

On August 24, 1992 appellant notified the Office that he had returned to work part time on July 20, 1992 and received appropriate wage-loss benefits. Appellant returned to work on a full-time basis on September 20, 1992, at a salary of \$26,286.00. However, he continued to receive compensation from the Office.

On January 27, 1995 appellant received a schedule award for the period February 9, 1994 through November 16, 1995, payable at 75 percent of his pay rate of \$471.69 per week, plus cost-of-living adjustments. His first payment was in the amount of \$17,718.43 for the period February 9, 1994 through January 7, 1995. Continuing checks were made in the amount of \$1,492.00 for each four-week period.

On December 11, 1995 appellant submitted Form EN1032, reflecting that he had been employed since September, 1992 at the rate of \$568.00 per week. Subsequent submissions reflected his continued full-time employment. On June 9, 2005 the employing establishment informed the Office that appellant was a full-time employee with an annual income of \$47,901.00 and that he had been a full-time employee since September 20, 1992.

The record contains several letters from appellant informing the Office that he was in receipt of payments to which he believed he was not entitled.

An automated computer payment system form, bearing a "run date" of July 11, 2005, reflected schedule award payments for the period February 9, 1994 through November 16, 1995. Appellant received a check in the amount of \$17,718.43 for the period February 9, 1994 through January 7, 1995; 12 payments in the amount of \$1,492.00 each for the period January 8 through March 4, 1995; a payment in the amount of \$5.71 for the period March 1 through 4, 1995; 9 payments in the amount of \$1,532.00 each for the period March 5 through November 11, 1995; and 1 payment in the amount of \$225.00 for the period November 12 through 16, 1995. The form also reflected that appellant received compensation for the periods September 20 through November 14, 1992 in the amount of \$1,232.72 and November 15, 1995 through June 11, 2005 in the amount of \$105,582.08, for a total net amount of \$106,914.80.

In a preliminary overpayment decision dated November 29, 2005, the Office found that appellant had received compensation in the amount of \$106,914.80 for the period September 20, 1992 through June 11, 2005, due to the fact that his part-time wage-loss benefits were erroneously reinstated following the expiration of his schedule award on November 17, 1995. The memorandum accompanying the preliminary finding reflects that the Office deducted payments made for the period of the schedule award (February 9, 1994 through January 7, 1995) from the overpayment amount. The Office found appellant at fault in the creation of the overpayment, appellant accepted payments that he knew or should have known were erroneous. The Office advised appellant of actions available to him if he believed that he should receive a waiver instead of repaying the overpayment, including requesting that the Office issue a final decision based on the written evidence currently of record. The Office further advised appellant to submit a detailed explanation of his reasons for seeking a waiver; a completed Form OWCP-20; and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

On December 14, 2005 appellant requested a telephone conference on the issues of fault and waiver. Appellant acknowledged that he had erroneously accepted payments to which he was not entitled after the expiration of his schedule award. He stated that he had made repeated attempts to stop the payments, but was unable to return them, since they were being electronically deposited into his checking account. Appellant submitted an overpayment recovery questionnaire reflecting monthly income of \$2,255.00 and monthly expenses of \$1,839.00.

In a December 22, 1995 telephone conference, appellant explained that he had been confused by the continuation of payments following his schedule award, but thought perhaps he had received two awards. He never received a letter to the effect that the schedule award had expired or that his compensation benefits had been reinstated. Appellant did not realize until sometime in 1996 that an error had been made, at which time he attempted to stop the payments.

By decision dated December 23, 2005, the Office found that an overpayment existed in the amount of \$106,914.80 and that appellant was at fault in the creation or acceptance of the overpayment. The Office further determined that appellant should repay the amount by submitting an initial payment in the amount of \$22,000.00, followed by payments in the amount of \$500.00 per month, commencing January 2006.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.² When an overpayment has been made to an individual 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 the individual is entitled.³

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$106,914.80 for the period September 20, 1992 through June 11, 2005.

Appellant returned to full-time employment on September 20, 1992 and was, thus, no longer entitled to receive compensation benefits after that date. However, he continued to receive compensation from the Office for partial loss of wage-earning capacity after September 20, 1992. The record reflects that appellant received compensation for the periods September 20 through November 14, 1992 in the amount of \$1,232.72 and November 15, 1992 through June 11, 2005 in the amount of \$105,528.08. Since appellant was not entitled to receive compensation from the Office after his return to full-time employment, the Office properly

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

determined that appellant received an overpayment of compensation in the amount of \$106,914.80.

The Office notes that appellant received a schedule award for the period February 9, 1994 through November 16, 1995. The Office properly excluded the schedule award payments received by appellant in the calculation of the overpayment. The Office differentiated between the schedule award payments made for the period February 9, 1994 through November 16, 1995 and the erroneous compensation payments made for the periods specified. The record clearly reflects both the schedule award payments to which appellant was entitled and the compensation payments to which he was not entitled in determining the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides 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. Section 10.433 of the Office's implementing regulation⁵ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the overpayment that occurred between September 20, 1992 and June 11, 2005 and is, therefore, not entitled to a waiver of the overpayment amount.

Appellant returned to full-time work on September 20, 1992, earning more than he did on the date of injury. He continued to receive compensation based on a partial loss of wage-earning capacity. Although his compensation benefits stopped when he began to receive his schedule award, the Office mistakenly reinstated them at the expiration of the schedule award. Appellant indicated that he was aware that he was receiving payments he knew to be incorrect. Appellant notified the Office of his return to work, signaling a change in his entitlement to benefits. Moreover, he repeatedly notified the Office that he was receiving payments to which he was not entitled. Yet, he continued to accept the erroneous payments for over 10 years. The Board has

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433.

held that the Office's erroneous payment of benefits does not excuse an employee from accepting a payment that he knew or should have known to be incorrect.⁶ Under these circumstances, the Board finds that the Office properly found that appellant was at fault in the creation of the overpayment. Therefore, the overpayment was not subject to waiver.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.⁷ However, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.⁸

ANALYSIS -- ISSUE 3

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.⁹ Appellant is not in receipt of continuing compensation. Therefore, this Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$106,914.80 for the period September 20, 1992 through June 11, 2005. The Board also finds that the Office properly determined that appellant was at fault in creating the overpayment and thus not entitled to waiver. The Board further finds that, as appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, it lacks jurisdiction to review recovery of the overpayment.

⁶ See *Ricky Greenwood*, 57 ECAB ____ (Docket No. 05-1739, issued March 10, 2006).

⁷ 5 U.S.C. § 8129(a).

⁸ *Terry A. Keister*, 56 ECAB ____ (Docket No. 04-1136, issued May 23, 2005); see also *Albert Pineiro*, 51 ECAB 310 (2000).

⁹ See *Terry A. Keister*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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