

FACTUAL HISTORY

Appellant, a 47-year-old mail processing equipment mechanic, has an accepted claim for acute bronchitis (16-2055375), which arose on or about March 20, 2003.¹ The Office placed appellant on the periodic compensation rolls effective September 5, 2004. On November 23, 2004 appellant advised the Office of a recent change of address, which the Office acknowledged by letter dated December 3, 2004. On December 7, 2004 appellant informed the Office that he had not received his compensation payment for the four-week period ending November 27, 2004. He reiterated his earlier request to update his records to reflect his recent change of address. On December 28, 2004 the Office sent a second letter acknowledging appellant's change of address request and that appropriate action had been taken. The Office, however, did not initiate the change of address until after it had issued appellant's November 27 and December 25, 2004 compensation payments.

The Office cancelled appellant's November 27, 2004 compensation payment effective December 7, 2004. The Office, however, did not cancel appellant's December 25, 2004 check. On January 5, 2005 the Office issued a duplicate check in the amount of \$5,083.52 for the period October 31 to December 25, 2004. By letter dated January 6, 2005, the Office advised appellant that it had reissued the checks for the period October 31 to November 27, 2004 and November 28 to December 25, 2004. The Office further explained that if appellant had already received and cashed the prior checks for the above-noted periods he should "NOT CASH THE NEW CHECKS!"

The November 27, 2004 check was returned to the Office. Appellant cashed the December 25, 2004 check on January 11, 2005. He wrote the Office on January 11, 2005 explaining that he had picked up the December 2004 check from his prior residence and deposited the funds. Appellant further stated that after depositing the December 2004 check he received a letter from the Office telling him not to do so. He also wrote "I will deposit the new check you sent me since it was combined with the missing November check and you can withhold my check for January or February."

On May 18, 2005 the Office advised appellant of its preliminary finding that he had received an overpayment of benefits in the amount of \$2,541.76 for the period November 28 to December 25, 2004. The Office explained that the overpayment resulted from appellant's receipt of duplicate payments for the same period. The Office further advised appellant that he was at fault in creating the overpayment.

Appellant requested a hearing, which was held on April 20, 2006. He did not dispute the existence or amount of the overpayment. Appellant did, however, challenge the Office's preliminary finding of fault. He claimed that because of mistakes by the Office and the employing establishment he did not receive compensation payments for three months, which created an extreme financial hardship. When the checks sporadically showed up appellant cashed them. He also indicated that the Office further complicated matters by combining two

¹ He also has an accepted claim for aggravation of allergic rhinitis (16-2067050). These two claims have been combined under file number 16-2055375.

missing checks into one and reissuing the check. Appellant acknowledged cashing the combined check, which he claimed occurred prior to his receipt of the Office's January 6, 2005 letter. Because of a recent Chapter 7 bankruptcy filing in April 2005, appellant claimed that returning the overpayment would create a financial hardship and thus, he requested waiver of recovery.² Appellant also submitted a June 1, 2005 overpayment recovery questionnaire.

In a decision dated July 21, 2006, the hearing representative affirmed the May 18, 2005 overpayment. Appellant was found to be at fault in creating the \$2,541.76 overpayment, therefore, waiver of recovery was denied. The hearing representative directed that \$250.00 be withheld every 28 days from appellant's continuing wage-loss compensation.³

LEGAL PRECEDENT -- ISSUE 1

An overpayment is created when a compensation recipient accepts more than one payment covering the same period of lost wages.⁴

ANALYSIS -- ISSUE 1

The record reflects that in late December 2004 and early January 2005 the Office twice disbursed payments of \$2,541.76 for wage-loss compensation for the period November 28 to December 25, 2004. Appellant acknowledged receiving the duplicate payments and cashing the respective checks. Accordingly, the record establishes that the Office overpaid appellant \$2,541.76 for the period November 28 to December 25, 2004.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to 20 C.F.R. § 10.433 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.⁵ The regulation further provides 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.⁶ A recipient will be found to be at fault with respect to creating an overpayment if the individual "[a]ccepted a payment which he or she knew or should have known to be incorrect."⁷

² The U.S. Bankruptcy Court ordered appellant's debt discharged effective October 10, 2005.

³ Effective July 24, 2006 appellant opted to receive a disability retirement annuity through the Office of Personnel Management (OPM) rather than continue to receive wage-loss compensation benefits from the Office.

⁴ *Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

⁵ 20 C.F.R. § 10.433(a) (1999).

⁶ *Id.*

⁷ 20 C.F.R. § 10.433(a)(3) (1999).

ANALYSIS -- ISSUE 2

At the April 20, 2006 hearing appellant testified that he cashed all of the relevant checks prior to receiving the Office's January 6, 2005 letter, which advised him not to cash the January 5, 2006 duplicate check if he had already cashed any prior payments covering the same time period. However, his testimony is not entirely consistent with his representations to the Office. When appellant wrote the Office on January 11, 2005, he explained that he had received the Office's January 6, 2004 letter after having already cashed the December 25, 2004 check but he had yet to cash the January 5, 2005 duplicate check. He specifically told the Office "I will deposit the new check ... since it was combined with the missing November check." Knowing he was not entitled to the full payment of \$5,083.52, appellant suggested that the Office withhold a future "check for January or February." The Office's January 6, 2005 letter clearly advised appellant that he "MAY NOT CASH THE NEW CHECKS!" if he had already received and cashed either of the previously issued checks for November and December 2004. Appellant ignored this warning because he was entitled to at least half of the monies dispersed on January 5, 2005.

Unlike his April 20, 2006 hearing testimony, appellant's January 11, 2005 letter to the Office is contemporaneous with his receipt of the overpayment. It more accurately reflects his knowledge concerning the compensation checks issued. Based on the January 11, 2005 letter, it is clear that in cashing the January 5, 2005 duplicate check appellant accepted a payment which he knew or should have known to be incorrect.⁸ He cashed the January 5, 2005 check after the Office had clearly advised him against it. The Board finds that appellant was at fault in creating the overpayment of benefits. Because appellant was at fault, he is not eligible for a waiver of recovery of the overpayment.⁹

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$2,541.76 for the period November 28 to December 25, 2004 and he was at fault in creating the overpayment.

⁸ 20 C.F.R. § 10.433(a)(3) (1999).

⁹ Appellant proposed that the Board institute a monthly repayment plan of \$100.00 rather than \$250.00, which the hearing representative ordered withheld from appellant's continuing wage-loss compensation. This issue is moot given that appellant opted to receive benefits from OPM rather than continue to receive wage-loss compensation. Because appellant is no longer receiving wage-loss compensation as July 24, 2006, the Board does not have jurisdiction with respect to the Office's method of recovering the overpayment. *Robert S. Luciano*, 47 ECAB 793, 799 (1996).

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board