

disc and permanent aggravation of degenerative disc disease and began paying temporary total disability compensation effective July 15, 2001.

By letter dated August 6, 2003, the Office advised appellant that he was not entitled to receive payments from the Office of Personnel Management (OPM), under the Civil Service Retirement System (CSRS) or Federal Employees' Retirement System (FERS) and compensation from the Office for wage loss at the same time. He was advised to make an election of benefits.

On August 21, 2003 appellant elected to receive OPM benefits, rather than wage-loss compensation from the Office, with an effective date of September 6, 2003. He later changed the effective date to September 7, 2003.¹

On March 22, 2004 the Office noted that appellant was not deleted from the workers' compensation rolls after he elected OPM benefits and, therefore, he had received both OPM benefits and wage-loss compensation for the period September 7, 2003 to February 21, 2004, creating an overpayment of compensation because of the receipt of dual benefits. The record contains computer printouts from the Office showing that compensation checks were sent to appellant for the period September 7, 2003 to February 21, 2004.

By letter dated July 19, 2004, the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$11,832.00, because he had elected to receive OPM benefits effective September 7, 2003, but continued to receive wage-loss compensation from the Office through February 21, 2004. It found that he was not without fault in the creation of the overpayment because he should have been aware, after going through the election of benefits process, that he could not receive OPM and Office wage-loss compensation benefits at the same time and had, therefore, received incorrect compensation payments. Appellant was given 30 days in which to request a telephone conference, request a prerecoupment hearing before the Branch of Hearings and Review or request a final decision.

¹ In a telephone memorandum dated September 15, 2003, an Office claims examiner stated that appellant would change the effective date of his election of benefits to September 7, 2003 in order to avoid the possibility of creating an overpayment.

By decision dated August 26, 2004, the Office found that there was an \$11,832.00 overpayment of compensation in appellant's case and that he was not without fault in the creation of the overpayment.²

By letter dated August 31, 2004 received by the Office on September 8, 2004, appellant indicated that on August 2, 2004 he had submitted financial information and a request for a hearing in response to the July 19, 2004 preliminary overpayment determination. He included a copy of a request for a prerecoupment hearing dated August 1, 2004. In the August 1 and 31, 2004 letters, appellant indicated that he did not know when his checks from the Office were to stop "based on constantly receiving them." He stated that the Office never told him to hold or return compensation checks. Appellant stated that repaying the overpayment would be a hardship and he submitted copies of financial information. On October 30, 2004 he submitted a partially completed overpayment recovery questionnaire.

By decision dated November 23, 2004, the Office denied appellant's request for a prerecoupment hearing on the grounds that it was not submitted within 30 days of the July 19, 2004 preliminary overpayment determination. The Office noted that a final decision concerning an overpayment is not subject to the hearing provisions in 5 U.S.C. § 8124(b).³

LEGAL PRECEDENT -- ISSUE 1

The Office has jurisdiction over overpayments made to a federal employee pursuant to the Act under section 8129.⁴ Section 8116(a) of the Act states that, while an employee is receiving workers' compensation, he or she "may not receive salary, pay or remuneration of any type from the United States," except in return for services actually performed or for certain payments related to service in the Armed Forces ... unless such benefits are payable for the same injury or the same death being compensated for under the Act.⁵ The implementing regulations provide that a "beneficiary may not receive wage-loss compensation concurrently with a Federal

² The Office also determined that recovery of the overpayment would be accomplished through deductions made by OPM from appellant's continuing OPM benefits. As recovery from continuing wage-loss compensation under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the manner of repayment. *Bob R. Gilley*, 51 ECAB 377 (2000). The Board notes that appellant is not entitled to a hearing concerning the August 26, 2004 final overpayment decision. Section 10.440(b) of the Office's regulations provides that "[t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such a decision." See also *Jan K. Fitzgerald*, 51 ECAB 659 (2000).

³ Appellant submitted additional evidence subsequent to the Office decision of November 23, 2004. The Board's jurisdiction 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). Therefore, the Board may not consider this evidence for the first time on appeal.

⁴ 5 U.S.C. § 8129.

⁵ 5 U.S.C. § 8116(a).

retirement or survivor annuity.”⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

ANALYSIS -- ISSUE 1

On August 21, 2003 appellant elected to receive OPM retirement benefits in lieu of wage-loss compensation from the Office under the Act. The record shows that he received wage-loss compensation from the Office in the amount of \$11,832.00, at the same time that he was receiving retirement benefits from OPM, from September 7, 2003 through February 21, 2004.⁸ Because appellant elected to receive OPM retirement benefits effective September 7, 2003, the wage-loss compensation he received from the Office beginning September 7, 2003 constituted an overpayment. He is not eligible to receive wage-loss compensation from the Office and retirement benefits from OPM for the same period.⁹ Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$11,832.00 for the period September 7, 2003 to February 21, 2004.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulation, 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.¹⁰ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.¹² Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient “[a]ccepted a payment which he or she knew or should have known to be incorrect.”¹³ 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.¹⁴

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ Appellant acknowledged in his August 31, 2004 letter, that he had received the compensation checks which created the overpayment.

⁹ *See supra* note 7.

¹⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.*

¹³ 20 C.F.R. § 10.433(a)(3).

¹⁴ 20 C.F.R. § 10.433(b).

ANALYSIS -- ISSUE 2

The record reflects that appellant signed an election of benefits form on August 21, 2003 in which he elected to receive OPM benefits in preference to wage-loss benefits under the Act. The effective date of his election was September 7, 2003. By letter dated August 6, 2003, the Office advised appellant that he was not entitled to receive payments from OPM and wage-loss compensation from the Office at the same time. In an September 15, 2003 telephone memorandum, an Office claims examiner stated that appellant was willing to change the effective date of his election of benefits from OPM to September 7, 2003 in order to avoid the possibility of creating an overpayment. In his August 31, 2004 letter, appellant indicated that he had received wage-loss compensation checks from the Office after the September 7, 2003 election date when OPM benefits were to begin. Considering all the evidence, the Board finds that he knew or should have known upon his election of OPM benefits effective September 7, 2003, that he was not entitled to receive wage-loss benefits from the Office and OPM benefits concurrently. The fact that the Office may have been negligent in continuing to issue appellant wage-loss checks after he elected OPM benefits does not excuse his acceptance of such checks.¹⁵ The Office, therefore, properly found that he was at fault in the creation of the overpayment as appellant should have known that he received an incorrect payment.

On appeal, appellant indicates that repayment of the overpayment would cause hardship for him. However, as the Office properly found that he was at fault in the creation of the overpayment, he is not entitled to consideration of waiver.¹⁶

LEGAL PRECEDENT -- ISSUE 3

Office regulations provides that a hearing request must be sent within 30 days after the date of the preliminary overpayment determination or the right to a hearing is waived.¹⁷

ANALYSIS -- ISSUE 3

There is no evidence of record that the Office received from appellant a request for a prerecoupment hearing within 30 days of the July 19, 2004 preliminary overpayment determination. Therefore, his right to a hearing is deemed waived.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$11,832.00, because he received dual benefits in the form of wage-loss compensation from the Office and OPM benefits for the same period, September 7, 2003 to February 21, 2004. The Board finds that he was not without fault in the creation of the overpayment and, therefore, recovery of the overpayment was not subject to waiver. The Board further finds that the Office properly denied appellant's request for a hearing.

¹⁵ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁶ 20 C.F.R. § 10.433(a).

¹⁷ 20 C.F.R. § 10.432.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 23 and August 26, 2004 are affirmed.

Issued: August 1, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board