

**United States Department of Labor  
Employees' Compensation Appeals Board**

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D.C., Appellant )

and )

DEPARTMENT OF THE AIR FORCE, OTIS )  
AIR NATIONAL GUARD BASE, MA, Employer )

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**Docket No. 08-1933**  
**Issued: February 2, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 3, 2008 appellant filed a timely appeal from a June 4, 2008 decision of the Office of Workers' Compensation Programs that found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$2,575.93; and (2) whether the Office properly determined that he was at fault in accepting the overpayment and was therefore not entitled to waiver.

**FACTUAL HISTORY**

On November 12, 2002 appellant, then a 50-year-old equipment operator, filed a Form CA-1, traumatic injury claim, alleging that he injured his right hand at work. The claim was accepted for tenosynovitis of the hand and wrist, late effect of injury to nerve roots, spinal plexus and nerves of shoulder and sprain of neck. Appellant returned to limited duty in March 2003 and

stopped work on May 4, 2004 because the employing establishment could not accommodate his work restrictions. He was placed on the periodic rolls effective June 13, 2004 and received compensation payments by direct deposit.

By letter dated May 22, 2006, the Office advised appellant that it had been informed that he was receiving or could be entitled to receive retirement benefits provided by the Office of Personnel Management (OPM). It informed him that annuity benefits paid by OPM and benefits for wage loss paid by the Office were not payable for the same period of time, and that employees entitled to both Office wage-loss compensation and OPM benefits must elect which benefit to receive. On May 30, 2006 appellant elected retirement benefits from OPM, effective July 2006. An August 21, 2006 telephone memorandum advised that he began receiving OPM benefits on April 13, 2006. Appellant continued to receive Office wage-loss compensation until August 5, 2006.

On January 9, 2008 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$8,228.66 for the period March 19 to August 5, 2006 because he received wage-loss compensation while he was also receiving OPM retirement benefits. It found appellant at fault in the creation of the overpayment because he accepted a payment he knew or reasonably should have known was incorrect. An overpayment worksheet contained in the record advised that appellant received \$8,228.66 in compensation for the period April 13 to August 5, 2006.

Appellant requested a decision on the written evidence and conceded that he had received an overpayment in compensation. He noted that he had reviewed his bank statements and had received three deposits from OPM, on April 21, August 4 and 31, 2006. Appellant also submitted an overpayment recovery questionnaire, bank statements from the Pentagon Federal Credit Union and Citizens Bank and financial information.<sup>1</sup>

On June 4, 2008 the Office finalized the determination that an overpayment in compensation had been created. It modified the period of the overpayment to July 1 to August 5, 2006 and the amount of the overpayment to \$2,575.93. The Office found that, based on appellant's election of OPM benefits beginning July 2006, July 1, 2006 was considered to be his first date of nonentitlement to Office benefits and again found appellant at fault in its creation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of the Federal Employees' Compensation Act<sup>2</sup> states that, while an employee is receiving workers' compensation benefits, 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, including benefits administered

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<sup>1</sup> Appellant submitted six bank statements from Citizens Bank dating from March 17 to August 4, 2006 showing deposits in varying amounts that were identified as "DOL Treasury Misc Pay." He also submitted bank statements from the Pentagon Federal Credit Union with an April 21, 2006 deposit described as "DFAS-Cleveland Fed Salary," and deposits dated August 4 and 31, 2006 described as "US Treasury 312 Civil Serv."

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under the Act.<sup>3</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>4</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>5</sup>

### ANALYSIS -- ISSUE 1

By appellant's own admission, he received both, wage-loss compensation under the Act and OPM retirement benefits, after his election of OPM benefits. Since a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,<sup>6</sup> an overpayment in compensation was created.<sup>7</sup>

The Board, however, finds this case is not in posture for decision regarding the amount of the overpayment. A telephone memorandum contained in the record advised that appellant's OPM retirement benefits were effective April 21, 2006, and this date was used in the preliminary overpayment finding. In its final overpayment determination, the Office found that, based on appellant's election of OPM benefits beginning July 2006, July 1, 2006 was considered to be his first date of nonentitlement to Office benefits. Appellant submitted bank statements showing direct deposits to Citizens Bank and three direct deposits to a Pentagon Federal Credit Union account.<sup>8</sup> Because there is no clear indication in the record, such as correspondence from OPM, to show when appellant's OPM retirement benefits began, the Board finds this case is not in posture for decision regarding the amount of the overpayment and the case must be remanded to the Office to ascertain exactly when appellant's OPM retirement benefits began in order to determine the correct amount of the overpayment in compensation.

The Board also notes that, based on the Board's determination in the first issue in this case, the second issue is not in posture for decision at this time. The Board, however, notes that, even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.<sup>9</sup> The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.<sup>10</sup> It is not appropriate, however, to

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<sup>3</sup> 5 U.S.C. § 8116(a).

<sup>4</sup> 20 C.F.R. § 10.421(a).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>8</sup> *Supra* note 1.

<sup>9</sup> *William E. McCarty*, 54 ECAB 525 (2003).

<sup>10</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004).

make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>11</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that an overpayment in compensation had occurred. The case is not in posture, however, for a decision regarding the amount of overpayment, whether appellant was at fault for any overpayment period and, if found without fault, whether he would be entitled to waiver.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 4, 2008 be affirmed in part, vacated in part and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: February 2, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).