

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. BIERKAMP and DETROIT POLICE DEPARTMENT,
Detroit, MI

*Docket No. 03-432; Submitted on the Record;
Issued May 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment in the amount of \$1,075.47 due to an increase in his Policemen and Firemen Retirement System (PFRS) pension; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly reduced appellant's continuing compensation to collect the overpayment.

The Office accepted that on January 3, 1983 appellant, then a 32-year-old policeman, was shot in the back of the head by a felon with a 12-gauge shotgun under circumstances that entitled him to compensation under the Federal Employees' Compensation Act.¹ The Office also accepted that appellant developed injury-related post-traumatic stress disorder and he retired from the Detroit Police Department on November 14, 1984 with a psychological disability.² At that time, in addition to benefits under the Act, appellant began receiving a pension from the PFRS.

On an annual basis the Office checked with the PFRS to ascertain whether there had been any changes in his pension amount. On October 18, 1993 the Office determined that appellant's pension had been increased for cost-of-living allowance from \$1,740.72 per month to \$1,778.45 per month effective July 1, 1993. On February 1, 1995 the Office determined that appellant's pension benefits had increased on July 1, 1994 to \$1,812.41 and on July 1, 1995 to \$1,846.37. By letter dated April 17, 1997, the Office inquired of the PFRS as to whether appellant was still receiving \$1,846.37. On April 22, 1997 the Office noted that appellant's benefits had increased effective June 1, 1996 to \$1,880.33. A table listed appellant's pension payments for the first six

¹ 5 U.S.C. §§ 8101-8193.

² The head injury also resulted in hearing impairment, chronic headaches and balance problems. It was determined that due to his continuing physical limitations and personality changes he was not capable of vocational rehabilitation or managing the stress and responsibilities of employment.

months of 1997 as \$1,880.33. The PFRS advised that effective August 1, 1997 appellant's benefits would increase to \$1,914.29.

By letter dated September 25, 1997, the PFRS advised appellant that on that date the Board of Trustees had approved his conversion to Reduced Duty Retirement effective September 11, 1997 and indicated that his new benefit would be approximately \$1,681.24 per month. On October 27, 1997 appellant advised the Office of his reduced duty retirement conversion with a reduced benefit from \$1,856.03 tax free to \$1,681.24 taxable.

By letter dated February 2, 1998, the Office advised appellant that his letter indicated that the PFRS had refunded him his accumulated contributions from the Annuity Savings Distribution Fund, which they interpreted to mean that his benefits were no longer funded with his 50 percent contribution but rather his retirement benefits were now funded 100 percent with public funds. The Office advised him that prior to this it had calculated his entitlement as 50 percent comparable but now they had recalculated it as 100 percent comparable which reduced his benefits from \$1,444.48 to \$776.09 each four weeks.

By letter dated September 10, 1998, the Office requested that PFRS advise it whether appellant's benefits were \$1,681.24 per month and whether or not he received a yearly increase of \$33.96 on July 1, 1994 of each year. In response the PFRS advised the Office that effective July 1, 1994 of each year appellant's benefits would be increased \$37.83. Appellant's benefits for the year 1998 were listed in a table format showing \$1,681.24 per month through July and \$1,719.07 for the remainder of the year.

By letter dated June 14, 2000, the Office requested that PFRS advise if appellant's pension payments were still \$1,719.07 per month, and it requested pension amounts from July 1, 1999 to July 1, 2000. The PFRS provided the Office with a pension table for January through July 2000 which showed that appellant was receiving \$1,756.90 per month and that on August 1, 1997 it would increase by \$37.83 to \$1,794.73.

In an undated memorandum, the Office noted that effective July 1, 1999 appellant was receiving \$1,756.90 which at 100 percent comparable yielded \$1,621.75 and that effective July 1, 2000 he was receiving \$1,794.73 which at 100 percent comparable yielded \$1,656.67, a difference of \$34.92.

In a preliminary determination dated November 28, 2000, the Office found that appellant had received an overpayment in the amount of \$1,075.47 because he received comparable benefit increases from the PFRS on July 1, 1999 to October 7, 2000 and his compensation benefits were not adjusted accordingly. The Office found that appellant was at fault in the creation of the overpayment as he reasonably should have known that an increase in his comparable benefits with the PFRS would result in a decrease adjustment in his Office benefits. He was provided with an overpayment recovery questionnaire to complete and advised that he could request a prerecoupment hearing.

On an April 6, 2001 debt management system worksheet the Office indicated that appellant had received an overpayment in the amount of \$1,075.74 with a date that the

overpayment began noted as July 1, 1999. This was reiterated on a worksheet dated January 15, 2002.

By decision dated January 15, 2002, the Office found that appellant had received an overpayment in the amount of \$1,075.47 because he received comparable benefit increases from the PFRS on July 1, 1999 to October 7, 2000 and his compensation benefits were not adjusted accordingly. The Office found that appellant was at fault in the creation of the overpayment as he reasonably should have known that an increase in his comparable benefits with the PFRS would result in a decrease adjustment in his Office benefits. The Office advised that the overpayment would be collected by withholding an amount from his continuing compensation benefits.

By letter dated January 22, 2002, appellant disagreed with the amount of the overpayment and provided copies of his W-2 forms for 1999 and 2000. He subtracted the 1999 amount of earnings from the 2000 amount which resulted in a difference of \$453.96, not \$1,075.47 and he requested that the Office explain how they derived the overpayment amount. Appellant claimed that the only pension increase he had received was the regular two percent escalator he routinely received every July 1, 1999. Appellant claimed that he was not at fault in the overpayment creation because the city and the Office had routinely reconciled the amounts he was being paid to account for any increases in his PFRS benefits. He requested that the Office provide him with the calculations used to determine that he had received a \$1,075.47 overpayment of compensation.³

By letter dated February 22, 2002, the Office again request repayment of the overpaid amount and it advised that collection efforts would be undertaken if he did not respond to the letter.⁴ No further calculations were provided to appellant.

The Board finds that this case must be reversed on the issues of amount and fault, such that the decision on collecting by withholding compensation is rendered moot.

In this case, the Board cannot determine how the Office arrived at the amount of the overpayment as no calculations were provided. The Board has carefully reviewed the evidence of record and cannot find an overpayment worksheet explaining how such an overpayment was determined. As the evidence of record is insufficient to allow the Board to determine whether the Office properly calculated the amount of the overpayment, the finding of the amount of overpayment must be reversed.

Section 8129(a) of the Act⁵ provides that, where an overpayment of compensation has been made 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

³ As this material was received after the Office's most recent merit decision, it cannot now be considered by the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

entitled. Section 8129(b) describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”⁶

Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault. Section 10.433 (a)(1),(2) and (3) of the implementing federal regulations provides the following:

“A recipient who has done any of the following will be found to be at fault with respect to the creation of the overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”⁷

In this case, the Office merely notified appellant of the existence of the \$1,075.47 overpayment without provided the requested calculations and found that appellant was at fault in its creation as he did not notify the Office that he had received an increase in his PFRS pension benefits. However, appellant had received a two percent cost-of-living increase in his pension each year on July 1 since he had been in receipt of compensation benefits under the Act and the Office had routinely gone to the fund to ascertain whether the standard increase had occurred on July 1, 1999 as scheduled. As appellant had been told that the Office did not trust his calculations of his benefits received and as he had been advised that the Office would consult the fund to ascertain whether the standard increase in his pension had occurred as scheduled, he was not put on notice, either actual or constructive due to amount discrepancies, that in 1999 and 2000 the Office had not consulted the Fund as it had previously done or that he had received any \$37.83 increase in his pension that was any different than that of the preceding years.⁸ In fact, following the most recent merit decision, appellant submitted W-2 forms which did not reflect

⁶ *Id.* at § 8129(b).

⁷ 20 C.F.R. § 10.433(a)(1),(2) and (3).

⁸ If the Office is claiming that, due to Office error, it forgot to reduce appellant's compensation to allow for his July 1, 1999 two percent pension cost-of-living increase, that is not clear from the case record before the Board and the Office has not demonstrated that appellant should have done the calculations to notice that the Office had made such an error, as it had been routinely performed as an Office function and the amount was small enough so as not to put appellant on notice that his compensation payments were incorrect.

any such increase as the Office is claiming that he received. These forms, however, cannot now be considered by the Board in this appeal.⁹

The Board finds that the Office erred when it did not provide the requested calculations from which it calculated that an overpayment in the amount of \$1,075.47 had occurred in appellant's case. The Board further finds that it is not clear that appellant knew or should have known that the compensation amount he was receiving from July 1999 to October 2000 was incorrect as it historically had changed every single year based on his cost-of-living adjustments from his PFRS pension and the time period from July 1999 to October 2000 was no different.

As the Board is reversing the Office's findings on the amount of the overpayment and the finding of fault, the collection of such overpayment by withholding compensation is rendered moot.

The decision of the Office of Workers' Compensation Programs dated January 15, 2002 is hereby reversed.

Dated, Washington, DC
May 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁹ See 20 C.F.R. § 501.2(c).