

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

JAMES M. DEVINE, Appellant)

and)

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, San Francisco, CA, Employer**)

**Docket No. 05-438
Issued: May 6, 2005**

Appearances:
James M. Devine, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 13, 2004 appellant filed a timely appeal of a September 3, 2004 decision of the Office of Workers' Compensation Programs, finding that an overpayment of \$1,720.40 was created and appellant was at fault in creating the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issues in this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$1,720.40 was created during the period March 23, 2002 to June 12, 2004; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

On February 7, 1983 appellant, then a 33-year-old machine clerk, filed an occupational disease claim for compensation (Form CA-2) alleging that he sustained right hand tendinitis as a result of his federal employment. The Office accepted the claim for right hand tendinitis of the third and fourth digits; appellant returned to a modified position as a manual clerk. By decision

dated April 29, 1987, the Office reduced appellant's compensation on the grounds that his actual earnings fairly and reasonably represented appellant's wage-earning capacity. Appellant's net compensation was \$36.00 every 28 days.

On June 22, 2004 appellant completed a Form EN-1032 indicating that he was receiving retirement benefits from the Office of Personnel Management (OPM). A memorandum of telephone call indicated that appellant stated that he began receiving OPM benefits in March 2003. On July 3, 2004 appellant completed a Form CA-1102 electing retirement benefits under the Civil Service Retirement System or Federal Employees' Retirement System. The effective date of the election was reported as March 23, 2002.

By letter dated July 21, 2004, the Office notified appellant that it had made a preliminary determination that an overpayment of \$1,720.40 was created during the period March 23, 2002 until June 12, 2004.¹ The Office stated that appellant elected to receive OPM benefits as of March 23, 2002, but continued to receive compensation for wage loss based on loss of wage-earning capacity. With regard to fault, the Office made a preliminary finding that appellant was at fault in creating the overpayment. In an accompanying memorandum, the Office indicated that a finding of fault can be based on a failure to furnish information which the claimant knew or should have known was material or by accepting payments that the claimant knew or should have known were incorrect. The Office found that both criteria applied, noting that the Form EN-1032 states that the claimant should notify the Office immediately of any change in a Federally assisted disability or benefit program and also stated that appellant should have known he could not receive compensation concurrently with OPM benefits.

On August 8, 2004 appellant completed an overpayment recovery questionnaire (Form OWCP-20) stating that he did not receive any OPM payments until March 2003 and reported this on the Form EN-1032; he also stated that he thought the continuing payments were for a schedule award. He submitted a certification of insurance status form indicating that appellant was separated from federal employment on March 22, 2002 and he indicated on the form that he was receiving compensation benefits and had received a schedule award.²

By decision dated September 3, 2004, the Office finalized the preliminary determinations with respect to the amount of overpayment and finding of fault. With respect to repayment of the overpayment, the Office directed appellant to submit a payment of \$1,720.40.³

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that while an employee is receiving compensation "he may not receive salary, pay, or remuneration of any type from the United

¹ The record contains a history of compensation payments indicating that for the period March 23, 2002 to June 12, 2004 appellant received \$1,720.40 in compensation payments.

² The date of the reported schedule award appeared to be in 1982; there is no evidence in the case record with respect to a schedule award.

³ As recovery of the overpayment was not sought from continuing compensation payments, the Board does not have jurisdiction over this issue. See *Levon H. Knight*, 40 ECAB 658 (1989).

States” except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under the Act.⁴ The implementing regulations provide that a “beneficiary may not receive wage-loss compensation concurrently with a Federal retirement or survivor annuity.”⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶

ANALYSIS -- ISSUE 1

The record does establish that appellant continued to receive compensation benefits based on a loss of wage-earning capacity through June 12, 2004. Appellant does not contest that he also began receiving retirement benefits from OPM prior to June 12, 2004. As noted above, he is not entitled to receive concurrent benefits and therefore an overpayment of compensation was created.

The specific amount of the overpayment cannot be determined based on the evidence of record. The amount of the overpayment was found to be all of the compensation paid from March 23, 2002 until June 12, 2004. While appellant indicated that he elected OPM benefits as of March 23, 2002, he also reported that he did not begin receiving payments until March 2003. The payments from OPM may have been retroactive to March 23, 2002, but there is no probative evidence in the record on this issue. There is no specific evidence as to when OPM payments began and the period covered by the payments. The Office must document what retirement benefits appellant actually received and the period covered by these payments before a proper determination can be made as to the period and the amount of the overpayment. The case therefore will be remanded to the Office for proper findings as to the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides: “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.”⁷ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁸

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.421(a) (1999).

⁶ *Id.*

⁷ 5 U.S.C. § 8129(b).

⁸ *Norman F. Bligh*, 41 ECAB 230 (1989).

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 was incorrect.”

ANALYSIS -- ISSUE 2

With regard to fault, the Office identified both the second and third criteria for fault. As noted above, however, the relevant factual findings regarding OPM payments were not made. Appellant stated that he did not begin to receive payments until March 2003 and he did report receipt of retirement benefits on the Form EN-1032 in June 2004. The Office did not provide sufficient factual findings with respect to a failure to furnish material information. With respect to the third criteria, accepting payment that appellant should have known to be incorrect, again the Office failed to make relevant findings as to when appellant began to receive OPM benefits and what he should have known regarding the acceptance of specific payments from the Office. The case will be remanded for appropriate findings with regard to fault in this case.

CONCLUSION

The Board finds that the Office did not make adequate findings with respect to the amount of the overpayment or the issue of fault and therefore the case is remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 3, 2004 is affirmed with respect to fact of overpayment; it is set aside and remanded with respect to the amount of the overpayment and fault.

Issued: May 6, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member