

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

R.C., Appellant	)	
	)	
and	)	<b>Docket No. 10-1535</b>
	)	<b>Issued: April 7, 2011</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>LOGISTICS AGENCY, Sacramento, CA,</b>	)	
<b>Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On May 19, 2010 appellant filed a timely appeal from a January 19, 2010 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation, for which he was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$36,671.90 from October 1, 1999 through May 15, 2004 because he received dual benefits; and (2) whether he was at fault in creating the overpayment.

**FACTUAL HISTORY**

On July 31, 1991 appellant, then a 40-year-old warehouse/forklift operator, filed a claim for an injury to his elbow and upper arm on July 30, 1991 in the performance of duty. He stopped work on July 31, 1991. The Office accepted the claim for right shoulder strain.

By decision dated April 11, 1997, the Office reduced appellant's compensation effective March 13, 1995 based on its finding that his actual earnings as a modified data transcriber fairly and reasonably represented his wage-earning capacity.<sup>1</sup>

In an October 6, 1999 telephone call, appellant requested that the Office stop paying him differential compensation as he was no longer a federal employee. By letter dated October 6, 1999, the Office informed appellant that he must submit a signed request to stop compensation payments. It further advised him that he might still be entitled to workers' compensation benefits depending on what payment he was collecting from the employing establishment and cited severance pay as one possible example where he might be able to receive both benefits. The Office concluded:

“If you are eligible you may choose to collect retirement benefits from the Office of Personnel Management [OPM]. If you are eligible and do choose OPM retirement you will not be able to collect OWCP [Office] benefits for lost wages. Enclosed are two copies of an election form for your use providing you are eligible and wish to make such an election at this time.”

On October 16, 1999 appellant elected to receive benefits from the Office in lieu of retirement benefits effective October 1, 1999. He signed the election form under the following provision: “I understand that I am not entitled to receive FECA benefits and CSRS/FERS benefits concurrently (except for a schedule award).”

On periodic CA-1032 forms, appellant noted that he received regular retirement benefits. In a telephone call dated May 19, 2004, he requested that the Office stop his compensation. Appellant informed the Office that he notified it yearly on CA-1032 forms that he received both workers' compensation benefits and OPM retirement.

On May 25, 2004 OPM notified appellant that the effective date of his election of retirement benefits through OPM should have been when he retired on October 1, 1999. OPM advised him that he had received an overpayment of compensation.

On June 7, 2004 appellant elected to receive retirement benefits effective October 1, 1999. On June 17, 2004 OPM informed the Office that it should have stopped paying benefits effective September 30, 1999 and noted that “it appears that dual payments may have been made through May 14, 2004.”

On December 16, 2009 the Office notified appellant of its preliminary determination that he received a \$36,671.90 overpayment of compensation from October 1, 1999 through May 15, 2004 because he received disability compensation from the Office and retirement benefits from OPM. It calculated the overpayment by obtaining the gross amount of compensation it paid him

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<sup>1</sup> By decision dated May 14, 1996, the Office reduced appellant's compensation to zero after finding that his actual earnings as a data transcriber effective May 23, 1993 fairly and reasonable represented his wage-earning capacity. On April 11, 1997 a hearing representative vacated the May 14, 1996 decision and remanded the case for further development of the factual and medical evidence. In a decision dated October 22, 1996, the Office granted appellant a schedule award for a 37 percent permanent impairment of the right upper extremity.

during the period of the overpayment. The Office also 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 prerecoupment hearing.

On January 1, 2010 appellant related that in September 1999 his claims examiner told him that he could continue to receive workers' compensation payments because he had less retirement income due to his injury. He indicated that he was uncomfortable continuing to accept compensation but that the claims examiner assured him that it would "not violate any of the Federal Government rules or regulations." Appellant referred to the October 6, 1999 letter from the Office which indicated that he may still be eligible for workers' compensation benefits. He noted that the letter indicated that if he chose OPM retirement then he could not receive benefits from the Office, and stated, "I filled out the two enclosed forms which I dated October 16, 1999 with a copy of my retirement papers. The Sharp Army Depot personnel also previously sent in a copy of my retirement papers to the workers' compensation office. I continued to receive checks from both the OPM and the OWCP."

Appellant related that OPM contacted him in May 2004 and told him that his workers' compensation benefits should have been terminated on September 30, 1999 when he retired. OPM did not take any further action and his case was closed because of "lack of evidence of wrong doing." He stated, "Never once did I ever deny to OPM or OWCP that I was collecting monies from the other. I at all times was nothing but truthful in stating what my earnings were whenever asked by either OPM or OWCP." Appellant asserted that repaying the overpayment would cause financial hardship. In an accompanying overpayment recovery questionnaire, he provided income and expenses. Appellant requested a decision based on the written evidence.

By decision dated January 19, 2010, the Office found that appellant received an overpayment of \$36,671.90 from October 1, 1999 through May 15, 2004 because it paid compensation for total disability when he also received OPM benefits. It further finalized its finding that he was at fault in creating the overpayment because he accepted compensation that he knew or should have known was incorrect. The Office based its fault determination on his signing an October 16, 1999 election of benefits acknowledging that he could not receive disability compensation from the Office and retirement benefits from OPM. It determined that he should forward a check for the entire amount as repayment.

On appeal appellant asserts that the Office informed him that it was permissible to receive retirement benefits and workers' compensation because of a pay differential. He requests that the overpayment be waived because he was scheduled for surgery and would be terminated by his employer for missing work. Appellant maintains that he is unable to repay the overpayment due to hardship.

### LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act<sup>2</sup> 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.<sup>3</sup>

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."<sup>4</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>5</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>6</sup>

### ANALYSIS -- ISSUE 1

Appellant elected to receive both retirement benefits from OPM and wage-loss compensation from the Office effective October 1, 1999. On May 25, 2004 OPM advised him that he had to elect between the two options and informed him that an overpayment existed. On June 7, 2004 appellant elected to receive retirement benefits from OPM retroactive to October 1, 1999. As he elected to receive OPM retirement benefits effective October 1, 1999, any wage-loss compensation he received from the Office after that date constitutes an overpayment of compensation.

With respect to the amount of the overpayment, the Office found that it paid appellant gross compensation of \$36,671.90 for the period October 1, 1999 to May 15, 2004. In calculating the overpayment, it thus included payments for health and life insurance premiums. In *Kenneth E. Rush*,<sup>7</sup> 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 did not derive any benefit from the Office's deductions. It is unclear in this case whether OPM was deducting health and life insurance premiums from appellant's retirement payments during the period of the overpayment. The case is therefore remanded for the Office to determine whether OPM was deducting health and life

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8102.

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.421(a).

<sup>6</sup> *Id.*

<sup>7</sup> 51 ECAB 116 (1999).

insurance premiums from his retirement benefits and, if so, to recalculate the overpayment of compensation.<sup>8</sup>

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

Section 8129(b) of the Act<sup>9</sup> 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 regulations<sup>10</sup> 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.”

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known was incorrect. It must thus 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.<sup>11</sup> On October 6, 1999 appellant requested that the Office stop his compensation as he no longer worked for the Federal Government. In a response of the same date, the Office advised that he needed to submit a signed request to stop payment. It notified appellant that he may be entitled to dual benefits in certain circumstances, such as if he was receiving severance benefits. The Office, however, informed him that he could not receive both workers’ compensation benefits and retirement benefits. On October 16, 1999 he elected to receive workers’ compensation benefits. 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 acknowledged that he was not entitled to receive compensation benefits under the Act and OPM benefits. Consequently, he knew or should have known that he was not entitled to receive dual compensation benefits. Appellant, however, received benefits from both OPM and the Office from October 1, 1999 until May 15, 2004. In May 2004 he elected OPM benefits retroactive to October 1, 1999. As appellant accepted

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<sup>8</sup> See *A.L.*, Docket No. 09-1529 (issued January 13, 2010).

<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> 20 C.F.R. § 10.433.

<sup>11</sup> *Franklin L. Bryan*, 56 ECAB 310 (2006).

compensation benefits from the Office that he knew or should have known he was not entitled to covering the period October 1, 1999 through May 15, 2004, the Board finds that he was at fault in the creation of the overpayment and is not entitled to waiver.<sup>12</sup>

On appeal appellant contends that the Office informed him that he could receive both retirement benefits and workers' compensation because he had a loss of pay due to his injury. The Office uses a reasonable person test in determining fault.<sup>13</sup> As discussed, appellant signed an election form specifically advising him that he could not receive benefits from the Office and OPM benefits. It was thus not reasonable for him to believe that he could receive dual benefits. While appellant notes that he repeatedly informed the Office that he was receiving workers' compensation and retirement benefits, the fact that the Office may have been negligent in continuing to pay wage-loss compensation does not excuse the acceptance of such payments.<sup>14</sup>

Appellant further requested that the overpayment be waived as he is scheduled for surgery and will be unable to repay the overpayment due to hardship. No waiver of an overpayment is possible, however, if the claimant is at fault in creating the overpayment.<sup>15</sup> Regarding appellant's ability to repay the overpayment, the Board's jurisdiction with respect to recovery of an overpayment is limited to those cases where the Office seeks recovery from continuing compensation under the Act.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation from October 1, 1999 through May 15, 2004 because he received dual benefits but that the case is not in posture for decision on the amount of the overpayment. The Board further finds that he was at fault in creating the overpayment, thereby precluding waiver of the recovery.

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<sup>12</sup> *A.L.*, *supra* note 8.

<sup>13</sup> *Tammy Craven*, 57 ECAB 689 (2006); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>14</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>15</sup> 20 C.F.R. § 10.433; *D.R.*, 59 ECAB 148 (2007).

<sup>16</sup> *E.V.*, 59 ECAB 258 (2007); *Joan Ross*, 57 ECAB 694 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 19, 2010 decision of the Office of Workers' Compensation Programs 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: April 7, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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