding the specific amount

² The record contains evidence submitted subsequent to the Office's May 20, 2003 decision. However, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board has no jurisdiction to review this evidence for the first time on appeal.

³ 5 U.S.C. § 8129(a).

⁴ Fred A. Cooper, Jr., 44 ECAB 498 (1993).

appellant received for the period February 1 to 22, 2003 or the specific amount he was entitled to receive at the two-thirds rate. The Office stated that an overpayment occurred in the amount of \$233.36, but did not support that finding with a copy of appellant's compensation check for the period in question or a copy of a computer printout showing the date and amount of the check and the specific period covered by the check. Therefore, the Office has failed to establish that an overpayment occurred in this case.⁵

CONCLUSION

The Board finds that the Office failed to establish that there was an overpayment of compensation in the amount of \$233.36.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁵ In light of the Board's resolution of the first issue, the remaining issues in this case are moot.