

FACTUAL HISTORY

On April 26, 1999 appellant, then a 64-year-old equipment operator, filed a claim alleging that on April 16, 1999 he stepped on a rock and slipped injuring his back.¹ The Office accepted that he sustained a lumbar strain and authorized an L4-5 foraminotomy and a L5-S1 discectomy.

By letter dated June 28, 1999, the Office notified appellant that his claim was accepted for a lumbar strain and advised him that he would receive compensation benefits. In an attached CA-1009 form, the Office advised him of certain information concerning payment of bills and compensation and dual benefits.

In a May 11, 2000 letter, the Office sent appellant an EN1032 form to report income from other sources and dependents. The Office informed him that he was to report all income from employment or receipt of benefits from federally funded or federally assisted programs including Office of Personnel Management (OPM) disability or regular retirement annuity. On May 17, 2000 appellant completed the EN1032 form and noted under Part A(3), Employment, that he provided an attached statement explaining his circumstances. He stated that he went to his personnel department to file for medical retirement and the representative informed him that he was eligible for regular retirement and could also continue to receive workers compensation. Appellant advised that he was not assigned a retirement number and “haven’t gotten paid.” He further stated “I do not want to get overpaid.” Under Part D, other federal benefits or payments, appellant indicated that he had not been assigned a retirement number from OPM and attested that during the past 15 months he had not received either regular or disability retirement. He also submitted EN1032 forms dated June 8, 2001 and May 31, 2002 and noted under Part D, other federal benefits or payments, that during the past 15 months “yes” he had received a regular retirement check. Accompanying the May 31, 2002 EN1032, appellant submitted a copy of his Civil Service Retirement Identification Card. He noted on a EN1032 form dated May 15, 2003, under Part D, other federal benefits or payments, that he was assigned a CSA number, 3945397 and that during the past 15 months “yes” he had received a regular retirement check.

On June 5, 2003 the Office notified appellant that he was currently receiving dual benefits. The Office noted that OPM confirmed that he was in receipt of retirement benefits since May 1, 2000. The Office advised appellant that the Federal Employees’ Compensation Act prohibits payment of dual benefits and that he was required to make an election between compensation under the Act and benefits paid by OPM.

In an election benefits form dated June 13, 2003, appellant elected to receive the civil service retirement benefits. In a letter dated August 20, 2003, the Office notified OPM of appellant’s election to receive civil service retirement benefits.

In a September 17, 2003 letter, the Office informed appellant that it had made a preliminary determination that he had received an overpayment of \$49,309.32 in compensation for the period May 1, 2000 to June 13, 2003, because he had continued to receive compensation

¹ The record reflects that appellant filed a claim for an injury sustained on August 28, 1997 which was accepted for a back contusion under file number 16-0313416 and was consolidated with the current claim before the Board.

through June 13, 2003 after he started to receive OPM benefits. The Office made a preliminary finding that he was at fault in the creation of the overpayment because he had been sent a CA-1009 form upon the acceptance of his injury on June 28, 1999, which specifically stated that receipt of compensation for wage loss and retirement benefits represented a dual benefit and was prohibited. The Office noted that for the years 2001 and 2002 appellant failed to report on the EN1032 form that he was receiving retirement benefits from OPM since 2000. The Office concluded that he failed in his reporting responsibilities and, therefore, received compensation through June 13, 2003 and was with fault in the creation of the overpayment. The Office informed appellant that he had the right to submit evidence or arguments if he disagreed. The Office also informed him that he had a right to a prerecoupment hearing before an Office hearing representative. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

In a letter dated October 14, 2003, appellant, through his attorney, requested a prerecoupment hearing on the issue of fault. He noted that he began receiving monthly compensation benefits in May 1999. In April 2000, appellant indicated that he met with Cindy Brooks, a personnel representative at the employing establishment, to discuss his options for retirement. She advised him that because he was 65 years of age he could immediately begin receiving a civil service retirement and receipt of such benefits would not interfere with the receipt of his workers' compensation benefits. On April 5, 2000 appellant submitted an Application for Immediate Retirement Civil Service Retirement System and completed schedule C, Federal Employees Compensation Information and accurately reported the requested information regarding his workers compensation claims. He indicated that he was informed by the personnel office that by selecting a regular retirement in lieu of a civil service disability retirement, he would continue to receive worker's compensation benefits. Appellant's civil service retirement became effective on April 29, 2000. He alleged that he had no recollection of receiving the June 28, 1999 letter from the Office with the accompanying CA-1009 form which advised him of the prohibition of receiving dual benefits. He further stated that he completed the EN1032 forms in good faith and thought that question four regarding receipt of other federal benefits was confusing and ambiguous and did not clearly identify OPM retirement benefits.

Appellant also submitted an overpayment recovery form with supporting financial documents. He attached a statement to OPM dated April 11, 2000 advising that he elected the Office benefits and requested that they process his application for disability retirement. Also attached was an application for civil service retirement benefits dated April 5, 2000.

By letter dated June 16, 2004, appellant withdrew his request for a hearing. He also submitted an election of benefits form dated July 30, 2004, in which he elected benefits under the Act.

By decision dated December 22, 2004, the Office found that appellant received a \$49,309.32, overpayment of compensation from May 1, 2000 to June 13, 2003,² for which he was at fault. The Office advised that the overpayment occurred because he received compensation benefits at the same time he was receiving retirement benefits from OPM. The

² The Office's decision listed the date as June 13, 2004; however, this appears to be a typographical error.

Office found that he failed to disclose information regarding the receipt of retirement benefits on the EN1032 forms for the years 2000, 2001 and 2002 and failed to make an election which would have resolved the period of dual benefits. The Office advised that OPM benefits continued to be paid. The Office requested that appellant either repay the overpaid amount in full or contact the Office to arrange a repayment plan.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act³ states:

“(a) While an employee is receiving compensation under this subchapter or if 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, 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, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services....

“However, eligibility for or receipt of benefits under subchapter 3 of [C]hapter 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.”⁴

ANALYSIS -- ISSUE 1

The record indicates that on June 28, 1999 appellant’s claim was accepted for a lumbar strain and he was paid compensation benefits under the Act. The record establishes that his civil service retirement became effective on April 29, 2000 and he began receiving OPM benefits on May 1, 2000. The record supports that he simultaneously received OPM and the Act benefits for the period May 1, 2000 until June 13, 2003. In this case, the Office properly determined that for the period May 1, 2000 to June 13, 2003, appellant received an overpayment in the amount of \$49,309.32 due to his receipt of dual benefits. He does not dispute that he received the overpayment in question, nor does he dispute the amount of the overpayment. The Office

³ 5 U.S.C. § 8116(a).

⁴ *Id.*

explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that the Office properly determined the amount of the overpayment that covered the period May 1, 2000 until June 13, 2003.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows: “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.”⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.433(a) provides 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.”⁷

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“(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.”⁸

ANALYSIS -- ISSUE 2

The Office applied the second standard of 20 C.F.R. § 10.433(a) in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that he was at fault in creating the overpayment of compensation, it must establish that appellant failed to furnish information which the individual knew or should have known to be material.

After consideration of the particular circumstances in this case, the Board finds that the facts do not establish that appellant failed to furnish information which the individual knew or

⁵ 5 U.S.C. § 8129(b).

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁷ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁸ 20 C.F.R. § 10.433(b).

should have known to be material. The record reflects that he acknowledged in a statement attached to the EN1032 form dated May 17, 2000, that he conferred with the employing establishment personnel regarding his desire to file for medical retirement and the representative informed him that he was eligible for regular retirement and that appellant would continue to receive workers compensation. Appellant advised that at that time he was not assigned a retirement number and “haven’t gotten paid.” He further asserted that “I do not want to get overpaid.” Additionally, the Office, in its decision dated December 22, 2004, incorrectly notes that appellant failed to disclose on the EN1032 forms filed for the years of 2001 and 2002 that he received retirement benefits during this period. On the contrary, the Board notes that a review of the record reveals that the EN1032 forms filed by him on June 8, 2001, May 31, 2002 and May 15, 2003, specifically note under Part D, other Federal benefits or payments, that during the past 15 months, he noted “yes” in response to a question inquiring as to whether he had received a regular retirement check. Moreover, accompanying the EN1032 form filed on May 31, 2002 appellant submitted a copy of his Civil Service Retirement System Identification Card. Consequently, it cannot be said that he failed to furnish information which he knew or should have known to be material. The Office has not cited any evidence showing that he was not forthcoming with furnishing information he knew or should have know to be material.

Consequently, the Office has not met its burden of proof in establishing that appellant was at fault in creating the overpayment as there is insufficient evidence to show that he failed to furnish information which he knew or should have known to be material. Accordingly, the case shall be remanded for a determination regarding his eligibility for waiver.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$49,309.32; however, it improperly determined that he was at fault in the creation of the overpayment of compensation. The case must, therefore, be remanded for the Office to consider his eligibility for waiver. After developing the issue of waiver as is necessary, the Office shall issue a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment and is reversed on the issue of fault and the case is remanded for action consistent with this decision of the Board.

Issued: August 16, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board