U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANUEL GONZALEZ, JR. and DEPARTMENT OF THE TREASURY, SECRET SERVICE, Washington, DC

Docket No. 01-2140; Submitted on the Record;
Issued January 8, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant received a $22,920.56 overpayment of compensation for the period January 1, 1995 through October 7, 2000 due to an underdeduction of comparable benefits from a disability retirement annuity; (2) whether the Office of Workers' Compensation Programs properly found that appellant was not without fault in creation of the overpayment and that therefore the overpaid amount was not subject to waiver; and (3) whether the Office properly required recovery of the overpayment of compensation by deducting $200.00 per month from his continuing compensation payments.

The Office accepted that on May 8, 1990 appellant, then a 40-year-old special senior agent in charge of security details and currency forgery investigations, sustained an aggravation of a herniated C6-7 cervical disc in a motor vehicle accident.[1] Appellant stopped work on December 15, 1991 and did not return.[2] He received a disability retirement annuity from the District of Columbia Police and Firefighter's Retirement Board effective May 28, 1993. His case was placed on the periodic rolls effective February 8, 1993.[3]

[1] Appellant also sustained other occupational injuries: a July 2, 1996 lumbar sprain due to tripping and falling while running next to a motorcade jaw, neck, shoulder and dental injuries sustained in a January 17, 1998 assault (Claim No. A25-132274); a lumbar strain sustained in an April 1, 1978 assault (Claim No. A25-135457; left hip, shoulder neck and groin injuries sustained on November 21, 1981 when he fell off a bicycle while on patrol at Camp David. He underwent anterior cervical fusion at C5 and C6 on April 11, 1989, related to his occupational cervical condition. These claims are not before the Board on the present appeal.

[2] Appellant submitted periodic reports supporting continuing total disability dated October 1991 through November 2000 from Dr. Ian J. Reynolds, an attending Board-certified orthopedic surgeon, finding him totally disabled for work due to a ruptured C6-7 disc with bilateral radiculopathy, degenerative disc disease at C4-5 with severe foraminal stenosis and severe chronic pain. Reports from May 1993 through 1994 from Dr. Moshe Allon, an attending Board-certified neurologist and anesthesiologist, state that appellant was extremely limited in activities of daily living.

[3] The Office periodically required appellant to submit an affidavit of earnings and employment (Form EN-1032),

In a February 8, 1993 letter, the Office advised appellant of his obligation to report "any retirement income, disability income or compensation benefits from any federal agency. This is because a recipient of compensation benefits under the Federal Employees' Compensation Act is not permitted to receive benefits under certain other federal programs, including the Civil Service retirement program."

In an August 26, 1993 letter, the Office noted that "after the 1993 cost of living increase," appellant received $3,478.52 every four weeks in compensation. The Office noted that appellants' "compensation was suspended when he received disability retirement." The Office explained the Act's provision that "where state or local benefits for an injured officer are less than that payable under the Act, additional compensation may be paid by the Office," and that appellant may be entitled to such benefits.

In a September 27, 1993 letter, the employing establishment stated that beginning August 1, 1993, appellant received $2,864.00 per month in retirement annuity benefits, with periodic cost-of-living increases. Appellant provided 7 percent of the annuity contribution, and the employing establishment contributed the remaining 93 percent.

In a March 21, 1994 letter, the Office advised appellant that "comparable benefits" must be deducted from his wage-loss compensation under the Act. The Office noted that it had "been advised that [appellant] receive[d] a monthly pension of $2,864.00 The pension is 93 percent comparable based on an employer contribution of 93 percent and an employee contribution of 7 percent." Multiplying the $2,864.00 monthly pension by the 93 percent comparable benefit proportion equaled $2,663.52 per month "$2,663.52 multiplied by 12 [months] divided by 52 [weeks] equaled $614.66 per week." The Office then multiplied the $614.66 weekly comparable benefit portion of the pension by four weeks per month, resulting in a total of $2,458.63 comparable pension benefit every four weeks. The Office then explained:

> "FECA entitlement is based on pay rate when disability began which is $48,782.00 plus $12,196.00 AUO = $60,978.00 divided by 52 [weeks per year] = $1,172.66 weekly pay rate multiplied by ¾ = $879.50 FECA pay rate per week. [Appellant was] entitled to a cost-of-living increase (CPI) on March 1, 1993 of 2.9 percent. $879.50 multiplied by 2.9 percent equals $25.51. $879.51 plus $25.51 equals $905.01 FECA pay rate per week. $905.01 pay rate multiplied by four equals $3,620.04 FECA each four weeks.

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advising him of his obligation to report any employment or other income to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. Appellant complied by completing and returning all forms sent to him. In a September 16, 1992 Form EN-1032, he stated that he had been on leave without pay status from the employing establishment from December 1991 onward, and that his retirement from the District of Columbia Metropolitan Police and Fire System was pending. In Forms EN-1032 dated August 3, 1994, September 20, 1996, September 17, 1997, October 19, 1998 and September 29, 2000, appellant noted receiving disability retirement benefits from the District of Columbia Metropolitan Police Retirement System, but did not specify the dollar amount. In a September 22, 1999 form, appellant reported that his disability pension was in the amount of $3,161.49 per month from May 1993 through September 1999.

"FECA entitlement $3,620.04 minus pension $2,458.63 equals $1,161.41 every four weeks."

The Office explained that since the Act's "benefits are contingent upon the benefits payable by State and local organizations, please advise us of any changes to comparable benefits."[4]

In a December 21, 1998 letter, the employing establishment stated that appellant's monthly annuity payments were as follows: $2,921.00 in 1995 with a 2 percent cost-of-living increase; $2,980.00 in 1996 with a 2 percent cost-of-living increase; $3,048.00 in 1997 with a 2.3 percent cost-of-living increase; $3,118.00 in 1998 with a 2.3 percent cost-of-living increase.

In a July 26, 2000 letter, the Office advised appellant that it required information about his pension on and after March 1, 1999, and that it was his "responsibility to ensure that this information is provided to us as promptly as possible. Please note that you should notify this Office immediately upon receipt of an increase in your pension benefits to reduce the possibility of an overpayment of compensation."

In a September 1, 2000 letter, the employing establishment stated that appellant received an annuity through the District of Columbia Police and Firefighter's Retirement System, with monthly amounts as follows: $3,214.00 effective February 1, 1999; $3,362.00 effective July 1, 1999; $3,522.00 effective February 1, 2000; $4,403.00 effective May 1, 2000.

In an October 16, 2000 file worksheet, the Office calculated a $22,920.56 overpayment of compensation. The Office found that as of January 1, 1995, appellant's compensation benefits were $2,507.57 every four weeks, $2,558.22 as of January 1, 1996, $2,616.59 as of January 1, 1997, $2,676.68 as of January 1, 1998, $2,759.10 as of January 1, 1999, $2,886.15 as of July 1, 1999, $3,023.50 as of February 1, 2000, and $3,779.81 as of May 1, 2000. Using these figures, the Office calculated that appellant received the following amounts of comparable benefits while receiving compensation for total disability: $32,687.96 in 1995; $33,439.58 in 1996; $34,109.11 in 1997; $37,855.90 from January 1, 1998 to January 31, 1999, $14,780.79 for the period February 1 to June 30, 1999; $22,161.50 for the period July 1, 1999 to January 31, 2000; $9,718.39 for the period February 1 to April 30, 2000; $21,598.91 for the period May 1 to October 7, 2000. The Office totaled the amount of compensation paid from January 1, 1995 through October 7, 2000, equaling $206,352.25. As appellant was also paid $183,431.69 in comparable benefits for this same period, this resulted in an overpayment of compensation of $22,920.56, the difference between the two amounts.

In a November 18, 2000 letter, appellant inquired as to why his monthly compensation check for that month had been reduced from $1,815.36 to $494.19. He enclosed a November 4, 2000 benefits statement showing gross compensation of $4,274.00, $3,779.81 of "overpayments," leaving a net amount of $494.19.

[4] In April 21, 1997 and December 11, 1998 letters, the Office advised appellant and the employing establishment of the need for updated information regarding appellant's comparable benefits. The most recent information of record indicated that as of August 1, 1994, appellant received $2,864.00 per month in retirement annuity.

In a December 6, 2000 letter, the Office explained that appellant's compensation benefits were reduced "based upon the increase in his comparable benefits (Pension)." The Office noted that appellant received a March 21, 1994 letter "explaining the deductions of [his] pension as a comparable benefit."

By notice dated December 12, 2000, the Office advised appellant of its preliminary determination that a $22,920.56 overpayment of compensation had occurred in his case, as he "received several pension increases (comparable benefits) from the District of Columbia Police and Firefighters Retirement and Relief Board from 1994 to the present." The Office also made the preliminary finding that appellant was not without fault in creating the overpayment of compensation, as he knew or should have known that the pension increases should have been offset by a reduction in his federal compensation benefits. The Office found the period of overpayment was from January 1, 1995 to October 7, 2000. The record indicates that appellant did not respond to the Office's December 12, 2000 notice prior to issuance of the Office's April 6, 2001 decision.

By decision dated April 6, 2001, the Office found that an overpayment of $22,920.56 had occurred in appellant's case as he worked while receiving compensation for temporary total disability. The Office determined that appellant was at fault in creating the overpayment of compensation, finding that he was "aware or reasonably should have been aware that when [his] pension increased," his federal compensation benefits "should have been adjusted to a decreased amount, so as to properly offset [his] benefits." The Office directed that the overpaid compensation would be recovered by deducting $200.00 per month from appellant's continuing compensation payments.

Regarding the first issue, the Board finds that the Office did not properly determine that there was a $22,920.56 overpayment of compensation for the period January 1, 1995 through October 7, 2000 in appellant's case, due to an underdeduction of comparable benefits from his disability pension.

Under the provisions of section 8192(a) of the Act, the Office is directed to reduce a claimant's compensation by the amount that it deems appropriate within its discretion "to reflect comparable benefits" received by appellant by virtue of his employment at the occasion which gives rise to the right to compensation under the Act. This section also provides that "[w]hen an enforcement officer has contributed to a disability compensation fund, the reduction of [f]ederal benefits provided for in this subsection is to be limited to the amount of the [s]tate or local government benefits which bears the same proportion to the full amount of such benefits as the

cost or contribution paid by the [s]tate or local government bears to the cost of disability coverage for the individual officer."[5]

In this case, appellant was a federal law enforcement officer at the time of his May 8, 1990 injury. Appellant's position made him eligible for a retirement annuity. The Office obtained detailed information from the employing establishment regarding the monthly amount of appellant's retirement annuity, and the percentage of the employing establishment's contributions. In a September 27, 1993 letter, the employing establishment stated that appellant had contributed 7 percent of the retirement annuity contributions, and that the employing establishment contributed the remaining 93 percent. The Board finds, therefore, that the Office had sufficient information to determine that 93 percent of appellant's disability pension constituted comparable benefits to be deducted from his continuing compensation payments.[6]

In an October 6, 2000 worksheet, the Office performed a detailed calculation regarding the amount of comparable benefits that should have been deducted from January 1, 1995 through October 7, 2000. This calculation was based on information provided by the employing establishment in December 21, 1998 and September 1, 2000 letters. The Office determined that from January 1, 1995 through October 7, 2000, appellant had been paid $206,352.25 in compensation benefits, as well as $183,431.69 in comparable benefits from the retirement annuity, a difference of $22,920.56.

The difficulty in this case arises from the Office's determination that the $22,920.56 difference between the compensation paid and comparable benefits represented the overpayment. The Board finds that this is not correct. The Office should have found that the entire $183,431.69 in comparable benefits, which should have been deducted from appellant's continuing compensation benefits, constituted an overpayment. Thus, the proper amount of overpayment in this case is $183,431.69 and not $22,920.56.

Therefore, the case must be remanded to the Office for issuance of a *de novo* decision finding that the amount of the overpayment in this case is $183,431.69.

Regarding the second issue, the Board finds that the Office properly found that appellant was not without fault in creation of the overpayment and that therefore the overpaid amount was not subject to waiver.

The Board notes that the difficulty in this case pertains to an Office error in mathematical calculation, separate and apart from the issue of fault, and that therefore the fault issue is in posture for adjudication.

[5] 5 U.S.C. § 8192(a); *see also* Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *Nonfederal Law Enforcement Officers*, Chapter 4.200.11(a)(1) (1994) (specifying that pension funds are included in the list of payments which could be classified as comparable benefits).

[6] *Cf. Gary L. Summers*, 42 ECAB 968 (1991) (where the Board found that the Office did not conduct sufficient development to determine the percentage of the claimant's disability pension that qualified as comparable benefits).

Section 10.320(b) of the Office's implementing regulation[7] provides that in determining whether a claimant is "at fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:

> "(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
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> "(2) Failed to furnish information which the individual knew or should have known to be material; or
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> "(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

The Board finds that appellant was not without fault in the creation of the overpayment under the third standard, as he accepted a payment which he knew or should have known to be incorrect.

In the March 21, 1994 letter, the Office explained to appellant the exact calculations used to determine his compensation payment every four weeks, and the percentage and dollar amount of his pension that was "comparable benefits." The Office set forth in detail precisely how the comparable benefits were deducted from his continuing compensation payments, and the resulting dollar amounts. Appellant was also advised explicitly to notify the Office of "any changes to comparable benefits," as the Act's benefits "are contingent upon the benefits payable by [s]tate and local organizations." Thus, appellant had actual notice that 93 percent of his pension constituted comparable benefits to be deducted from his continuing compensation payments, and that he was responsible for advising the Office of any changes in his pension.

The Board notes that appellant's position as a senior special agent involved exercising a high level of judgment and required extensive education and training. Appellant therefore appears to be well able to understand the explanation in the March 21, 1994 letter that 93 percent of his disability pension was classified as comparable benefits to be deducted from his continuing compensation payments. Therefore, appellant's contentions that he was unaware that his pension had any impact on his compensation, and that he was unaware of his obligation to notify the Office of any changes to his pension, are without merit.

Regarding the third issue, the Board finds that the Office improperly required recovery of the overpaid compensation by deducting $200.00 from his continuing compensation payments.

Section 10.441(a) of the Office's regulations provides that, with respect to collecting overpayments, the Office "shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."[8]

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[7] 20 C.F.R. § 10.320(b).

[8] 20 C.F.R. § 10.441(a) (1999).

In this case, the Office properly found that as appellant was not without fault in creation of the overpayment, the overpaid amount was not subject to waiver, and thus could be collected from appellant. However, the Office did not obtain any information regarding appellant's financial circumstances, including ordinary and necessary living expenses, assets and debts. Therefore, it cannot be determined if deducting $200.00 per month from appellant's continuing compensation payments would create financial hardship. The Board notes that the record does not contain a copy of the overpayment recovery questionnaire form usually used by the Office to determine the amount of overpaid compensation to be deducted from continuing compensation payments.

Thus, the case must be remanded so that the Office may conduct further development to determine appellant's financial status. Following such development, the Office shall issue an appropriate decision on the issue of recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs dated April 6, 2001 is hereby affirmed as to the finding of appellant not being without fault in its creation. The April 6, 2001 decision is set aside regarding the issues of the amount of overpayment and the rate and method of recovering the overpaid amount, and remanded to the Office for further development consistent with this decision and order and issuance of a *de novo* decision.

Dated, Washington, DC
January 8, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member