



overpayment of compensation for which he was at fault such that it was not subject to waiver.<sup>1</sup> The Board noted that the record did not contain sufficient documentation to establish that he received \$3,281.21 in compensation from April 1 to June 10, 2006 that he was not entitled to receive and that the Office did not provide any explanation for its determination that he was at fault in the creation of the overpayment. The Board remanded the case to the Office for further adjudication of the overpayment. The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office supplemented the record and determined that appellant received \$3,281.21 in wage-loss compensation for the period April 1 to June 10, 2006. In a form signed on April 26, 2006, appellant elected to receive OPM benefits in lieu of Office compensation effective April 1, 2006.<sup>2</sup>

In a November 28, 2007 letter, the Office advised appellant of its determination that he received a \$3,281.21 overpayment of compensation from April 1 to June 10, 2006 because he received wage-loss compensation in that amount after he elected to receive OPM benefits effective April 1, 2006.<sup>3</sup> It made a preliminary determination that he was at fault in the creation of the overpayment. The Office found that appellant knew or reasonably should have known that he was not entitled to receive dual benefits from the Office and the OPM. It requested that he complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

In a January 2, 2008 decision, the Office found that appellant received a \$3,281.21 overpayment of compensation for the period April 1 to June 10, 2006 for which he was at fault such that the overpayment was not subject to waiver. It directed appellant to send it a check in the amount of \$3,281.21.<sup>4</sup>

At an April 23, 2008 hearing before an Office hearing representative, appellant asserted that he did not realize that he was not entitled to receive Office compensation for the period April 1 to June 10, 2006 because he had not yet received OPM benefits for that period when he

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<sup>1</sup> Docket No. 07-237 (issued October 10, 2007). The Office accepted that on November 18, 1983 appellant, then a 29-year-old mail handler, sustained a lumbar sprain and left herniated nucleus pulposus at L4-5 due to lifting a mail sack. In early 2006 appellant was receiving compensation for total disability. He retired from the employing establishment on disability retirement effective February 17, 2006 and elected to receive retirement benefits from the Office of Personnel Management (OPM) effective April 1, 2006 instead of disability compensation from the Office. In its October 11, 2006 decision, the Office determined that appellant received a \$3,281.21 overpayment of compensation for the period April 1 to June 10, 2006 because he received wage-loss compensation totaling that amount after he elected to receive OPM benefits effective April 1, 2006. It found that appellant was at fault in the creation of the overpayment such that the overpayment was not subject to waiver.

<sup>2</sup> In an undated letter received by the Office on July 24, 2006, an official from the OPM stated that it would be paying appellant OPM benefits beginning April 1, 2006 at a rate of \$1,198.77 per month.

<sup>3</sup> The Office indicated that appellant had also received OPM benefits for the period April 1 to June 10, 2006.

<sup>4</sup> 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 method of repayment dictated by the Office. *Levon H. Knight*, 40 ECAB 658, 665 (1989). Appellant requested a prerecoupment hearing in connection with the claimed overpayment but it is unclear from the record whether such a hearing was held.

received the Office compensation.<sup>5</sup> He testified that he did not receive OPM benefits for the period April 1 to June 10, 2006 until some point in the summer. In an overpayment questionnaire form completed on May 11, 2008, appellant indicated that he had \$5,658.00 in monthly income and \$4,870.00 in monthly expenses. He reported \$20.00 in assets comprised of checking account funds.<sup>6</sup>

In a July 10, 2008 decision, an Office hearing representative affirmed the January 2, 2008 decision finding that appellant received a \$3,281.21 overpayment of compensation for the period April 1 to June 10, 2006 and that the overpayment was not subject to waiver. She modified the Office's July 10, 2008 decision to reflect that appellant was not at fault in the creation of the overpayment but found that his financial circumstances did not allow for waiver of the overpayment. The hearing representative found that appellant's monthly income exceeded his monthly expenses by \$788.00.

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

Section 8102(a) of the Act<sup>7</sup> 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.<sup>8</sup> 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.”<sup>9</sup>

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.<sup>10</sup>

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<sup>5</sup> Appellant did not contest that he received \$3,281.21 in Office compensation for the period April 1 to June 10, 2006 through direct deposits into his bank account.

<sup>6</sup> The monthly expenses were comprised of \$1,650.00 for mortgage payments, \$750.00 for food, \$600.00 for utilities, \$820.00 for credit card payments and student loan obligations, \$1,000.00 for an automobile loan and insurance and \$50.00 for miscellaneous expenses.

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8102(a).

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *Id.* at § 8116(a).

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

The Board finds that appellant received a \$3,281.21 overpayment of compensation from April 1 to June 10, 2006. Appellant received wage-loss compensation during this period despite the fact that he also received OPM benefits. This constituted a receipt of dual benefits as he was not eligible to receive OPM benefits and workers' compensation for the same period.<sup>11</sup> The record contains evidence, including a manual adjustment form, which shows that appellant received \$3,281.21 in wage-loss compensation from April 1 to June 10, 2006. After his election of OPM benefits he received an annuity for this same period from OPM.<sup>12</sup> Therefore, the Board finds that appellant received a \$3,281.21 overpayment.

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

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>13</sup> These statutory guidelines are found in section 8129(b) of the Act which states, "Adjustment or recovery [of an overpayment] 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."<sup>14</sup> If the Office finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>15</sup> According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice

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<sup>11</sup> See *Franklin L. Bryan*, 56 ECAB 310 (2005); *John L. Wolf*, 48 ECAB 148 (1996).

<sup>12</sup> The record contains an OPM form showing that appellant elected to receive OPM benefits starting April 1, 2006 as well as documents showing that he received OPM benefits for the period April 1 to June 10, 2006. The documents of record regarding the Office and OPM payments are supported by appellant's testimony before an Office hearing representative.

<sup>13</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>14</sup> 5 U.S.C. § 8129(b).

<sup>15</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). Office procedure provides that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

that such payments would be made, gives up a valuable right or changes his position for the worse.<sup>16</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>17</sup>

### ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the \$3,281.21 overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. His monthly income exceeds his monthly ordinary and necessary expenses by \$788.00.<sup>18</sup> As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00 he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.<sup>19</sup> Because he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it was not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.<sup>20</sup>

Appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Office did not abuse its discretion by refusing to waive the overpayment.

### CONCLUSION

The Board finds that appellant received a \$3,281.21 overpayment of compensation. The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

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<sup>16</sup> 20 C.F.R. § 10.437(a), (b).

<sup>17</sup> *Id.* at § 10.437(b)(1).

<sup>18</sup> The Office properly found that appellant had \$5,658.00 in monthly income and \$4,870.00 in monthly expenses comprised of \$1,650.00 for mortgage payments, \$750.00 for food, \$600.00 for utilities, \$820.00 for credit card payments and student loan obligations, \$1,000.00 for an automobile loan and insurance and \$50.00 for miscellaneous expenses.

<sup>19</sup> *See supra* note 15 and accompanying text.

<sup>20</sup> *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' July 10, 2008 decision is affirmed.

Issued: July 28, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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