

**United States Department of Labor
Employees' Compensation Appeals Board**

NICHOLAS J. BARONE, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Philadelphia, PA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1443
Issued: December 12, 2005**

Appearances:
Adam M. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 24, 2005 appellant filed a timely appeal of the April 29, 2005 decision of the Office of Workers' Compensation Programs, which found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$6,777.19 overpayment of compensation; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby, precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 7, 1995 appellant, then a 35-year-old insulator, filed a traumatic injury claim alleging that on that date he felt pain in his heels after jumping out of a truck while at work. By letter dated April 6, 1995, the Office accepted appellant's claim for bilateral heel contusions and

approved the excision of calcaneal spurs, which he underwent on November 1995 and February 1996. On April 11, 1995 the employing establishment terminated appellant from service based on his inability to perform the physical duties of his position. By letters dated July 26 and November 16, 1995, the Office advised appellant that he would receive compensation benefits for total disability effective July 19, 1995. Appellant also received a schedule award based on permanent impairment of the right and left legs from February 28, 1999 to October 22, 2001. In a November 8, 1999 decision, the Office reduced appellant's compensation benefits based on his ability to earn wages in the constructed position of a mail clerk. The reduction of appellant's compensation benefits took effect after the schedule award expired on October 22, 2001. The record reflects that appellant originally received compensation at the rate of 75 percent based on his dependents, but in a decision dated February 10, 2003, the Office reduced appellant's compensation rate to 66 and 2/3 percent effective August 16, 2002, as appellant no longer had any qualifying dependents.¹

In a March 8, 1999 letter, the Office sent appellant an EN1032 form to report all income from other sources and dependents. The Office informed appellant 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. Appellant completed the EN1032 forms on March 16, 1999, May 31, 2001, October 2, 2002 and March 31, 2004 for periods covering the prior 15 months. In EN1032 forms dated May 31, 2001, October 2, 2002 and March 31, 2004, appellant noted under Part D, other federal benefits or payments, that "yes" during the past 15 months he had received a disability retirement check and wrote down his assigned Civil Service Annuity (CSA) number.

By letter dated June 29, 2004, the Office notified appellant that he was receiving dual benefits. The Office noted that appellant had been in receipt of compensation benefits from April 12, 1995 to June 12, 2004 and that OPM confirmed that he was in receipt of civil service benefits since April 12, 1995. The Office advised appellant that the Federal Employees' Compensation Act (FECA) prohibits payment of dual benefits and that he was required to make an election between compensation under the Federal Employees' Compensation Act and the benefits paid by OPM. The Office further advised that, as an overpayment had incurred, it stopped wage-loss benefits effective June 12, 2004 to prevent a greater overpayment. Appellant was advised to elect either OPM or FECA benefits for the time frame of April 12, 1995 to June 12, 2004 and was provided with an election form.

In an election benefits form dated May 17, 2004, appellant elected to receive the Civil Service Retirement (CSR) benefits.

By letter dated September 13, 2004, the Office requested that appellant specify whether he received benefits from OPM during the period 1995 to February 27, 1999 and elect what benefits he wished to received.

¹ The record reflects that, on April 15, 2003, appellant filed an appeal to the Board and requested a waiver of overpayment, which had occurred in his case based on his receipt of benefits from August 16 through November 30, 2002. On August 25, 2003 the Board issued an order dismissing appeal as the case record contained no final decision over which the Board could assume jurisdiction. Docket No. 03-1254 (issued August 25, 2003).

In a March 8, 2005 letter, the Office informed appellant that it had made a preliminary determination that he had received an overpayment of in the amount of \$22,227.75 during the period December 31, 2001 to June 12, 2004, because he received both compensation for temporary total disability and CSR benefits from the OPM. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because he knew or should have known that he was not entitled to receive compensation and retirement benefits under from both programs at the same time. The Office informed appellant that he had the right to submit evidence or arguments if he disagreed. The Office also informed him of the various actions he could take within 30 days of the date of the letter with regard to the overpayment. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

By decision dated April 29, 2005, the Office found that appellant received a \$6,777.19 overpayment of compensation during the period December 31, 2001 to June 12, 2004, for which he was at fault. The Office reduced the overpayment amount of \$22,227.75 as it found that appellant remained entitled to the balance of the schedule award which had been interrupted effective March 25, 2001 due to his nonresponse to a EN1032 request for information and not reinstated. The Office determined that appellant was entitled to a total of \$15,450.56 for the period March 25 to October 22, 2001, for the remainder of the schedule award and applied this balance to the overpayment balance of \$22,227.75 to arrive at the corrected overpayment balance of \$6,777.19. The Office advised that the overpayment occurred because he received compensation payments from both the Office and OPM during the period December 31, 2001 to June 12, 2004 and noted that appellant did not respond with any additional evidence or argument. The Office requested that appellant either repay the overpaid amount in full or contact the Office to arrange a repayment plan.²

On appeal, appellant's attorney argued that the Office double deducted appellant's health insurance premiums.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation 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;

² The Board notes that, in the worksheets provided by the Office and OPM, both the Office and OPM were deducting health benefits.

³ 5 U.S.C. § 8116(a).

(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 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.⁴

ANALYSIS -- ISSUE 1

The record indicates that on April 6, 1995 appellant’s claim was accepted for bilateral heel contusions and he was paid compensation benefits under the Federal Employees’ Compensation Act effective July 19, 1995. The record establishes that appellant began receiving OPM benefits effective April 12, 1995. The record supports that appellant simultaneously received OPM and the Federal Employees’ Compensation Act benefits for the time period at issue, December 31, 2001 to June 12, 2004 and that appellant failed to make an election for this period.

The Board finds that the record supports that, for the period December 31, 2001 to June 12, 2004, appellant received an overpayment in the amount of \$22,227.75 due to his receipt of dual benefits. The Office, however, erred by offsetting the amount of overpayment with the balance of the schedule award due for the period March 25 to October 22, 2001, which amounted to \$15,450.56. Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁵ In *Califano v. Yamasaki*,⁶ the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until, inter alia, it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees’ Compensation Act and the Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Federal Employees’ Compensation Act.⁷

⁴ *Id.*

⁵ See generally FECA Circular No. 82-48, “Overpayments and Waiver” (issued December 1, 1982).

⁶ 442 U.S. 682 (1979).

⁷ This policy was announced in FECA Bulletin No. 80-35, issued October 20, 1989 and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994). See *Robert L. Curry*, 54 ECAB ___ (Docket No. 03-1082, July 7, 2003); *Kathleen D. Abbott*, 53 ECAB 270 (2001); *Earl D. Long*, 50 ECAB 464 (1999).

The Office's offset practice, as exercised in the April 29, 2005 decision, precludes the proper consideration of waiver of the entire amount of the overpayment, which in this case is \$22,227.75. The Office's practice also permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a).⁸ The Board finds that such a practice denies administrative due process with respect to the amount offset.⁹ The case will, therefore, be remanded for the Office to reflect the amount of the overpayment of compensation as \$22,227.75.

On appeal, appellant's attorney contended that appellant's health insurance costs were double deducted. Although appellant correctly notes that health benefits were taken out by both the Office and OPM, this situation arose as appellant failed to elect between OPM or Federal Employees' Compensation Act benefits during the entire period of dual benefits and pertains to the amount of overpayment. There is no evidence that the Office itself took double health benefits from appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation 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.¹⁰ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹¹

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; (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.¹²

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

⁸ This section states that, in collecting an overpayment of compensation, the Office "shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."

⁹ *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹² *Kenneth E. Rush*, 51 ECAB 116 (1999).

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.¹³

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 he knew or should have known to be material.¹⁴

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 should have known to be material. The record reflects that appellant acknowledged in his EN1032 forms dated May 31, 2001, October 2, 2002 and March 31, 2004 that, during the previous 15 months, he received disability retirement benefits and provided his CSA number. Thus, it cannot be said that appellant failed to furnish information which he knew or should have known to be material.¹⁵ The Office has not cited any evidence showing that appellant was not forthcoming with furnishing information he knew or should have known 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 also be remanded for a determination regarding appellant's eligibility for waiver.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$22,227.75, but improperly offset it by the \$15,450.56 unpaid remainder of the schedule award for the period March 25 to October 22, 2001. The Board further finds that the Office also improperly determined that appellant was at fault in the creation of the overpayment of compensation. The case must, therefore, be remanded for the Office to consider appellant's eligibility for waiver of the entire overpayment and appropriate consideration of its regulations. After conducting such further development as is deemed necessary, the Office shall issue a *de novo* decision.

¹³ 20 C.F.R. § 10.433(b).

¹⁴ See *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁵ See *Porfirio M. Amador*, Docket No. 05-864 (issued August 16, 2005).

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2005 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of overpayment, modified with regard to the amount of the overpayment and is reversed on the issue of fault. The case is remanded for action consistent with this decision of the Board.

Issued: December 12, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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