

noting that she cashed compensation checks from January 3 to April 2009 but returned two checks in the amount of \$87.00 each to the Office on August 6, 2009. On August 28, 2009 she returned another compensation check to the Office.

FACTUAL HISTORY

The Office accepted that on December 24, 1996 appellant, then a 56-year-old nursing assistant, sustained a left elbow fracture and dislocation as a result of slipping on ice on a sidewalk. It authorized left elbow surgery, which was performed on January 23, 1997. By decision dated January 31, 2001, the Office reduced appellant's compensation benefits based on its finding that her actual wages as a program support clerk effective March 28, 1999 fairly and reasonably represented her wage-earning capacity. It determined that she was entitled to \$69.00 every four weeks.

On April 9, 2009 appellant elected to receive retirement benefits under OPM effective January 3, 2009. A January 2, 2009 Form SF-50 indicated that she had been approved for retirement from the employing establishment effective that date. On January 3, 2009 OPM advised the Office that appellant's monthly retirement annuity of \$1,474.00 commenced effective January 3, 2009. However, appellant continued to receive monetary compensation of \$87.00 every four weeks through July 4, 2009 based on a wage-earning capacity determination. The amount of the checks totaled \$571.71.

On July 10, 2009 the Office notified appellant of its preliminary determination that she received an overpayment of \$571.71 from January 2 to July 4, 2009 because she received dual benefits from both the Office and OPM. It determined that she was paid her \$87.00 every four weeks for a total overpayment of \$571.71. The Office found that appellant was without fault in the creation of the overpayment. It requested that she complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. The Office notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

In an August 4, 2009 note, appellant stated that "enclosed with this note are two checks of \$87[.00] each which have not been cashed." Images of the compensation checks indicated that they were payable for the periods May 10 to June 6, 2009 and June 6 to July 3, 2009.

By decision dated August 11, 2009, the Office finalized its determination that appellant received an overpayment of \$571.71 for the period January 2 to July 4, 2009 and that she was without fault in the creation of the overpayment. It advised her to forward a check for the entire amount as repayment. In an accompanying August 11, 2009 letter, the Office advised appellant that it did not receive the two \$87.00 compensation checks she claimed to have enclosed with her correspondence.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Act¹ 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.²

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered 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.³ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁴ The beneficiary must elect the benefit that he or she wishes to receive.⁵

ANALYSIS -- ISSUE 1

Appellant elected to receive OPM retirement benefits effective January 3, 2008 in lieu of compensation under the Act for partial disability based on a loss of wage-earning capacity determination. As she elected to receive OPM retirement benefits effective January 3, 2009, any wage-loss compensation received after that date constitutes an overpayment of monetary compensation.⁶ The record establishes that the Office continued to issue compensation checks to appellant until July 4, 2009. The Board finds that she received an overpayment in compensation from January 2 to July 4, 2009 due to the receipt of dual benefits from OPM and under the Act.

Appellant contended that an overpayment was not created as she did not receive any retirement benefits until April 2009; however, OPM advised the Office that her benefits commenced on January 3, 2009. The weight of the evidence of record establishes the fact of overpayment based on the receipt of dual benefits.

With respect to the amount of the overpayment, the Office found that appellant received compensation in the amount of \$87.00 every four weeks from January 2 to July 4, 2009 or a total of \$571.71 in compensation. In response to the July 10, 2009 preliminary notice of overpayment, appellant stated on August 4, 2009 that she was enclosing two checks in the amount of \$87.00 both of which had not been cashed. The checks cover the period May 10 to

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8102.

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.421(a).

⁵ *Id.*

⁶ *Franklin L. Bryan*, 56 ECAB 310 (2005).

June 6, 2009 and June 6 to July 3, 2009. The Office advised appellant on August 11, 2009 that it did not receive any compensation checks.

In *Jessie M. Banks*,⁷ the Board set aside the Office's determination of the amount of overpayment. While the employee acknowledged receiving and cashing two of the four compensation checks she received, it was not established that she had cashed checks covering certain periods of the overpayment that she maintained were returned to the Office. The Board noted that the record contained no evidence the employee cashed a check for a specific period of compensation and that evidence from the Department of the Treasury did not identify the dates covered by any cancelled checks. The case was remanded for further development on the amount of the overpayment. In the present case, the Office's final overpayment decision did not address appellant's August 4, 2009 correspondence. There was no factual finding made as to whether certain checks were returned by appellant to be cancelled, as alleged.⁸ For this reason, the case will be remanded to the Office for further development on the amount of the overpayment. After such further development, it should issue an appropriate decision. Based on this determination it is premature to address the issue of waiver.⁹

As to appellant's contention on appeal that she returned a third compensation check to the Office on August 28, 2009, the Board's jurisdiction is limited to consideration of the evidence of record at the time of the Office's August 11, 2009 final decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation because she received dual benefits from OPM and the Office. The Board finds, however, that the case is not in posture for decision regarding the amount of the overpayment.

⁷ Docket No. 00-481 (issued March 16, 2001).

⁸ The record contains a photocopy of the checks issued for May 10 to June 6, 2009 and June 6 to July 3, 2009. There is no evidence regarding cancellation or whether the checks were cashed.

⁹ Regarding repayment of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. *Ronald E. Ogden*, 56 ECAB 278 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2009 decision of the Office of Workers' Compensation Programs be affirmed, in part, as to the fact of overpayment. The decision is set aside, in part and the case remanded for further proceedings consistent with this decision on the amount of overpayment.

Issued: June 22, 2010
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