

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

---

N.S., Appellant )

and )

PEACE CORPS, OFFICE OF MEDICAL )  
SERVICES, Washington, DC, Employer )

---

**Docket No. 08-1085  
Issued: March 6, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 4, 2008 appellant filed a timely appeal of a January 3, 2008 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$19,086.61 during the period September 7, 2004 through September 3, 2005 because she received dual compensation benefits from the Office of Personnel Management (OPM) and under the Federal Employees' Compensation Act; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of recovery of the overpayment.

**FACTUAL HISTORY**

On November 1, 2001 appellant, then a 57-year-old volunteer, filed a traumatic injury claim alleging that on June 25, 2001 she sustained a severe head injury and injuries over her right

eye and to her right thumb and knee as a result of falling in the street while working in Otavalo, Ecuador. She was separated from the employing establishment on October 31, 2001.

On November 9, 2001 appellant filed a claim for compensation (Form CA-7) for the period November 1 through December 5, 2001. She answered “no” to the question whether she had applied for or received payment under any federal retirement or disability law.

By letter dated December 7, 2001, the Office accepted the claim for a concussion, right knee and thumb and thoracic sprains, right orbital contusion and postconcussion syndrome. On February 15, 2002 it paid appellant compensation for temporary total disability for the period November 1 through December 5, 2001.

On January 9, 2003 and January 5, 2004 appellant completed EN1032 forms which, among other things, advised her to report OPM or other federal disability or retirement benefits. In these forms, she noted under Part D (1), OPM benefits, that she received benefits from OPM in file number CSA3301862, for disability retirement.

By letter dated November 15, 2004, OPM advised the Office that appellant had elected to receive OPM retirement benefits effective January 28, 1990 instead of workers’ compensation benefits.<sup>1</sup> It stated that her workers’ compensation benefits should have been terminated but, it appeared that dual payments had been made from January 1990 to the present. A copy of the election form signed by appellant on September 7, 2004 was enclosed. Appellant acknowledged that “I understand that I am not entitled to receive OWCP benefits and CSRS/FERS benefits concurrently (except for a schedule award).”

On December 28, 2004 appellant completed an EN1032 form, indicating that she continued to receive OPM disability retirement benefits.

By letter dated October 6, 2005, the Office terminated appellant’s compensation benefits effective September 4, 2005 due to her receipt of an annuity from OPM while receiving workers’ compensation benefits. Appellant was advised that she could not receive both workers’ compensation benefits and OPM annuity benefits at the same time.

On November 22, 2005 the Office made a preliminary determination that appellant received an overpayment in the amount of \$71,736.84 due to her receipt of dual benefits from OPM and under the Act during the period September 3 through November 1, 2005. It found that she was at fault in the creation of the overpayment. The Office stated that appellant was aware or should have reasonably been aware that she was receiving compensation that she was not entitled to receive. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

---

<sup>1</sup> Appellant was receiving retirement benefits from OPM due to a whiplash injury she sustained in 1990.

On December 12, 2005 the Office issued an amended preliminary overpayment determination, noting that the correct period of the overpayment was November 1, 2001 through September 3, 2005.

By letter dated January 9, 2006, appellant requested a prerecoupment hearing before an Office hearing representative. She contended that repayment of the overpayment would cause severe financial hardship as her monthly expenses exceeded her monthly income. In a January 9, 2006 OWCP-20 form, appellant stated that she did not have any of the incorrectly paid checks or payments in her possession. She believed that she was entitled to the incorrect payments because the employing establishment explained to her that, if she sustained an employment-related injury and was unable to work, she would receive workers' compensation benefits. Appellant stated that an Office claims examiner advised her not to worry about questions from the Office regarding her receipt of OPM benefits since her current work-related injury was different from the injury she sustained while working at the U.S. Postal Service. She further stated that the employing establishment was aware of her prior work-related injury during an interview for her volunteer position and it determined that she would be able to perform the duties of the position. Appellant contended that her OPM annuity was not enough to survive. She further contended that the EN1032 forms she completed stated that the information she provided would be used to decide whether she would continue to receive benefits. Since appellant continued to receive compensation, she believed that she was entitled to it. She reported monthly income of \$1,996.38 which represented her OPM benefits and rent from a tenant. Appellant also reported monthly expenses of \$2,949.80 which included a monthly debt of \$823.68. She had \$8.50 in cash. Appellant submitted supporting financial documents.

During the July 10, 2006 hearing, appellant contended that she was without fault in creating the overpayment. She testified that despite being notified by OPM in September 2004 that she could not receive concurrent OPM and workers' compensation benefits, unless she was receiving a schedule award, she believed that she was receiving a schedule award. Appellant reiterated her contention that repayment of the overpayment would cause financial hardship. She owned a house in Harrison, Maine and a farm in Sweden, Maine. Appellant rented the house in Harrison to a tenant and lived with her daughter to whom she paid rent. She did not receive any rent for the farm in Sweden and owed more on it than it was worth. Appellant testified that foreclosure notices had been issued on the two properties. She had a Jeep and a rowboat that were not worth anything. With the exception of this information, appellant testified that her financial situation remained the same as she reported to the Office in January 2006. She submitted financial records which indicated that she had an outstanding home equity loan of \$30,944.62 on the Sweden farm which was worth \$17,015.00.

Following the July 10, 2006 hearing, appellant reported that she had \$6.00 in a savings account and paid \$390.00 in rent to her daughter. She stated that her monthly debt of \$823.68 represented several loans issued by her credit union.

Appellant appealed to the Board. In a November 29, 2007 order, the Board dismissed appellant's appeal of an Office hearing representative's December 18, 2006 decision, finding that she was entitled to waiver of a \$52,000.00 overpayment that occurred during the period November 1, 2001 to September 6, 2004 and that, while she was at fault in creating an overpayment for the period September 7, 2004 through September 3, 2005 because she knew or

reasonably should have known that she was not entitled to receive workers' compensation following the effective date of her election of OPM retirement benefits, the case had to be returned to the Office to calculate the amount of the overpayment and to decide upon the method of recovery of the overpayment.<sup>2</sup> The Board found that appellant's case was in an interlocutory posture with regard to the amount of the overpayment for the period September 7, 2004 through September 3, 2005 and, thus, it did not have jurisdiction over the Office's decision pursuant to 20 C.F.R. § 501.2(c).

Following the issuance of the Board's November 29, 2007 order, the Office, by decision dated January 3, 2008, determined that appellant received an overpayment in the amount of \$71,746.14 during the period November 1, 2001 through September 3, 2005. It recalculated the prior \$71,736.84 overpayment to reflect compensation received by appellant based on calendar days rather than workdays. The Office found that she was not at fault in the creation of the overpayment in the amount of \$52,659.53 for the period November 1, 2001 through September 6, 2004 and, thus, entitled to waiver of recovery of the overpayment. It, however, found that appellant was at fault in the creation of the overpayment in the amount of \$19,086.61 for the period September 7, 2004 through September 3, 2005 and ordered her to repay the overpayment in full.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of the Act states that, while an employee is receiving workers' compensation, he or she may not receive salary, pay or remuneration of any type from the United 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.<sup>3</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>4</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

On September 7, 2004 appellant elected to receive OPM disability retirement benefits in lieu of wage-loss compensation she had been receiving under the Act. By letter dated November 15, 2004, OPM notified the Office that appellant elected to receive OPM retirement disability benefits effective January 28, 1990.

The record reflects that appellant received wage-loss compensation from the Office in the amount of \$19,086.61 for the period September 7, 2004 through September 3, 2005. Because appellant elected to receive OPM disability retirement benefits effective January 28, 1990, any

---

<sup>2</sup> Docket No. 07-1094 (issued November 29, 2007).

<sup>3</sup> 5 U.S.C. § 8116(a).

<sup>4</sup> 20 C.F.R. § 10.421(a).

<sup>5</sup> *Id.*

wage-loss compensation she received from the Office for a period beginning on or after January 28, 1990 constitutes an overpayment of benefits. She is not eligible to receive wage-loss compensation and disability retirement benefits from OPM for the same time period.<sup>6</sup> Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$19,086.61 for the period September 7, 2004 through September 3, 2005.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>7</sup> provides that an overpayment of compensation shall be recovered by the Office unless 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.<sup>8</sup> Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.<sup>9</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>10</sup>

On the issue of fault, section 10.433 of the Office regulations, provide 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 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.”<sup>11</sup>

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

“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>12</sup>

---

<sup>6</sup> 20 C.F.R. § 10.421(a); *see Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>9</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>10</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>11</sup> 20 C.F.R. § 10.433(a).

<sup>12</sup> *Id.* at § 10.433(b).

## ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, it must establish that appellant accepted a payment that she knew or should have known was incorrect.<sup>13</sup>

The Office found that appellant was at fault in the creation of the overpayment as she was aware or should have been aware that she was not entitled to dual benefits following the effective date of her election of OPM disability retirement benefits. The record establishes that on September 7, 2004 appellant elected to receive OPM benefits in lieu of compensation benefits under the Act effective January 28, 1990. The election form specifically advised her that she was not entitled to receive workers' compensation benefits and OPM retirement benefits concurrently except for a schedule award. In signing the election form, appellant thereby acknowledged that she was no longer entitled to compensation benefits under the Act as of September 7, 2004. Once appellant made this election she knew or should have known that acceptance of compensation benefits for periods after September 7, 2004 was incorrect. The fact that the Office may have been negligent in continuing to issue appellant wage-loss checks after she elected OPM benefits does not excuse her acceptance of such checks.<sup>14</sup> As appellant accepted compensation benefits from the Office which covered the period September 7, 2004 through September 3, 2005, the Board finds that she was at fault in the creation of the overpayment and is not entitled to waiver.<sup>15</sup>

Appellant contended that the Office compensation benefits she received represented a schedule award. However, the record does not indicate that the Office granted her a schedule award on or after September 7, 2004. Therefore, the Board finds that appellant's contention is without merit.

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>16</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.<sup>17</sup>

---

<sup>13</sup> *Diana L. Booth*, *supra* note 10; *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>14</sup> *Lorenzo Rodriguez*, *supra* note 13.

<sup>15</sup> *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

<sup>16</sup> *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>17</sup> *Cheryl Thomas*, *supra* note 16.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$19,086.61 during the period September 7, 2004 through September 3, 2005 because she received dual compensation benefits from OPM and under the Federal Employees' Compensation Act. The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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