

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH R. JIMENEZ and U.S. POSTAL SERVICE,
POST OFFICE, Uplands, CA

*Docket No. 98-1494; Submitted on the Record;
Issued June 19, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$40,653.21 for the period January 10, 1994 through January 16, 1995; and (2) whether the Office abused its discretion by denying waiver of the overpayment.

On May 19, 1988 appellant, then a 37-year-old supervisory mail clerk, filed an occupational disease claim, alleging that factors of employment caused stress. The Office accepted that he sustained employment-related major depression and aggravation of essential arterial hypertension, and he was placed on the periodic rolls. The Office continued to develop the claim and, by decision dated January 18, 1994, the Office terminated appellant's benefits. An Office form dated April 6, 1994 indicates that appellant had begun retirement processing with the Office of Personnel Management (OPM). He timely requested a hearing that was held on July 14, 1994 and, in a decision dated December 6, 1994, an Office hearing representative reversed the prior decision on the grounds that the referee examiner, relied upon by the Office, was not a Board-certified specialist. The Office was instructed to retroactively reinstate benefits and refer appellant to another impartial examiner.

The Office then referred appellant to Dr. Harvey W. Oshrin, who is Board-certified in psychiatry and neurology. He submitted a January 29, 1995 report in which he advised that appellant's condition was not employment related. By check dated March 3, 1995, the Office paid appellant retroactive compensation for the period February 6, 1994 through January 16, 1995, totaling \$36,503.13. In a letter dated April 6, 1995, the Office informed appellant that it proposed to terminate his compensation based on the opinion of Dr. Oshrin. On that same date the Office advised appellant of his rights regarding a choice between compensation from the Office and retirement benefits from OPM. By decision dated May 16, 1995, the termination decision was finalized, effective January 17, 1995. On May 22, 1995 appellant requested a hearing that was held on April 9, 1996. In a June 21, 1996 decision, an Office hearing

representative affirmed the prior decision terminating appellant's compensation but noted that the case contained outstanding fiscal issues.

By letter dated July 25, 1996, the Office again informed appellant of his rights under the Federal Employees' Compensation Act and OPM and provided him with an election form. Appellant did not respond and by letter dated November 21, 1996, the Office again informed him of his rights, stating that, if no response was received within 30 days, it would be assumed that he elected OPM benefits and the Office would declare an overpayment in compensation. On February 19, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$234,907.84, which arose because during the period August 13, 1988 through January 16, 1995 appellant was receiving benefits from OPM and under the Federal Employees' Compensation Act.

On March 5, 1997 appellant requested a hearing that was held on October 22, 1997. At the hearing appellant testified that he received his first OPM payment in September 1994 that was retroactive to January 1994. He stated that he tried to inform the Office that he was receiving retirement benefits from OPM when he received the \$36,000.00 check from the Office. Appellant testified regarding his current income and expenses and submitted a handwritten financial statement. By decision dated January 2, 1998 and finalized February 18, 1998, the hearing representative found that an overpayment in compensation had been created in the amount of \$40,653.21, based on his recomputation of the overpayment from January 10, 1994. He further found appellant was not entitled to waiver and that recovery should be made at the rate of \$175.00 per month.

The Board finds that the Office properly determined that appellant received an overpayment in compensation in the amount of \$40,653.21, resulting from his dual receipt of benefits.

In this case, the record establishes that the Office hearing representative properly calculated an overpayment of \$40,653.21. Appellant's wage-loss compensation was initially terminated effective February 6, 1994. He applied for and received retirement benefits from OPM commencing January 10, 1994. On March 3, 1995 he was issued retroactive compensation from the Office for the period February 6, 1994 through January 16, 1995.

Section 8116 of the Act¹ defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

(1) "(a) While an employee is receiving compensation under this subchapter, 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, he may not receive salary, pay, or remuneration of any type from the United States...."²

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8116(a).

On February 17, 1998 the Office completed a disability payment worksheet and attached a computer printout, which indicated that during the period January 10, 1994 through January 16, 1995 appellant was paid wage-loss compensation totaling \$40,653.21.

Section 8116(b) of the Federal Employees' Compensation Act requires an employee to elect whether to receive compensation benefits under the Federal Employees' Compensation Act or civil services disability benefits from the OPM.³ In the present case, by letters dated April 6, 1995, July 25 and November 21, 1996, the Office informed appellant of his rights under the Federal Employees' Compensation Act and OPM and furnished election forms. In the November 21, 1996 letter, the Office further informed appellant that, if no response was received within 30 days, it would be assumed that he elected OPM benefits and the Office would declare an overpayment in compensation. Appellant did not respond. Thus, as appellant was not entitled to receive dual benefits from the Office and OPM for the same period, he received an overpayment in compensation totaling \$40,653.21.

The Board also finds that the Office properly denied waiver of this overpayment.

Section 8129(a) of the Act⁴ provides that, where an overpayment of compensation has been made 'because of an error of fact or law,' adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): "Adjustments 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 [the Act] or would be against equity and good conscience."⁵

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.323(b) of the Office's regulations⁶ provides:

"Recovery of an overpayment is considered to be inequitable and against good conscience when an individual in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.... 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 on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."

³ 5 U.S.C. § 8116(b); 20 C.F.R. § 10.313(a).

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.323(b).

In this case, the Office found that appellant was not at fault in the creation of the overpayment of compensation. Regarding waiver, the evidence does not show that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment.

Section 10.322(a) of the Office's regulations⁷ provides that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship, be depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed the resource base or \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment. Section 10.322(d) states:

"Assets. An individual's assets include:

- (1) Liquid Assets -- cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like; and
- (2) Non-liquid Assets -- the fair market value of property such as a camper, second home, extra automobile, jewelry, etc.

Assets for these purposes shall not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the primary family domicile, or income producing property if the income from such property has been included in comparing income and expenses."

At the hearing appellant testified that he owned a lot that was worth approximately \$10,000.00. He also provided a handwritten financial statement that indicated he had an income from OPM of approximately \$1,385.00 per month with expenses of approximately \$1,300.00. The record further indicates that appellant's benefit from OPM as of January 1, 1997 was \$1,576.00 per month. As appellant's testimony and financial records provided to the Office establish that he had an asset worth \$10,000.00, the Office did not abuse its discretion by refusing to waive the overpayment of compensation.

Finally, regarding repayment of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as in this case, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.⁸

⁷ 20 C.F.R. § 10.322(a).

⁸ See *Robert S. Luciano*, 47 ECAB 793 (1996).

The decision of the Office of Workers' Compensation Programs dated February 18, 1998 is hereby affirmed.

Dated, Washington, D.C.
June 19, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member