

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

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**R.S., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
SECRET SERVICE, Washington, DC, Employer**

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**Docket No. 10-1180  
Issued: January 20, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 24, 2010 appellant, through his representative, filed a timely appeal of a February 22, 2010 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in the amount of \$13,735.17 from November 4, 2006 through October 25, 2008 due to the dual receipt of retirement benefits and compensation benefits for which he was without fault; and (2) whether the Office properly denied waiver.

**FACTUAL HISTORY**

On December 12, 1979 appellant, then a 28-year-old secret service officer and firearms trainer, filed an occupational disease claim alleging on September 19, 1979 that he developed an emotional condition due to factors of his federal employment. The Office accepted his claim for

temporary aggravation of a preexisting emotional condition of obsessive compulsive neurosis. Appellant returned to a civilian position on October 20, 1980. The Office provided compensation based on his loss of wages. In 1989 appellant accepted a position as a payroll technician with the Department of Veterans Affairs.

In a letter dated July 21, 1994, the Office informed appellant that he could not receive benefits from the Office of Personnel Management (OPM) and compensation benefits under the Federal Employees' Compensation Act at the same time. It requested that he advise whether he was considering disability retirement and that it would provide an election notice. On August 2, 1994 appellant informed the Office that he would apply for disability retirement.

On October 13, 2006 appellant contended that he was permanently partially disabled. The Office requested supporting medical evidence on October 18, 2006. Appellant's physician, Dr. Laura Gaffney, a Board-certified psychiatrist, responded on November 8, 2006 and diagnosed panic disorder and recurrent major depression. She stated that appellant could only work in a civilian job and experienced severe anxiety and depression around firearms.

Appellant completed a Form EN1032 on January 19, 2007 and stated that he was working and was not receiving OPM benefits. He completed a form on December 1, 2007 but indicated that he had retired and received a regular retirement check. In a report dated July 14, 2008, Dr. Gaffney stated that appellant had experienced an exacerbation of his anxiety disorder and post-traumatic stress disorder and was unable to work due to poor concentration and low energy.

In a letter dated November 6, 2008, the Office informed appellant that he was not entitled to compensation benefits for disability and from OPM during the same period. It informed him to elect which benefits to receive.

The Office contacted OPM, which advised that appellant received retirement benefits from November 4, 2006 in the amount of \$2,379.00 every 30 days. It ceased payment of monetary wage-loss benefits on October 26, 2008 as he had not completed the election form. The Office noted that appellant's OPM benefits exceed his compensation benefits and an overpayment was created.

In a letter dated January 9, 2009, the Office informed appellant of a preliminary determination that he received an overpayment in the amount of \$13,735.17 based on dual receipt of benefits from OPM and the Office from November 4, 2006 through October 25, 2008. It found that he was without fault in the creation of the overpayment and informed him of his appeal rights. The Office included overpayment calculations and documentation. It provided appellant with an overpayment recovery questionnaire to complete within 30 days. On January 21, 2009 appellant requested a precoupment hearing on the issues of fault and waiver. He contended that the overpayment was not his fault.

The Office contacted appellant by telephone and requested that he complete the overpayment recovery questionnaire. It provided him with a second copy of the form on February 12, 2009.

On November 24, 2009 appellant advised that he was unable to attend the oral hearing and requested that his compensation be reinstated.

By decision dated February 22, 2010, the Branch of Hearings and Review finalized the overpayment determination, finding that appellant received an overpayment in the amount of \$13,735.17, that he was not at fault in the creation of the overpayment, but that he had not provided any financial information to warrant waiver of the overpayment.

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

Section 8102 of the Act<sup>1</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>2</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>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**

Appellant began receiving OPM retirement benefits on November 4, 2006. He did not complete any formal election forms regarding the wage-loss benefits also paid by the Office through October 25, 2008. Because appellant was in receipt of OPM retirement, all wage-loss compensation he received from the Office constituted a dual receipt of benefits.<sup>6</sup> The record establishes that the Office paid him monetary compensation to October 26, 2008; thus, he received an overpayment.

With respect to the amount of the overpayment, the Office documented its calculations of the compensation payments made for the period in question totaling \$13,735.17. Appellant has not disputed the fact or amount of the overpayment. The Board finds that he received an overpayment due to dual benefits in the amount of \$13,735.17.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8102.

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 8116(a)

<sup>4</sup> 20 C.F.R. § 10.421(a).

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

<sup>6</sup> *A.L.*, 61 ECAB \_\_\_ (Docket No. 09-1529, issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.<sup>7</sup> The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“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.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations<sup>8</sup> provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom the Office seeks recovery needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed the resource base of \$4,800.00 for an individual.<sup>9</sup> An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).<sup>10</sup>

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.<sup>11</sup> Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.<sup>12</sup>

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<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> 20 C.F.R. § 10.436.

<sup>9</sup> *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

<sup>10</sup> *Id.*

<sup>11</sup> 20 C.F.R. § 10.437(b).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

Section 10.438 of the implementing regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>13</sup>

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

The Office notified appellant of the existence of the overpayment, that he was without fault and that he needed to explain his reasons for seeking a waiver. It provided a recovery financial questionnaire form and asked him for documents to support claimed income and expenses. The Office advised appellant to submit a response within 30 days.

The overpayment recovery questionnaire is designed to obtain financial information to determine a beneficiary eligibility for waiver of an overpayment. Appellant did not respond to the preliminary determination. He did not submit a response to the overpayment recovery questionnaire provided by the Office. Although appellant was found without fault in the creation of the overpayment, he nevertheless bears responsibility for providing the financial information necessary to support a request to waive recovery of the overpayment.

Section 10.438 of the regulations state that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>14</sup> Failure to submit the information within 30 days of a request from the Office will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.<sup>15</sup> The Board finds that the Office properly denied waiver of the overpayment in this case as appellant failed to provide any financial penalty information to the preliminary overpayment determination. The Office provided a second recovery questionnaire on February 12, 2009, but it too was not returned. Under section 10.438(b) of the implementing regulations, the Office properly denied waiver.

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

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<sup>13</sup> 20 C.F.R. § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

<sup>14</sup> *Id.* at § 10.438(a).

<sup>15</sup> *Id.* at 10.438(b). *See Linda Hilton*, 52 ECAB 476 (2001).

<sup>16</sup> *See Lewis George*, 45 ECAB 144, 154 (1993).

**CONCLUSION**

The Board finds that appellant received a \$13,735.17 overpayment of compensation based on the dual receipt of benefits from November 4, 2006 to October 25, 2008. The Office properly denied waiver of recovery based on his failure to submit requested financial information.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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