

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. GROSSMAN and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

*Docket No. 98-2511; Submitted on the Record;
Issued September 21, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether an overpayment of \$5,182.72 occurred when appellant concurrently received compensation for temporary total disability and a six-month lump-sum payment of base salary as a special retirement option; and (2) whether the Office of Workers' Compensation Programs properly denied waiver of recovery.

On February 4, 1985 appellant sustained an injury while in the performance of his duties. The Office accepted his claim for temporary adjustment disorder with mixed emotional features and paid compensation for temporary total disability.

As part of an effort to restructure and downsize its operations, the employing establishment made available to many of its employees a special retirement option that included a six-month lump-sum payment of base salary. Appellant took early voluntary retirement under this option effective November 21, 1992 and received the six-month lump sum. Without notice of appellant's retirement option, the Office continued to pay compensation for temporary total disability. In a letter dated March 10, 1993, the Office advised appellant that his compensation would cease beginning March 7, 1993 because he was being paid the six-month lump sum. The Office further advised that he would remain ineligible to receive compensation for disability until at least May 21, 1993, when the six-month period covered by his lump-sum retirement payment ended. The Office provided appellant with an election of benefits form. On June 24, 1993 appellant elected compensation in lieu of retirement benefits. With his signature on the election form appellant acknowledged the following: "I understand that I am not entitled to receive [compensation] benefits and CSRS/FERS benefits concurrently (except for a schedule award)." The Office resumed compensation for temporary total disability on July 25, 1993.

On May 6, 1998 the Office issued a preliminary determination that an overpayment of \$5,182.72 occurred because appellant received a lump-sum early out payment that was not credited toward any compensation entitlement. The Office explained that appellant was entitled to only \$8,127.00 in compensation from May 22 through July 23, 1993. He instead received

\$13,309.72 in compensation from November 21, 1992 through March 6, 1993. The Office found that the difference of \$5,182.72 represented an overpayment. The Office further found that appellant was without fault in the creation of the overpayment and explained the conditions under which he might obtain a waiver of recovery. The Office informed appellant of the following:

“If you feel that you should receive a waiver instead of repaying the overpayment, within 30 days of the date of this letter you may request a telephone conference with the district Office or you may request that the district Office make a decision on your request based on the written evidence only. Alternatively, you may request a prerecoument hearing with a representative of the Branch of Hearings and Review. Whatever course you choose, you should (1) submit a detailed explanation of your reasons for seeking waiver; (2) fully complete and submit the enclosed overpayment recovery questionnaire; and (3) attach any supporting documents in your possession.

“The financial documents that you submit should include income tax returns, bank account statements, bills and cancelled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. This financial information is necessary to assist this Office in deciding whether or not to waive the overpayment. In the event that waiver is not granted, this information will be used to decide how to recover the overpayment. No collection action shall be taken until a final decision on your request for waiver has been reached.

“It should also be noted that under the provisions of section 10.324 of Title 20 of the Code of Federal Regulations, the failure to furnish the financial information requested on the enclosed questionnaire (or other information required by this office in connection with a request for waiver) within 30 days will result in a denial of waiver of the overpayment, and no further request for waiver will be considered until the requested information is furnished.”

In a letter dated May 15, 1998, appellant asserted that he did not have enough information to make an informed decision on the options available to him. He requested that the Office provide him significantly more information. On June 15, 1998 the Office explained certain matters and provided him a copy of the relevant materials concerning his overpayment.¹ In a letter dated June 28, 1998, appellant complained that the Office had not answered all of his questions. He requested that the Office answer each of his 10 questions (several of which

¹ The Office provided appellant copies of the following: an internal memorandum, used to support the preliminary determination, explaining the fact and amount of overpayment; the March 10, 1993 letter to appellant explaining the fact of overpayment; FECA Bulletin No. 93-1 (issued October 12, 1992) explaining that the lump sum and compensation were not concurrently payable; an internal worksheet showing the overpayment from November 21, 1992 through March 6, 1993 and the underpayment from May 22 through July 23, 1993; computer sheets showing the gross amounts of overpaid and underpaid compensation; and a detailed computerized log of appellant's compensation payment history during the relevant periods.

contained multiple questions) and that he be given 60 days from receipt of the answers to request waiver.

In a decision dated August 7, 1998, the Office finalized its preliminary determination. The Office noted that appellant had submitted no financial information to allow any consideration of waiver, and for this reason the Office denied waiver of recovery. The Office found that \$500.00 should be withheld from continuing compensation payments effective August 16, 1998, which would absorb the overpayment by approximately May 1999.

The Board finds that an overpayment arose when appellant concurrently received compensation for temporary total disability and a six-month lump-sum payment of base salary as a special retirement option.

It is well established that an injured employee must make an election between compensation for disability and retirement pay; the employee may not receive both.² Section 8116(a) of the Federal Employees' Compensation Act ("Act" or "FECA") places the following limitations on the right to receive compensation:

"(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 that installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the [Department of Veterans Affairs] unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

"However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title."³

² See *John Russell Miller*, 6 ECAB 544 (1954) (U.S. Navy retirement pay); *Marcel F. Hubert*, 6 ECAB 539 (1954) (Coast Guard retirement pay); *Mariquita Atcheson (George Atcheson, Jr.)*, 5 ECAB 570 (1953) (annuity under the Foreign Service Retirement System); *Ben D. Pate*, 4 ECAB 70 (1950) (annuity under the Civil Service Retirement Annuity Act of July 3, 1926); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000 (January 1997).

³ 5 U.S.C. § 8116(a).

Section 10.313(a) of the implementing federal regulations specifically prohibits as a dual benefit the concurrent receipt of compensation and a retirement annuity:

“Except as otherwise provided by law, a person may not concurrently receive compensation pursuant to the Act and a retirement or survivor annuity under the U.S. Civil Service Retirement Act, the Federal Employees’ Retirement System Act, or a retirement or survivor annuity which stands in lieu of either of these Acts, such as Foreign Service or Central Intelligence Agency disability and retirement programs. Such beneficiary shall elect the benefit which he or she wishes to receive, and such election, once made, is revocable.”⁴

The Board has recently addressed the issue of dual benefits in the case of *Willard S. Moger, Jr.*⁵ In that case, the employee elected to receive compensation for total disability beginning October 1, 1995. The record established that he also received separation pay during that same period following his voluntary retirement. The Board found that the employee received an overpayment as a result of his dual receipt of separation or early retirement incentive pay and compensation for total disability.

FECA Bulletin No. 93-1, issued on October 12, 1992, specifically addresses the special retirement option appellant elected effective November 21, 1992. The FECA Bulletin quotes the provisions of 5 U.S.C. § 8116(a) and explains that, because the six-month lump-sum payment did not fall into any of the categories that were statutorily excluded, it must be considered remuneration subject to that section of the Act, which governs dual benefits. The FECA Bulletin states: “The six-month period will start the effective date of the employee’s retirement and no claimant will be entitled to compensation payments until that period expires.”

Because appellant concurrently received a six-month lump-sum payment of base salary as a special retirement option and compensation for temporary total disability, the Board finds that he erroneously received a dual benefit. As a result an overpayment of \$13,309.72 in compensation occurred from November 21, 1992 through March 6, 1993.

Following this overpayment appellant received the balance of his six-month lump-sum payment through May 21, 1993. He was thereafter entitled to compensation for temporary total disability, but compensation did not resume until July 25, 1993. As a result an underpayment of \$8,127.00 in compensation occurred from May 22 to July 25, 1993.

In its preliminary determination and final decision, the Office found that an overpayment of \$5,182.72 occurred in appellant’s case. The Office calculated this amount by offsetting the \$13,309.72 overpayment with the \$8,127.00 underpayment. Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁶ In *Califano v. Yamasaki*,⁷ the Supreme Court held

⁴ 20 C.F.R. § 10.313(a).

⁵ 51 ECAB ____ (Docket No. 99-1798, issued June 15, 2000).

⁶ See generally FECA Circular No. 82-48, “Overpayments and Waiver” (December 1, 1982).

that due process required the Social Security Administration to defer any measures to recover suspected overpayments until, *inter alia*, it informed the claimant of the grounds for waiver under the Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act, and the Director of the Office of Workers' Compensation Programs has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under FECA.⁸

The Office's offset practice precludes the proper consideration of waiver of the entire amount of the overpayment, which in this case is \$13,309.72. The Office in fact considered only whether to waive a portion of this amount. The Office's practice also permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.321(a). Had the Office resumed appellant's compensation at some later point, so that the underpayment equaled or exceeded the overpayment, the Office's offset practice would have effected an immediate recovery of the entire overpayment with no consideration of waiver and no consideration of the financial hardship that recovery might impose. The Board finds that such a practice denies administrative due process with respect to the amount offset.

This issue arose in the case of *Jerry P. Ryan*.⁹ It was the employee in that case who contended that the Office should have deducted the amount of an underpayment from his overpayment of compensation. The Board rejected that argument on the grounds that such an offset could only be detrimental to the employee because the employee was entitled to both the amount of the underpayment and to consideration of waiver of the entire amount of the overpayment.

The Board will accordingly modify the Office's August 7, 1998 decision to find that an overpayment of \$13,309.72 occurred in appellant's case, representing the compensation for temporary total disability erroneously paid from November 21, 1992 through March 6, 1993.

With respect to the \$5,182.72 of overpayment adjudicated by the Office, the Board finds that the Office afforded due process and properly denied waiver of recovery.

Section 10.324 of Title 20 of the Code of Federal Regulations, entitled "Responsibility for providing financial information," states as follows:

"In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in section 10.322 [pertaining to waiver on the grounds that recovery would defeat the purpose of the Act], as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the

⁷ 442 U.S. 682 (1979).

⁸ This policy was announced in FECA Bulletin 80-35, issued October 20, 1989 and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management.

⁹ Docket No. 95-2588 (issued October 16, 1997).

information within 30 days of request shall result in denial of waiver, and no further requests for waiver shall be entertained until such time as the requested information is furnished.”

When the Office issued its preliminary determination on May 6, 1998, it properly advised appellant of the basis of the overpayment and of the grounds for waiver under the Act. The Office notified appellant that he had 30 days to request waiver and advised that he should submit a detailed explanation of his reasons. The Office also advised appellant to complete and submit an enclosed overpayment recovery questionnaire and to attach any supporting documents in his possession. The Office emphasized that this financial information was necessary to assist the Office in deciding whether or not to waive the overpayment and, in the event that waiver was not granted, to decide how to recover the overpayment. The Office further advised appellant of the provisions of 20 C.F.R. § 10.324.

Appellant submitted no overpayment recovery questionnaire and no financial information.¹⁰ Pursuant to 20 C.F.R. § 10.324 the Office properly denied waiver with respect to the \$5,182.72 of overpayment adjudicated.

Appellant remains entitled to the \$8,127.00 in compensation underpaid from May 22 to July 25, 1993. On remand the Office shall afford appellant due process with respect to the unadjudicated balance of the overpayment, also \$8,127.00, and shall issue an appropriate final overpayment decision with respect to this balance.

¹⁰ On appeal appellant submitted an overpayment recovery questionnaire and supporting documents. The Board’s jurisdiction, however, is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review this new evidence.

The August 7, 1998 decision of the Office of Workers' Compensation Programs is modified to find that an overpayment of \$13,309.72 occurred in appellant's case and is affirmed as modified. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
September 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member