

FACTUAL HISTORY

In early 1996, the Office accepted that appellant, then a 45-year-old distribution clerk, sustained several left shoulder conditions due to his repetitive work duties, including a rotator cuff sprain, tendinitis and impingement syndrome. In early 1999, it accepted that he sustained impingement syndrome of his right shoulder due to his repetitive work duties. Appellant received compensation from the Office for periods of disability.

In an October 8, 1999 decision, the Office determined that appellant's actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity. In this decision, appellant was advised that he was not entitled to Office benefits while in receipt of Office of Personnel Management (OPM) benefits. The decision stated, "You are advised that receipt of [Office] benefits for loss of wage-earning capacity and receipt of an annuity from OPM constitutes a dual benefit. If you receive such benefits from OPM, you should so advise this [O]ffice immediately. You will be asked to make an election between the two benefits."

In a Form EN1032 completed on February 11, 2008, appellant indicated that he had been receiving both OPM and Office benefits.¹ He advised the Office via telephone that he had received OPM benefits since he retired from the employing establishment effective June 19, 2004 and had received both OPM and Office benefits since that time.

The Office asked appellant to elect whether to receive Office or OPM benefits.² In a form received by the Office on April 16, 2008, appellant elected to receive OPM benefits effective June 19, 2004. The record documents that appellant received \$11,376.03 in Office compensation for the period June 19, 2004 to April 2, 2008. The documents identify the amount of Office compensation appellant received every 28 days.

In an April 28, 2008 letter, the Office advised appellant of its preliminary determination that he received an \$11,376.03 overpayment of compensation because he received Office compensation for the period June 19, 2004 to April 2, 2008 while also receiving OPM benefits.³ It also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. The Office advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. The Office requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

¹ At that time, appellant was receiving \$938.00 per month in OPM benefits and \$238.00 every four weeks in Office benefits. He had also provided similar information regarding benefits received on prior EN1032 forms.

² Appellant advised the Office via telephone that he wished to elect OPM benefits because such benefits were greater than Office benefits.

³ The Office indicated that appellant elected to receive OPM benefits effective June 19, 2004.

In a form received by the Office on May 7, 2008, appellant requested waiver of the overpayment and indicated that he did not believe he was at fault in its creation.⁴ On May 7, 2008 the Office also received a completed Form OWCP-20.⁵

In a July 2, 2008 decision, the Office finalized the \$11,376.03 overpayment of compensation for the period June 19, 2004 to April 2, 2008. It found that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. The Office determined that the overpayment would be repaid through payments of \$100.00 each month.⁶

On July 18, 2008 the Office received appellant's request for a prerecoupment hearing regarding his overpayment.⁷ In an August 5, 2008 decision, it denied his request for a prerecoupment hearing as untimely filed.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act⁸ 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 his duty.⁹ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”¹⁰

Section 8116(a) of the Act provides that while an employee is receiving compensation 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, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.¹¹

⁴ Appellant did not check the portion of the form for requesting a prerecoupment hearing.

⁵ On this form, appellant stated, “I did not know that OPM and OWCP was the same. I did not know what this money was for.”

⁶ As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay every 28 days. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁷ Appellant completed the hearing request form on July 15, 2008. He alleged that he had not received a Form OWCP-20 from the Office. However, in May 2008 appellant returned a completed Form OWCP-20 to the Office.

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8102(a).

¹⁰ *Id.* at § 8129(a).

¹¹ *Id.* at § 8116(a).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an \$11,376.03 overpayment of compensation. In the present case, appellant received Office compensation for the period June 19, 2004 to April 2, 2008. However, he was not entitled to Office compensation for this period because he had elected to receive OPM benefits effective June 19, 2004 and began receiving such benefits starting that date. The record contains evidence which shows that appellant received \$11,376.03 in Office compensation for the period June 19, 2004 to April 2, 2008 when he was not entitled to receive any Office compensation. Therefore, the Office properly determined that appellant received an \$11,376.03 overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act¹² 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.¹³ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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.”¹⁴ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁵

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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....”¹⁶

¹² *Id.* at §§ 8101-8193.

¹³ *Id.* at § 8129(a).

¹⁴ *Id.* at 8129(b).

¹⁵ *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁶ 20 C.F.R. § 10.433(a).

Section 10.433(c) of the Office regulations provides:

“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.”¹⁷

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant was at fault in the creation of the \$11,376.03 overpayment because he accepted payments which he knew or should have known to be incorrect.¹⁸ In an October 8, 1999 decision, the Office specifically advised appellant that he was not entitled to Office benefits while in receipt of OPM benefits. The decision stated, “You are advised that receipt of [Office] benefits for loss of wage-earning capacity and receipt of an annuity from OPM constitutes a dual benefit. If you receive such benefits from OPM, you should so advise this office immediately. You will be asked to make an election between the two benefits.”

Appellant acknowledged receiving both Office and OPM benefits since June 19, 2004, the date that he retired from the employing establishment. He believed that the Office and OPM payments were for different purposes but he did not provide any basis for this apparent belief.¹⁹ The Board notes that the explicit notice to appellant that he could not receive both Office and OPM benefits and the fact that appellant received such dual benefits for almost four years shows that he knew or should have known that the payments were incorrect. There is nothing unduly complex about the circumstances of the overpayment or appellant’s ability to understand these circumstances that would lead to the conclusion that he did not know or should not have known that he was being overpaid between June 19, 2004 and April 2, 2008.²⁰ Even though the Office may have been negligent in continuing to issue appellant checks after learning that he was receiving both Office and OPM benefits, this does not excuse appellant’s acceptance of such checks which he knew or should have known were incorrect.²¹ Because the Office properly found that appellant was at fault in the creation of the overpayment, it also properly found that the overpayment was not subject to waiver.²²

¹⁷ *Id.* at § 10.433(c).

¹⁸ *See supra* note 16 and accompanying text.

¹⁹ In a May 2008 Form OWCP-20, appellant stated, “I did not know that OPM and OWCP was [sic] the same. I did not know what this money was for.”

²⁰ *See supra* note 17 and accompanying text.

²¹ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

²² *See supra* note 15 and accompanying text.

LEGAL PRECEDENT -- ISSUE 3

The Office regulations on the recovery of overpayments provide that before collecting an overpayment, it must provide the claimant with written notice of the fact and amount of overpayment, the finding of fault, the right to submit evidence challenging the fact, amount, or finding of fault, and the right to request waiver of the overpayment.²³ The regulations also provide that a claimant is entitled to submit additional evidence in writing or at prerecoupment hearing, that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment, and that “[f]ailure to request the hearing within this 30-day time period shall constitute a waiver of that right.”²⁴

ANALYSIS -- ISSUE 3

The Office issued a preliminary finding of overpayment on April 28, 2008 and informed appellant that any request for a prerecoupment hearing must be filed within 30 days of the date of the preliminary finding. It did not receive a request from appellant for a prerecoupment hearing until July 18, 2008. As appellant did not request the prerecoupment hearing within 30 days of the required 30-day time period, the Board finds that he waived his right to this hearing.

CONCLUSION

The Board finds that the Office properly determined that appellant received an \$11,376.03 overpayment of compensation and that he was at fault in creating the overpayment such that the overpayment was not subject to waiver. The Board further finds that the Office properly denied appellant’s request for a prerecoupment hearing as untimely filed.

²³ 20 C.F.R. § 10.431.

²⁴ *Id.* at § 10.432.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 5 and July 2, 2008 decisions are affirmed.

Issued: February 23, 2009
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