

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA L. GREENFIELD and DEPARTMENT OF JUSTICE,
CIVIL RIGHTS DIVISION, Washington, DC

*Docket No. 98-1210; Submitted on the Record;
Issued May 1, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
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 \$3,592.42; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and that, therefore, the overpayment was not subject to waiver.

On January 25, 1994 appellant, then a 66-year-old legal technician, filed a notice of traumatic injury alleging that she hurt her back on January 12, 1994, while picking up boxes in the course of her federal employment. The Office accepted the claim for a lumbosacral strain and herniated nucleus pulposus, L2-3 and awarded appellant compensation for total temporary disability beginning April 6, 1994. The Office subsequently provided appellant with a pamphlet entitled, "*Now that Your Claim Has Been Accepted,*" which stated that appellant could, "not receive federal retirement benefits and compensation for wage loss for the same period of time."

On December 21, 1994 the Office stated that appellant would receive compensation for total temporary disability for the period December 11, 1994 through March 4, 1995. The Office indicated that appellant's monthly compensation, minus her health benefits, was \$1,595.78.

On March 10, 1995 the employing establishment indicated that appellant retired effective December 31, 1994.

On April 27, 1995 the Office indicated that appellant remained entitled to compensation for wage loss, but noted that it had been informed that appellant was also receiving benefits from the Office of Personnel Management (OPM). The Office informed appellant that employees entitled to both Office benefits and the OPM benefits must elect, which benefit to receive.

On April 28, 1995 appellant completed a Form CA-1105 and elected to receive benefits provided by the OPM under the Civil Service Retirement System (CSRS). The election form indicated that appellant understood that she was not entitled to receive Federal Employees'

Compensation Act benefits concurrently, except for a schedule award. The election form, however, did not contain an effective date for the election of CSRS benefits.

On April 24, 1996 OPM indicated that appellant had received compensation for wage loss from the Office from December 11, 1994 through March 4, 1995. It also indicated that on April 28, 1995 appellant elected to receive a civil service annuity in lieu of compensation. OPM stated that because appellant did not provide an effective date for election of OPM benefits, that it processed appellant's retirement payments beginning March 4, 1995, the date of termination of the Act's benefits. It stated, however, that the rate of pay for the Act benefits was lower than that of CSRS benefits for the period January 1, 1995 through March 4, 1995. It, therefore, indicated that appellant could elect benefits with CSRS for that period and have the Office determine the amount of its overpayment. Appellant was allowed 30 days to make this election.

On March 7, 1997 OPM indicated that it provided benefits for appellant for the period January 1 through March 4, 1995.

On April 18, 1997 OPM indicated that it would reverse a May 22, 1995 decision in which it found that an overpayment existed with it. OPM stated that in response to a telephone call from appellant on May 9, 1995 indicating that she had not received the Act benefits since 1994, it placed appellant on the annuity rolls. It further stated that, based on appellant's separation pay cessation date of December 31, 1994, appellant's annuity commenced January 1, 1995. OPM noted that appellant received the Act benefits from December 11, 1994 through March 4, 1995. OPM stated that its initial issue of payment occurred on May 9, 1995 and included payments for January 1 through April 30, 1995. OPM further indicated that because appellant elected CSRS benefits in preference to the Act benefits, it was reversing its initial decision that an overpayment existed with it. It noted, however, that the Office overpaid appellant because she was not entitled to receive both civil service annuity and compensation benefits at the same time.

On June 17, 1997 the Office informed appellant that she received benefits from both it and OPM for the period of January 1 through March 4, 1995 and that this constituted an overpayment. The Office asked appellant to retroactively select benefits for this period from either it or OPM, but noted that OPM benefits for the period were paid at a higher rate. The Office further informed appellant that if she elected to receive benefits from OPM, an overpayment would exist with the Office.

On January 20, 1998 the Office completed a disability benefit payment worksheet, Form CA-25, which indicated that appellant received compensation for the period January 1 through March 4, 1995 in the amount of \$3,677.39. The Office then indicated that appellant was entitled to an \$84.97 health benefits refund to be deducted from the above amount. The Office, therefore, determined that appellant was paid \$3,592.42 in compensation for the period January 1 through March 4, 1995. The Office's Form CA-25 was supported by the Office's daily computation logs, which indicated that appellant received this amount of compensation.

By letter dated January 21, 1998, the Office made a preliminary determination that an overpayment to appellant had occurred in the amount of \$3,592.42 because appellant had received dual benefits from OPM and the Office for the period January 1 through March 4, 1995. The Office preliminarily found that appellant was at fault in this matter because it was well

known that an injured worker could not receive federal retirement benefits and compensation for wage loss at the same time. It informed appellant that this was not a final decision and appellant had the right to submit any evidence or arguments if she disagreed that an overpayment occurred, disagreed with the amount of the overpayment, believed she was not at fault in creating the overpayment, or believed that recovery of the overpayment should be waived. The Office described the specific information appellant should provide pertaining to income and expenses if she sought a waiver of repayment. The Office stated that appellant could request a telephone conference or a prerecoupment hearing. Finally, the Office provided an overpayment recovery questionnaire for appellant to complete. In an accompanying memorandum, the Office indicated that appellant should have known that she was not entitled to two checks for the period January 1 through March 4, 1995 because she previously received a pamphlet entitled "*Now that Your Claim Has Been Accepted,*" stating that she could not receive federal retirement benefits and compensation for wage loss at the same time.

On January 28, 1998 appellant stated that she felt the overpayment issue was closed two years ago. She further indicated that she should not be held responsible for the mistakes made by OPM. Appellant further stated that she refused to complete any of the Office's paperwork or attend a hearing.

On February 12, 1998 the Office again informed appellant that she improperly received dual benefits from it and OPM for the period January 1 through March 5, 1995. The Office noted that appellant's monthly benefits from OPM were greater than those from the Office and calculated that appellant owed it an overpayment of \$3,592.42.

In a letter dated February 19, 1998, appellant again indicated that she should not be held responsible for the overpayment because OPM waived the overpayment in 1995. She stated that when she received the payment from OPM in June 1995, that she was not aware that it covered her retirement benefits beginning in January 1995.

By decision dated February 25, 1998, the Office determined that an overpayment occurred in the amount of \$3,592.42 because appellant received dual benefits from OPM and the Office from January 1 through March 4, 1995. The Office then stated that it considered appellant's additional evidence or arguments and found that appellant was at fault in the matter of the overpayment because it was a well-known concept that an injured worker could not receive federal retirement benefits and compensation for wage loss at the same time.

The Board finds that the Office properly found that an overpayment of compensation occurred in the amount of \$3,592.42 for the period from January 1 through March 4, 1995.

Section 8116 of the Act¹ provides limitations on the right to receive compensation. While an employee is receiving compensation under the Act, she may not receive salary, pay, or

¹ 5 U.S.C. § 8116(a); see 20 C.F.R. § 10.313(a), which provides: 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 he or she wishes to receive and such election, once made, is irrevocable."

renumeration of any type from the United States. The Act precludes payment of dual benefits for the same injury or death.

The record establishes and appellant does not dispute, that she concurrently received CSRS benefits and compensation benefits from January 1 through March 4, 1995. Appellant, therefore, was not entitled to compensation for wage loss after January 1, 1995. Appellant submitted no evidence indicating that she did not receive this overpayment of compensation. Thus, the Office properly determined that she received an overpayment of compensation during that period.

The Office also correctly calculated the amount of the overpayment at \$3,592.42 as the Office's disability benefit payment worksheet, Form CA-25, and its daily computation logs showed that this was the amount of net compensation that she received from January 1 through March 4, 1995.

The Board, however, finds that the Office erred in finding that appellant was at fault in creating the overpayment.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment 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 test set forth as follows in section 8129(b): "Adjustment 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."² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

² 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides in relevant part:

“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
- (2) Failed to furnish information, which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that at the time appellant received the compensation checks, covering the period from January 1 to March 4, 1995, she knew or should have known that the payment was incorrect. The record establishes appellant had no such knowledge.

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, *understanding of the obligation to return payments, which were not due* and ability to comply with any reporting requirements....”⁴ (Emphasis added.)

In the present case, appellant had already received her compensation for wage loss from the Office for the period of January 1 through March 4, 1995 when the Office informed her on April 27, 1995 that she must elect between the Office and OPM benefits. Appellant elected OPM benefits on April 28, 1995, but failed to indicate an effective date for her election of the OPM benefits. In a letter dated April 18, 1997, OPM stated that it made its initial payment to appellant on May 9, 1995 and that this payment included compensation covering the period January 1 through March 4, 1995. Consequently, at the time appellant received her compensation for wage loss from the Office, she had no way of knowing that she would retroactively receive higher benefit payments from OPM covering the same time period.

³ 20 C.F.R. § 10.320(b).

⁴ 20 C.F.R. § 10.320(c).

Appellant, therefore, did not accept a payment from the Office, which she knew or should have been expected to know was incorrect and she was not “with fault” in creating the overpayment. Accordingly, the Office’s February 25, 1998 decision must be remanded for a determination of appellant’s entitlement for waiver because the Office did not meet its burden of proof in finding appellant “with fault” in creating the overpayment.

The decision of the Office of Workers’ Compensation Programs dated February 25, 1998 is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
May 1, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member