

FACTUAL HISTORY

The Office accepted in August 2003 that appellant, then a 37-year-old mail handler, sustained bilateral plantar fascial fibromatosis and other conditions affecting both legs and feet due to the performance of his job duties over time. Appellant received compensation from the Office for periods of disability.

The record contains a form, signed October 15, 2008, in which appellant indicated that he was electing to receive Office of Personnel Management (OPM) disability retirement payments effective “December 25, 2008 or soon as possible.” On November 25, 2008 an Office official indicated that she advised appellant *via* telephone on that date that his election date was in the future and that “the Office cannot terminate his compensation for a date that is in the future and OPM cannot pay him until it is verified that we have stopped paying him.”

In December 30, 2008 and February 11, 2009 letters to OPM, the Office advised that appellant had elected to receive OPM benefits in lieu of Office benefits effective December 25, 2008. It asked OPM to begin its payments effective that date.¹ On February 4, 2009 appellant called the Office and advised that OPM had told him that he could not receive OPM benefits until the Office stopped its payments.

In a February 25, 2009 notice, the Office advised appellant of its preliminary determination that he received a \$3,949.65 overpayment of compensation because he elected to receive retirement benefits from OPM effective December 25, 2008 but received wage-loss compensation from the Office through February 14, 2009.² It also made a preliminary determination that he was not at fault in the creation of the overpayment. The Office advised appellant that he could submit evidence challenging the fact and amount of the overpayment and request waiver of the overpayment. It requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

In a March 26, 2009 decision, the Office determined that appellant received a \$3,949.65 overpayment of compensation. It found that appellant was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. The Office noted that appellant had not completed the financial information questionnaire as requested and therefore had not justified waiver of the overpayment. It directed appellant to forward the full amount of \$3,949.65.

¹ In the February 11, 2009 letter, the Office asked OPM to reimburse it for the amount it paid appellant between December 25, 2008 and February 14, 2009.

² The Office indicated that it did not stop wage-loss compensation payments to appellant until February 15, 2009. The record reveals that appellant received \$3,949.65 in Office compensation for the period December 25, 2008 to February 14, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁵

Section 8116(a) of the Act provides that while an employee is receiving compensation 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, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶ In *Marcello A. Garcia*,⁷ the Board determined that the Office improperly found an overpayment of compensation for a given period because the Office had not shown that the claimant actually received both OPM benefits and Office wage-loss compensation for that period.

ANALYSIS -- ISSUE 1

The Office found that appellant had received an overpayment because he received wage-loss compensation from the Office and OPM benefits for the same period, December 25, 2008 to February 14, 2009.⁸ Although the record contains a document in which appellant elected to receive OPM benefits effective “December 25, 2008 or soon as possible,” the record does not provide any written documentation from OPM to show the effective date it began payment of retirement benefits to appellant, whether the date was retroactive or not. The Office, therefore, has not established by evidence in the record that appellant received retirement benefits from OPM for the same period he received wage-loss compensation from the Office. For these reasons, the evidence of record is not sufficient to establish that appellant received a \$3,949.65 overpayment of compensation.⁹

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

⁷ 43 ECAB 842 (1992).

⁸ The record reflects that appellant did receive Office compensation through February 14, 2009.

⁹ *See supra* note 7. Given the Board's finding that the Office did not establish the existence of an overpayment, it is not necessary to consider the second issue of the present case.

CONCLUSION

The Board finds that the Office improperly determined that appellant received a \$3,949.65 overpayment or compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 7, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board