

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

A.L., Appellant)	
)	
and)	Docket No. 09-1529
)	Issued: January 13, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Cohasset, MA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 12, 2009 appellant filed a timely appeal from an April 22, 2009 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and that he was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that appellant received an overpayment of \$15,950.50 for the period August 13, 2006 to January 20, 2007 because he received dual compensation benefits from the Office of Personnel Management (OPM) and under the Federal Employees' Compensation Act; and (2) whether he was at fault in the creation of the overpayment and, therefore, ineligible for waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 3, 2005 appellant, then a 49-year-old letter carrier, filed an occupational disease claim alleging that he sustained a torn right shoulder tendon due to factors of his federal

employment. The Office accepted the claim for a right rotator cuff tear. Appellant underwent a subacromial decompression and rotator cuff repair on June 15, 2005. The Office paid him compensation for temporary total disability on the periodic rolls beginning July 10, 2005.

On May 23, 2006 the employing establishment notified the Office that appellant had been approved for disability retirement. Appellant elected to receive retirement benefits under OPM effective November 13, 2006. By letter dated August 9, 2006, the Office transferred appellant's health benefits to OPM and enclosed a copy of his election form. On August 15, 2006 appellant sent the Office a new election form switching the effective date of his election to receive benefits from OPM to August 13, 2006. In a report of telephone call dated August 15, 2006, the Office indicated that it was sending by facsimile a new copy of his election form with the appropriate election date to OPM. On August 24, 2006 OPM requested further information from the Office about appellant.

On January 30, 2007 the Office terminated appellant's compensation payments. It noted that he had elected OPM benefits effective August 13, 2006.

On October 31, 2007 the employing establishment notified the Office that appellant had received compensation from both OPM and the Office through January 20, 2007. On January 17, 2008 OPM informed the Office that he had received OPM disability benefits beginning June 11, 2006. The Office calculated that he received an overpayment of \$19,904.96 for the period June 11, 2006 to January 20, 2007 based on the receipt of dual benefits from OPM and from the Office. On June 11, 2008 it notified appellant of its preliminary determination that he received an overpayment of \$19,904.96 and that he was at fault in its creation.

On June 25, 2008 appellant asserted that he did not receive his initial check from OPM until late November 2006. He requested a telephone conference. On July 23, 2008 OPM informed the Office that appellant's OPM benefits began on August 13, 2006. The Office indicated that it would recalculate the overpayment and reissue a preliminary determination of overpayment.

On February 18, 2009 the Office notified appellant of its preliminary determination that he received an overpayment of \$15,950.50 because he received dual compensation from both the Office and OPM. It calculated that it paid him \$14,306.68 in compensation, \$1,559.29 in health benefit premiums and \$484.53 for basic life insurance premiums, for a total overpayment of \$15,950.50. The Office advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On February 27, 2009 appellant requested a telephone conference. He disagreed that an overpayment occurred. Appellant enclosed a letter from OPM showing that the first date of his regular payment was November 1, 2006 and that his benefits began on June 11, 2006. OPM indicated that it was subtracting health insurance premiums from his benefits.

A telephone conference was held on March 25, 2009. The Office informed appellant that OPM stated that he received his initial check on November 2, 2006 with benefits beginning August 13, 2006. It agreed to provide appellant with a copy of the information.

On April 7, 2009 appellant completed an overpayment recovery questionnaire. He asserted that he had informed the Office in writing that he no longer desired benefits because he was retiring.

In a decision dated April 22, 2009, the Office finalized its determination that appellant received an overpayment of \$15,950.50 for the period August 13, 2006 to January 20, 2007. It found that he was at fault in the creation of the overpayment. The Office advised appellant to forward a check for the entire amount as repayment.

On appeal, appellant argues that he believed that he was entitled to compensation from the Office after August 2006 because he was not receiving payments from OPM. He noted that it took the Office years to take action on the error and asserted that repaying the overpayment would cause financial hardship.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Act¹ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.²

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except 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."³ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁴ The beneficiary must elect the benefit that he or she wishes to receive.⁵

ANALYSIS -- ISSUE 1

Appellant elected to receive OPM disability retirement benefits in lieu of wage-loss compensation under the Act effective August 13, 2006. As he elected to receive OPM disability

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8102.

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.421(a).

⁵ *Id.*

retirement effective August 13, 2006, any wage-loss compensation he received from the Office after that date constitutes an overpayment of compensation.⁶ The record shows that the Office continued to pay appellant compensation until January 20, 2007; thus he received an overpayment.

With respect to the amount of the overpayment, the Office found that the gross amount of compensation paid to appellant constituted an overpayment of compensation. In calculating the overpayment, it added payments for health and life insurance premiums to his net compensation. In *Kenneth E. Rush*,⁷ the Board found that it was improper to base overpayment calculations on the gross amount of compensation if health and life insurance premiums were deducted from a claimant's wages during the same period because he does not derive any benefit from the Office's deductions. In this case, the record shows that OPM was deducting health insurance premiums from appellant's retirement payments during the period of the overpayment. The Office thus should not have included health insurance premiums when calculating the amount of the overpayment. The case, therefore, will be remanded for the Office to recalculate the amount of the overpayment.

Appellant argues that he did not receive retirement benefits until November 2006 even though he elected benefits in August 2006. OPM, however, clarified that his benefits began on August 13, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁸ provides that “[a]djustment 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.” Section 10.433 of the Office's implementing regulations⁹ provide that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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 to be incorrect.”

⁶ *Franklin L. Bryan*, 56 ECAB 310 (2005).

⁷ 51 ECAB 116 (1999).

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433.

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. It must establish that he knew or should have known that he was not entitled to dual benefits following the effective date of his election of OPM retirement benefits.¹⁰ On August 15, 2006 appellant completed an election form and elected to receive OPM benefits in lieu of compensation benefits under the Act effective August 13, 2006. The election form specifically advised him that he was not entitled to receive workers' compensation benefits and OPM retirement benefits concurrently except for benefits paid for a schedule award. In signing the election form, appellant thereby acknowledged that he was no longer entitled to compensation benefits under the Act as of August 13, 2006. Having made his election, he knew or should have known that acceptance of compensation benefits for periods after August 13, 2006 was incorrect. As appellant accepted compensation benefits from the Office covering the period August 13, 2006 to January 20, 2007, the Board finds that he was at fault in the creation of the overpayment and is not entitled to waiver.¹¹

On appeal, appellant contends that he believed that he was entitled to receive compensation from workers' compensation as he continued to receive compensation checks from the Office after he elected retirement benefits. He also argued that he had difficulty understanding the procedure. In applying the tests to determine fault, the Office applies a "reasonable person" test.¹² While appellant argued that he believed he was entitled to both disability compensation and retirement benefits, it was not reasonable for him to expect that he could receive compensation for total disability from the Office and OPM benefits in view of his signing of the election of benefits form. A recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.¹³

Appellant noted that it took the Office two years to discover the overpayment. The fact that the Office may have been negligent in continuing to pay wage-loss compensation after he elected OPM benefits does not excuse his acceptance of such payments.¹⁴

Appellant asserts that he is unable to repay the overpayment due to his financial situation. As he is not without fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover the overpayment.¹⁵

¹⁰ See *Franklin L. Bryan*, *supra* note 6.

¹¹ *Lawrence J. Dubuque*, 55 ECAB 667, 663 (2004).

¹² *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹³ *Danny E. Haley*, 56 ECAB 393 (2005); *Otha J. Brown*, 56 ECAB 228 (2004).

¹⁴ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007).

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation for the period August 13, 2006 to January 20, 2007 because he received dual compensation benefits from OPM and the Office. The Board finds that the case is not in posture for decision regarding the amount of the overpayment. The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of recovery of the overpayment.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 22, 2009 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 13, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ Regarding repayment of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. *Ronald E. Ogden*, 56 ECAB 278 (2005).