

FACTUAL HISTORY

On September 24, 2002 appellant, then a 55-year-old maintenance specialist, sustained injury while he was removing ladders from his van.¹ The Office accepted that he sustained a left knee meniscus tear and authorized arthroscopic surgery which was performed on June 18, 2003.

By letter dated February 10, 2004, the Office advised appellant of his diagnosed conditions and his eligibility for benefits. In an attached Form CA-1008, it advised appellant of certain information concerning payment of bills and compensation and dual benefits. On December 22, 2004 the Office noted that appellant had permanent restrictions after his June 18, 2003 knee surgery that could not be accommodated by his position of a facilities maintenance specialist. The employing establishment offered appellant a permanent modified position as a transportation clerk which he accepted on October 22, 2004.

By decision dated April 28, 2005, the Office found that appellant's actual earnings as a full-time transportation clerk effective December 12, 2004 fairly and reasonably represented his wage-earning capacity. In an attached statement, the Office advised, as follows:

“You may not receive [Office] benefits for loss of wage-earning capacity for the same time period as receiving OPM [Office of Personnel Management] benefits. If you receive any benefits from OPM, you should advise this office immediately. You will be asked to make an election between the two benefits....”

In a notice of personnel action the employing establishment advised that appellant retired effective July 29, 2005.

In an October 31, 2005 compensation payment history form, the Office noted that appellant received an overpayment of compensation starting on July 29, 2005, the date of his retirement, because he received compensation benefits and retirement benefits for the same period.

In letters dated October 31, 2005, January 19 and February 16, 2006, appellant informed the Office that he was returning three compensation checks because he was informed by the employing establishment that he was not entitled to additional compensation after his retirement on July 29, 2005. In phone bank memorandum dated January 24, 2006, the employing establishment informed the claims examiner that appellant continued to receive compensation following his retirement on July 29, 2005.

On February 5, 2006 the employing establishment notified the Office that appellant received loss of wage-earning capacity benefits effective December 12, 2004; however, it

¹ The record reflects that appellant filed the following claims: a claim for an injury sustained on September 28, 1990 which the Office accepted for bilateral carpal tunnel syndrome, File No. 25-0570522; a claim for an injury sustained on December 12, 2002 which the Office accepted for sprain or strain of the left knee and leg, File No. 25-2024663; a claim for an injury sustained to the right knee on January 24, 2003 which the Office denied, File No. 25-2025626.

advised that this compensation should have been discontinued effective the date of his retirement on July 29, 2005.

In an election of benefits form dated April 4, 2006, appellant elected to receive civil service retirement benefits from OPM. He noted the effective date of his election was July 29, 2005.

In a disability payment worksheet dated September 29, 2006, the Office noted that appellant retired effective July 29, 2005 but continued to receive wage-earning capacity benefits through March 18, 2006. Appellant received five checks in the amount of \$362.00 each and eight days of compensation from July 30 to August 6, 2005 and returned three checks. The Office calculated that five compensation checks for \$362.00 each equaled \$1,810.00² in addition to eight days of compensation at \$12.93 per day equaled \$103.44, for a total overpayment of \$1,913.44.

In a September 29, 2006 letter, the Office informed appellant that it made a preliminary determination that he had received a \$1,913.44 overpayment of compensation from July 30, 2005 to March 18, 2006 because he continued to receive loss of wage-earning capacity benefits which should have been terminated effective July 29, 2005, the date he elected to receive OPM benefits. Appellant was at fault in creating the overpayment because he had been advised in the April 28, 2005 loss of wage-earning capacity decision that receipt of compensation for wage-loss and retirement benefits represented a dual benefit and was prohibited. The Office noted that subsequent to appellant's retirement on July 29, 2005, he returned three compensation checks with a note indicating that he was not supposed to receive compensation benefits after his retirement. It found that, as he had returned the three compensation checks, he was reasonably aware that he was not entitled to dual benefits from July 30, 2005 to March 18, 2006, and was with fault in creating the overpayment. The Office informed appellant that he had the right to submit evidence or argument if he disagreed with the Office's finding. It also informed appellant that he had a right to a prerecoupment hearing before an Office hearing representative. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

In a letter dated March 27, 2006 received on November 2, 2006, appellant indicated that he was returning the sixth loss of wage-earning capacity check he received after being informed by the employing establishment that he was not entitled to compensation checks since his retirement on July 29, 2005. He attached six photocopies of checks for the periods October 2 to 29, 2005, October 30 to November 25, 2005, December 25, 2005 to January 21, 2006, January 22 to February 18, 2006, February 19 to March 18, 2006 and an illegible copy of another check.

On October 19, 2006 appellant submitted an overpayment questionnaire. He indicated that he was married and listed assets, not including real property, totaling \$122,150.00. Appellant listed monthly income of \$4,667.00 which included a part-time job, retirement and his spouses income. He noted monthly expenses totaling \$4,156.00. No other supporting financial information was submitted.

² The Office calculated that appellant was paid \$362.00 every 28 days, or \$12.93 per day.

By decision dated July 27, 2007, the Office found that appellant received a \$1,913.44 overpayment of compensation from July 30, 2005 to March 18, 2006 for which he was at fault in creating. The overpayment occurred because appellant received loss of wage-earning capacity benefits at the same time he was receiving retirement benefits from OPM. The Office found that appellant was at fault in the creation of the overpayment because he had been advised in the April 28, 2005 loss of wage-earning capacity decision that receipt of dual benefits was prohibited. It noted that subsequent to appellant's retirement on July 29, 2005 he returned three compensation checks with a note indicating that he was not supposed to receive compensation benefits after his retirement. The Office concluded that the fact that appellant returned three compensation checks proved that he was reasonably aware that he was not entitled to both OPM and Office compensation benefits from July 30, 2005 to March 18, 2006. It found that the overpayment of \$1,913.44 was due and payable.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act³ states:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired, retirement pay, retainer pay or equivalent pay for service in the [a]rmed [f]orces or other uniformed services....

“However, eligibility for or receipt of benefits under subchapter III of Chapter 83 of this title, or another retirement system for employees of the [g]overnment, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”⁴

ANALYSIS -- ISSUE 1

On April 28, 2005 the Office issued a loss of wage-earning capacity determination that reduced appellant's compensation. The record reflects that appellant's civil service retirement became effective on July 29, 2005 and he began receiving OPM benefits on July 30, 2005. The

³ 5 U.S.C. § 8116(a).

⁴ *Id.*

record supports that appellant received OPM and compensation benefits under the Act for the period July 30, 2005 to March 18, 2006. The Office properly determined that the receipt of dual benefits resulted in an overpayment of \$1,913.44. Appellant does not dispute that he received the overpayment in question; however, he does dispute the amount of the overpayment. He returned six checks to the Office and provided photocopies of those checks, contending that the amount of overpayment should be less than the Office calculated. However, the record is void of any evidence to suggest that appellant returned six checks to the Office that were not cashed. The mere fact that appellant photocopied the checks is not evidence that the checks were not cashed. The Office noted in its overpayment decision that it received three of the eight compensation checks issued to appellant for the period October 2 to 29, 2005, January 22 to February 18, 2006 and February 19 to March 18, 2006 which were not cashed by appellant. It explained how the overpayment occurred and noted appellant's overpayment was calculated based on his receipt of five compensation checks and eight days of leave.

The overpayment worksheet indicated that from July 30, 2005 to March 18, 2006 appellant was paid \$1,913.44 in compensation benefits while also receiving OPM benefits. Although appellant returned three checks, he accepted five checks in the amount of \$362.00 each and eight days of compensation from July 30 to August 6, 2005. The Office calculated that the five compensation checks equaled \$1,810.00⁵ in addition to eight days of compensation equaled \$103.44,⁶ for a total overpayment of \$1,913.44. The record supports that the overpayment occurred because appellant was paid dual benefits, to which he was not entitled, from July 30, 2005 to March 18, 2006. The Board finds that the Office's determination of the amount of the overpayment is supported by the evidence of record.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows:

“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.⁷ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.”⁸

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual

⁵ The Office calculated that appellant received \$362.00 every 28 days multiplied by 5 totaling \$1,810.00.

⁶ The Office calculated that appellant was paid \$362.00 every 28 days, or \$12.93 per day multiplied by 8 days totaling \$103.44.

⁷ 5 U.S.C. § 8129(b).

⁸ *Gregg B. Manston*, 45 ECAB 344 (1994).

knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁹

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“(b) 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. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁰

ANALYSIS – ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant accepted the compensation checks in question, he knew or should have known the payments were incorrect.¹¹ The record establishes such knowledge.

On appeal, appellant indicated that he did not dispute the fact of the overpayment but disputed the amount of the overpayment and asserted that he returned six of the compensation checks received and cashed three compensation checks which totaled \$827.44.

The Board notes that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting a payment which he knew or should have known to be incorrect.¹² The Office advised appellant in the April 28, 2005 loss of wage-earning capacity decision that he “may not receive [Office] benefits for loss of wage-earning capacity for the same time period as receiving OPM benefits. If you receive any benefits from OPM, you should advise this office immediately. You will be asked to make an election between the two benefits.” Appellant knew or should have known that, as of April 28, 2005, the date of the loss of wage-earning capacity decision, that he was not entitled to receive Office benefits for the same time period as receiving OPM benefits.

Additionally, the record reflects that appellant contacted the Office in letters dated October 31, 2005, January 19 and February 16 and March 26, 2006 to advise that he was returning three compensation checks because he had been informed by the employing establishment that he was not entitled to additional compensation after his retirement on

⁹ *Kenneth E. Rush*, 51 ECAB 116 (1999).

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ *See Claude T. Green*, 42 ECAB 174, 278 (1990).

¹² *See Russell E. Wageneck*, 46 ECAB 653 (1995).

July 29, 2005. This also demonstrates that appellant knew or should have known that he was accepting incorrect compensation payments.

The Board finds that the Office properly found that appellant accepted compensation payments from July 30, 2005 to March 18, 2006 which he knew or should have known were incorrect. As appellant was at fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,913.44 may not be waived.¹³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,913.44 for the period July 30, 2005 to March 18, 2006 and that appellant was at fault in creating the overpayment.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹³ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).

¹⁴ With his appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).