

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM M. ECKSTEIN and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, San Mateo, CA

*Docket No. 02-782; Submitted on the Record;  
Issued August 23, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issues are: (1) whether an overpayment of \$8,580.82 occurred in appellant's case; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating the overpayment and therefore not entitled to waiver of the overpayment.<sup>1</sup>

Appellant's claim, filed on June 11, 1987 after he slipped and fell at work, was accepted for a ruptured cervical disc for which he underwent a discectomy at C5-6 and C6-7 on June 26, 1987.

Appellant returned to work on April 20, 1990 for six hours a day and the Office calculated a loss of wage-earning capacity of \$195.00 a week. On July 6, 1993 the employing establishment controverted the payment of wage-loss benefits, stating that appellant was hired for only six hours a day and was working that schedule on the date of injury. The Office responded on June 13, 1994 that appellant worked 35 hours on the date of injury and 30 hours on the date of the wage-earning capacity rating. Therefore, he had a 14 percent loss of wage-earning capacity.

On October 16, 1997 appellant signed a Form 1032 reporting income and status for the previous 15 months. He indicated that he was employed for the entire period. On January 15, 1999 appellant completed a similar form stating that he had not worked in the previous 15 months and was receiving retirement checks. He stated the same information on a December 9, 1999 form.

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<sup>1</sup> The Board has no jurisdiction over the Office's method of recovery of the overpayment from appellant's retirement benefits; the Board's jurisdiction is limited to recovery of an overpayment from continuing compensation under the Federal Employees' Compensation Act. *Beverly E. Labbe*, 50 ECAB 440, 443 (1999).

On June 28, 2000 the Office wrote to appellant that information from the Office of Personnel Management indicated that he had retired on November 1, 1997. Appellant elected retirement benefits on May 15, 2000. On June 30, 2000 the Office stated that appellant had received dual benefits from November 1, 1997 until June 17, 2000, resulting in an overpayment of \$8,580.82.

On August 28, 2000 the Office issued a preliminary determination that appellant had received dual benefits and was not without fault in creating an overpayment of \$8,580,82, thereby precluding waiver of recovery of the overpayment. Appellant disagreed with the decision and stated that he had relied on information from the employing establishment regarding the amount of money he was to receive each month.

On July 27, 2001 the Office found that appellant was at fault in creating the overpayment of \$8,580,82 because he knew or should have known that he was not entitled to receive dual benefits.

The Board finds that the Office properly determined that appellant received an overpayment as a result of receipt of dual benefits.

The basic rate of compensation under the Act<sup>2</sup> is 66 and 2/3 percent of the injured employee's monthly pay.<sup>3</sup> When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation augmented at eight and one-third percent, totaling seventy-five percent.<sup>4</sup> Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.<sup>5</sup>

In this case, appellant was entitled to a 14 percent loss of wage-earning capacity after he returned to work in April 1990. The May 24, 1990 letter informing him of this stated that "receipt of Office benefits for loss of wage-earning capacity and receipt of an annuity from OPM [Office of Personnel Management] constitutes a dual benefit. If you receive such benefits from OPM, you should so advise this office immediately. You will be asked to make an election between the two benefits."

By the time he retired on November 1, 1997, appellant was receiving \$244.00 every 4 weeks at the augmented 75 percent rate. From November 1, 1997 when he retired through June 17, 2000 he received this amount in error because he was also receiving a retirement check from OPM, as he acknowledged in 1999 when he signed the required Office forms. The Board finds that the Office correctly calculated the overpayment from his retirement date to the date he elected OPM benefits at \$8,580.82.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8105(a).

<sup>4</sup> 5 U.S.C. § 8105(b).

<sup>5</sup> 5 U.S.C. § 8115(a); *Penny L. Baggett*, 50 ECAB 559, 560 (1999).

The Board also finds that appellant was at fault in the creation of the overpayment, which is not, therefore, subject to waiver.

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.<sup>6</sup> The only exception to this requirement must meet the tests set forth 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 this subchapter or would be against equity and good conscience.”<sup>7</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>8</sup>

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations provides in relevant part:

“(a) [The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of the benefits. A recipient who had done any of the following will be found to be at fault with respect to creating an 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 furnish 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. (This provision applies only to the overpaid individual.)

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>9</sup>

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<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

<sup>9</sup> 20 C.F.R. § 10.433 (1999).

In this case, appellant was informed in a February 5, 1988 letter from the Office that the Act did not constitute a retirement system and that he might wish to elect retirement benefits in the future should it become necessary to reduce or terminate his compensation. The letter added that OPM administered the retirement system and reminded appellant of the temporary nature of periodic disability benefits. In 1990 when appellant was issued a wage-earning capacity determination, the Office specifically informed appellant that he could not receive both retirement benefits and wage-loss compensation and instructed him to notify the Office “immediately” if he received retirement benefits.

While appellant reported on his 1999 earnings forms that he had not worked and was receiving retirement, the record contains no evidence that he notified the Office in November 1997 that he had retired, nor did he make the required election between retirement and wage-loss benefits until June 2000.

Appellant does not contend that he failed to notify the Office as required, but argues that he relied on the employing establishment to inform him of the correct amount of his “total” retirement and that the Office should have realized much sooner than it did that he was no longer entitled to wage-loss compensation because he had stopped working.

As the Office noted in its July 27, 2001 decision, appellant did not allege that the employing establishment or OPM gave him specific information that would have contradicted the Office’s specific warning regarding receipt of dual benefits, nor did appellant provide any documentation that either entity told him he was entitled to receive both benefits. In fact, since appellant was aware that his [the Office] compensation was for wage loss while working, he should have realized that when he stopped working, he was no longer entitled to wage-loss benefits.

Regardless of the Office’s failure to act on the information contained in appellant’s earnings form, it was his responsibility to notify the Office immediately that he had retired.<sup>10</sup> Because he knew or should have known about this responsibility, and failed to make the required election of benefits for more than two years, the Board finds that appellant was not without at fault in creating the overpayment, which is not, therefore, subject to waiver of recovery of the overpaid amount, despite appellant’s financial circumstances.<sup>11</sup>

The July 27, 2001 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC  
August 23, 2002

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<sup>10</sup> See *Larry D. Strickland*, 48 ECAB 669, 673 (1997) (finding that the Office’s negligence in continuing to issue compensation checks in an amount to which appellant was not entitled did not excuse his acceptance of such checks).

<sup>11</sup> See *John L. Wolf*, 48 ECAB 148, 156 (1996) (finding that appellant should have known he could not receive retirement benefits and wage-loss compensation at the same time despite his assertion that he relied on information from government employees).

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member