

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICKY S. COVEY and OFFICE OF PERSONNEL MANAGEMENT,
PERSONNEL SERVICE CENTER, Boyers, PA

*Docket No. 99-1469; Submitted on the Record;
Issued December 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether an overpayment in the amount of \$2,235.10 occurred when appellant concurrently received compensation for temporary total disability and severance pay; and (2) whether the Office of Workers' Compensation Programs properly denied waiver of recovery.

On February 28, 1986 appellant, a 57-year-old office program assistant, fell from some train steps and injured her right leg and right ankle. She filed a claim for benefits, which the Office accepted on May 8, 1996 for a fractured right ankle. The Office commenced payment for temporary total disability compensation. Appellant returned to full-time work at her previous job on April 7, 1997 but periodically went off work due to her work injury. The Office paid her appropriate compensation based on loss of wages. On April 3, 1998 appellant filed a claim for recurrence of her employment-related disability, which the Office accepted. The Office paid her compensation for temporary total disability from June 27 to October 16, 1998.

The record indicates that the employing establishment was relocated from Pennsylvania to West Virginia. Appellant decided not to transfer to the new location and was separated from the agency. Effective June 27, 1998, appellant began receiving severance pay for seven weeks, which lasted through August 14, 1998 in the amount of \$3,130.00.

On December 15, 1998 the Office issued a preliminary determination that an overpayment of \$2,235.10 occurred because appellant received seven weeks of severance pay concurrently with temporary total disability compensation. Appellant was found to be without fault in the creation of the overpayment. In addition, the Office informed appellant that, if she felt entitled to a waiver instead of repaying the overpayment, she could request a preresumption hearing with the Branch of Hearings and Review, or she could make her request directly with the Office. The Office further informed appellant that she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in her possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns,

bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that pursuant to 20 C.F.R. § 10.324, the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment and that no further request for waiver would be considered until the requested information was furnished. Appellant did not respond to this notice within 30 days.

By decision dated February 24, 1999, the Office finalized its preliminary overpayment 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 \$200.00 should be withheld from continuing compensation payments every four weeks effective February 28, 1999, which would absorb the overpayment by approximately January 29, 2000.

The Board finds that an overpayment arose when appellant concurrently received compensation for temporary total disability and severance pay.

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.¹ Section 8116(a) of the Federal Employees' Compensation Act² places the following limitations on the right to receive compensation:

“While an employee is receiving compensation under this subchapter, or if [s]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, [s]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.

¹ 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 (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).

² 5 U.S.C. § 8116(a).

“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

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 addressed the issue of dual benefits based on separation pay 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 she also received separation pay as a “buyout” during that same period following his voluntary retirement. The Board found that appellant received an overpayment of compensation as a result of the dual receipt of separation pay or early retirement incentive pay and compensation for total disability.

Because appellant concurrently received separation pay and compensation for temporary total disability, the Board finds that she received dual benefits for which an election was required. As a result an overpayment of \$2,235.10 in compensation occurred for the period June 27 through August 14, 1998.

With respect to the \$2,235.10 of overpayment adjudicated by the Office, the Board finds that the Office properly denied waiver of recovery.

Section 10.324 of the Office’s 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 information within 30 days of the 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.”

³ 5 U.S.C. § 8116(a).

⁴ 20 C.F.R. § 10.313(a).

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

When the Office issued its preliminary determination on December 15, 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 she had 30 days to request waiver and advised that she should submit a detailed explanation of her reasons. The Office also advised appellant to complete and submit an enclosed overpayment recovery questionnaire and to attach any supporting documents in her 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. Pursuant to 20 C.F.R. § 10.324 the Office properly denied waiver with respect to the \$2,235.10 of overpayment adjudicated.⁶ Thus, the Office's February 24, 1999 decision is affirmed.

The decision of the Office of Workers' Compensation Programs dated February 24, 1999 is hereby affirmed.

Dated, Washington, DC
December 12, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁶ *William D. Emory*, 47 ECAB 365 (1996).