



the employing establishment withdrew the position. He received vocational rehabilitation services.

In a letter received by the Office on April 7, 2005, the employing establishment noted that appellant had retired effective September 30, 2004. An SF-50 form was enclosed confirming appellant's retirement. The employing establishment reported appellant had received a separation incentive of \$25,000.00. Appellant also continued to receive compensation benefits for wage loss. By decision dated December 21, 2006, the Office reduced his compensation on the grounds that his wage-earning capacity was represented by the selected position of electronics technician. Appellant received a schedule award for 14 percent permanent impairment to the right arm covering the period May 13, 2007 to March 13, 2008.<sup>1</sup>

By letter dated February 26, 2007, the Office notified appellant of its preliminary determination that an overpayment of \$25,000.00 occurred because he concurrently received compensation for wage loss and the separation pay incentive. It found that appellant was at fault in creating the overpayment. By decision dated April 23, 2007, the Office finalized the overpayment determination. It found the overpayment would be recovered by deducting \$300.00 from appellant's continuing compensation payments.<sup>2</sup>

In a May 21, 2008 letter, the Office issued an amended preliminary overpayment determination. The amount listed was \$17,831.84, less the \$3,600.00 already paid. The Office modified the original fault determination to find that appellant was without fault in creating the overpayment and explained the requirements for consideration of waiver of the recovery of the overpayment. Appellant was provided an overpayment recovery questionnaire (OWCP-20) and advised that failure to submit necessary financial information within 30 days would result in denial of waiver. He did not respond.

By decision dated June 25, 2008, the Office finalized its preliminary determination of a \$17,831.84 overpayment during the period September 30, 2004 to March 2, 2005. It denied waiver of the recovery of the overpayment on the grounds that appellant did not submit a response to the preliminary overpayment notice.

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

The Act, at 5 U.S.C. § 8102, provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. There are limitations on the right to receive compensation and while an employee is receiving compensation he may not receive salary, pay or remuneration of any type from the United States.<sup>3</sup> Office regulations, at 20 C.F.R. § 10.421(c), of the implementing regulations provides that an employee may not receive compensation for total disability concurrently with

---

<sup>1</sup> Appellant did not request review of the March 24, 2008 decision.

<sup>2</sup> On April 11, 2008 appellant elected to receive retirement benefits in lieu of benefits under the Federal Employees' Compensation Act.

<sup>3</sup> 5 U.S.C. § 8116. There are specific exceptions noted in this section, such as military pensions or Veterans Administration benefits for the same injury, which are not at issue in this case.

separation pay. When the Office discovers concurrent receipt, it must declare an overpayment of compensation and give due process rights.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes that on September 30, 2004 appellant received a voluntary separation incentive payment (VSIP) of \$25,000.00. Appellant also received compensation for temporary total disability. Under 5 U.S.C. § 8116 and 20 C.F.R. § 10.421(c), appellant is not entitled to receive both compensation and separation pay concurrently. Therefore an overpayment of compensation was created. As noted in *Willard S. Moger, Jr.*,<sup>5</sup> FECA Bulletin No. 96-2 defined separation pay as a “buyout” offered by the employer to encourage an employee to leave Federal Government service voluntarily. A claimant in receipt of compensation benefits, however, may not concurrently receive separation pay and payment of wage loss for total disability.<sup>6</sup> The record establishes that an overpayment was created in this case.

### **LEGAL PRECEDENT -- ISSUE 2**

Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. However, in order to apply uniform standards to all claimants, offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.<sup>7</sup> Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The Office initially calculated the amount of overpayment amount using the “dollar-for-dollar” method. The amended decision attempted to recalculate the amount of the overpayment using the “number of weeks” method. However, the Office did not provide any explanation to appellant as to how or why the calculation of the amount the overpayment had changed. The

---

<sup>4</sup> See *L.J.*, 59 ECAB \_\_\_ (Docket No. 07-1844, issued December 11, 2007).

<sup>5</sup> 51 ECAB 550 (2000).

<sup>6</sup> See *Robert B. Hutchins*, 52 ECAB 344 (2001); *Michael A. Grossman*, 51 ECAB 673 (2000). Under section 8116, an injured employee must make an election between compensation for disability and retirement pay.

<sup>7</sup> See *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005).

<sup>8</sup> The Board notes that the Office’s Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17 (April 1996) originally provided that separation pay could be offset by either a dollar-for-dollar amount or based on the period of weeks’ salary the payment represented. Following the Board’s decisions in *Schaack*, *supra* note 7 and *L.J.*, *supra* note 4, the Office revised this section of the Procedure Manual in FECA Transmittal No. 09-05, issued June 1, 2009. Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of weeks worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated.

Board is unable to determine whether the “number of weeks” method was properly applied in this case. It is not clear how the Office determined that the appropriate period of the overpayment was September 30, 2004 to March 2, 2005. Appellant was not advised of the overpayment period until the final decision on June 25, 2008. The Office did not explain the method being used or the evidence on which it relied. In addition, the record contains little evidence regarding the compensation paid during the period of the overpayment. There is a brief worksheet that reports the gross and net compensation as \$17,831.84 for the period, without further explanation. It is well established that the Office, as part of its adjudicatory function, must make findings of fact and a statement of reasons for the decision reached.<sup>9</sup> It is well established that, in an overpayment situation, it must explain the basis for its finding of overpayment and a clear statement indicating how the amount of overpayment was calculated.<sup>10</sup>

The case will accordingly be remanded to the Office for proper findings as to the amount of the overpayment. After such further development as it deems necessary, it should issue an appropriate decision.<sup>11</sup>

### CONCLUSION

The Board finds that fact of overpayment is established as appellant concurrently received separation pay and compensation for wage loss. However, further development is required as to the amount of overpayment and whether he is entitled to waiver of the recovery thereof.

---

<sup>9</sup> See *Robert N. Johnson*, 51 ECAB 480 (2000); see also 20 C.F.R. § 10.126.

<sup>10</sup> See *Jenny M. Drost*, 56 ECAB 587 (2005); *Aquilline Braselman*, 49 ECAB 547 (1998).

<sup>11</sup> Based on this decision, the issue of whether the Office properly denied waiver of recovery of the overpayment is premature.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 25, 2008 is affirmed with respect to fact of overpayment. The decision is set aside on the issues of amount and waiver of the recovery of the overpayment and the case is remanded for further action consistent with this decision of the Board.

Issued: July 20, 2009  
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