

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH J. HATLEY and DEPARTMENT OF THE NAVY,  
NAVY PUBLIC WORKS, San Diego, CA

*Docket No. 99-643; Submitted on the Record;  
Issued May 17, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment was created in the amount of \$424.29; and (2) whether appellant was at fault in the creation of the overpayment.

The Office accepted that appellant, a former hazardous materials handler, sustained a lumbar strain to his back in the performance of his federal employment on September 30, 1991, and paid him disability benefits accordingly. Appellant was terminated from his position on June 12, 1992 due to his partial disability and inability to perform in the position he held when he was injured. He returned to work as a clerk with the employing establishment on February 22, 1993. Appellant was later selected for a position as an environmental program assistant on May 30, 1993 and was promoted to permanent environmental program specialist at the employing establishment on August 20, 1994. The Office determined that on July 27, 1993, April 13 and May 15, 1995 that each of the positions held by appellant fairly and reasonably represented his wage-earning capacity and adjusted appellant's disability benefits based upon his loss of wage-earning capacity at each position. Appellant was advised on those occasions that receipt of benefits for loss of wage-earning capacity and receipt of an annuity from the Office of Personnel Management (OPM) constituted a dual benefit, and that if he had received such benefits he must elect to receive one or the other.

Appellant informed the Office by letter dated July 23, 1997 that he would retire from civil service on September 2, 1997. The Office date-stamped appellant's letter as received on August 5, 1997.

By letter dated February 5, 1998, Robin Merriweather, a representative from appellant's employing establishment, informed the Office that appellant had retired on September 2, 1997 and also received a voluntary separation incentive payment (VSIP) of \$25,000.00. Ms. Merriweather noted that appellant was also receiving OPM retirement benefits of \$1,136.00

per month and requested that the Office offer appellant an election between OPM retirement and compensation benefits under the Federal Employees' Compensation Act.

By letter dated March 4, 1998, the Office informed appellant that effective March 1, 1998 his compensation benefits would be terminated because he had been receiving dual benefits. The Office explained that because appellant accepted a VSIP of \$25,000.00 and was also receiving OPM retirement benefits, his \$25,000.00 VSIP would be offset on a dollar-for-dollar basis by the amount of compensation he was entitled to receive from the Office, for a period of 29 years until the amounts have equaled out. The Office indicated that, once the offset ended, appellant would be offered a choice between benefits from the Office, and his retirement benefits from OPM. Appellant was informed that he still remained entitled to medical benefits from the Office for his accepted lumbar strain condition.

On April 6, 1998 the Office issued a preliminary determination that an overpayment of compensation occurred in the amount of \$424.29 because appellant received dual benefits for the period September 2, 1997 through February 28, 1998 and that appellant was at fault in the creation of the overpayment. The Office found that, although appellant would not be likely to have realized how the VSIP would impact his compensation benefits, he should have been aware that he could not receive retirement benefits and compensation from the Office for wage loss at the same time. The Office further found that, although appellant informed it in a July 23, 1997 letter that he would be retiring, neither he nor the employing establishment informed the Office of his actual retirement, with VSIP, until February 5, 1998. The Office advised appellant that within 30 days he could request a telephone conference or a prerecoumment hearing, or that he could request that a final decision be made based upon the written evidence; however, appellant did not respond.

By decision dated May 11, 1998, the Office found that an overpayment existed in the amount of \$424.29 because appellant received dual benefits in the form of a VSIP and retirement compensation from OPM for the period September 2, 1997 to February 28, 1998; that appellant was at fault in the creation of the overpayment because he knew or should have known that he could not receive benefits from the Office and OPM at the same time. The Office also noted in its decision that appellant should have questioned whether he could receive Office benefits and a separation payment at the same time.

Appellant replied by an undated letter that he notified the Office in July 1997 that he might retire in September, and that he believed the Office would notify him of his options, but that the Office never responded. Appellant contended that the overpayment arose through no fault of his own, and that he could not afford to repay the money.

The Office determined in a letter dated May 27, 1998 that appellant's response letter was sent by express mail and had been received prior to the issuance of its May 11, 1998 decision, therefore, his response served as a basis for reopening the final decision. The Office informed appellant that he must submit a Form CA-20 overpayment questionnaire to the Office within 14 days so that further consideration could be given to his case.

By final decision dated October 5, 1998, the Office found that an overpayment existed in the amount of \$424.29 as appellant received dual benefits in the form of a VSIP and retirement

compensation from OPM for the period September 2, 1997 to February 28, 1998, and that the preliminary finding that appellant was not without fault should be made final. The Office determined that, with regard to fault, although appellant informed the Office of his impending retirement, he made no inquiry as to whether his retirement status would alter his compensation benefits. The Office determined that, with regard to repayment, upon review of appellant's OWCP-20 overpayment questionnaire received on June 17, 1998, which summarized his income and expenses, appellant would not suffer financial hardship if repayment was made in the amount of \$50.00 per month.

The Board finds that the Office properly determined that an overpayment existed in this case in the amount of \$424.29.

The Federal Employees' Compensation Act (FECA) provides at section 8116<sup>1</sup> that generally while an employee is receiving the Act's disability compensation, he may not receive salary, pay or remuneration of any type from the United States. The Office's regulations specifically provide at section 10.313(a) as follows:

"Except as otherwise provided by law, a person may not concurrently receive compensation pursuant to the [Federal Employees' Compensation] 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 beneficiary shall elect the benefit, which he or she wishes to receive, and such election, once made, is revocable"<sup>2</sup>

Appellant was entitled to compensation for a loss of wage-earning capacity during the period of his employment after he was found partially disabled due to the employment-related lumbar strain. Once appellant retired on September 2, 1997, however, his loss of wage-earning capacity was no longer a factor because his period of employment had expired, thus, he was clearly not entitled to continued receipt of disability benefits under the Federal Employees' Compensation Act. As the record substantiates that appellant did receive a VSIP and OPM retirement benefits, as well as disability benefits under the Act during the time period September 2, 1997 through February 28, 1998, an overpayment was created in this case.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of compensation and, therefore, the overpayment is not subject to waiver and has to be recovered.

The Federal Employees' Compensation Act at 5 U.S.C. § 8129(b) states that 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

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<sup>1</sup> 5 U.S.C. § 8116.

<sup>2</sup> 20 C.F.R. § 10.313(a).

this subchapter or would be against equity and good conscience. Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.<sup>3</sup>

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent 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.”<sup>4</sup>

In the present case, the Office applied the third standard -- acceptance of a payment which the payee either knew or should have been expected to know was incorrect -- in finding appellant at fault in creating the overpayment. The circumstances of the case support the Office’s finding that appellant knew or should have been expected to know that he was not entitled to a VSIP and both FECA disability and OPM retirement benefits. Appellant was advised on three occasions, when his compensation was reduced due to his loss of wage-earning capacity, that receipt of such benefits and receipt of an annuity from OPM constituted a dual benefit, and that if he had received such benefits he must elect to receive one or the other. Although appellant did provide material information to the Office by submitting the July 23, 1997 letter which informed the Office of his intent to retire on September 2, 1997, his letter substantiates the fact that appellant was aware that his retirement status could affect his status with respect to receipt of compensation. Furthermore, appellant acknowledged to the Office after the May 11, 1998 decision that he thought he would be contacted regarding his options of compensation upon retirement, which establishes that he was aware that he should not receive dual payments. Because appellant accepted payments that he knew or should have been expected to know were incorrect, the Office properly found that he was with fault in the creation of the overpayment that occurred from September 2, 1997 through February 23, 1998. Although the Office was negligent in overlooking appellant’s letter and failing to inquire as to whether appellant had actually retired from federal employment on September 2, 1997, this does not excuse the employee from accepting payment which he knew or should have been expected to know was incorrect and he was not entitled.<sup>5</sup>

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> 20 C.F.R. § 10.320(b).

<sup>5</sup> 20 C.F.R. § 10.320(a); *see Russell E. Wageneck*, 46 ECAB 653 (1995).

As the Office properly found that appellant was at fault in the creation of the overpayment, this overpayment may not be waived.

With respect to the issue raised on appeal regarding the amount of recovery determined by the Office, the Board's jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act.<sup>6</sup> As appellant's wage-loss compensation benefits were terminated prior to the Office's October 5, 1998 decision, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.

The decision of the Office of Workers' Compensation Programs dated October 5, 1998 is hereby affirmed.

Dated, Washington, D.C.  
May 17, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> *Lewis George*, 45 ECAB 144 (1993).