

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

E.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Philadelphia, PA, Employer)

**Docket No. 13-1307
Issued: December 3, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 8, 2013 appellant filed a timely appeal from an April 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 \$56,316.66 for the period March 1, 2009 to February 9, 2013 because he received compensation from OWCP after he elected retirement benefits from the Office of Personnel Management (OPM); and (2) whether he was at fault in the creation of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated October 21, 2009, the Board affirmed an October 21, 2008 nonmerit decision denying appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.² On March 10, 2011 the Board affirmed a March 2, 2010 nonmerit decision denying his untimely request for reconsideration on the grounds that he failed to establish clear evidence of error.³ In a decision dated April 5, 2012, the Board affirmed a July 19, 2011 decision finding that appellant's request for reconsideration was untimely and insufficient to show clear evidence of error.⁴ The facts and the circumstances as set forth in the prior decisions are hereby incorporated by reference. The facts pertinent to the instant appeal are set forth.

OWCP paid appellant wage-loss compensation for four hours a day beginning September 6, 2002. On May 19, 2012 appellant noted that he wanted to receive benefits from OPM beginning on the date of his retirement. He asked OWCP to inform him in writing of the date that his compensation would end. On September 3, 2012 appellant submitted a completed election form to OWCP to receive retirement benefits from OPM effective March 1, 2009. By letter dated February 4, 2013, OWCP advised him that he was not entitled to receive workers' compensation benefits and retirement benefits for the same period. It enclosed another election form. On February 7, 2013 appellant again elected to receive retirement benefits from OPM effective March 1, 2009.

On March 4, 2013 OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$56,316.66 because he received benefits from OWCP from March 1, 2009 to February 9, 2013 but elected to receive compensation retroactively from OPM beginning March 1, 2009. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment. OWCP requested that he complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of

² Docket No. 09-435 (issued October 21, 2008). On July 29, 1985 appellant, then a 30-year-old letter carrier, sustained acute lumbar strain and a herniated disc at L5 in the performance of duty. He returned to part-time work on September 12, 2002 and received compensation from OWCP for two hours per day. By decision dated October 24, 2003, a hearing representative reopened appellant's case for review under section 8128 and reversed OWCP decisions terminating his compensation for refusing suitable work. The hearing representative instructed OWCP to refer him for an impartial medical examination. OWCP paid appellant compensation for total disability from July 15, 2000 to September 6, 2002 and compensation for four hours per day effective September 6, 2002. By decision dated May 24, 2004, it found that he did not establish an employment-related recurrence of disability beginning April 16, 2003. OWCP continued to pay appellant compensation for four hours per day. On April 20, 2005 a hearing representative vacated the May 24, 2004 decision and remanded the case for clarification from Dr. Paul Liebert, a Board-certified orthopedic surgeon, regarding whether appellant sustained a recurrence of disability beginning April 16, 2003. Based on Dr. Liebert's opinion, by decisions dated November 29, 2005 and April 21, 2006, OWCP found that appellant did not establish a recurrence of disability beginning April 16, 2003. In decisions dated October 21, 2008, March 2, 2010 and July 19, 2011, it denied his requests for reconsideration as untimely and insufficient to show clear evidence of error.

³ Docket No. 10-1278 (issued March 10, 2011).

⁴ Docket No. 11-1983 (issued April 5, 2012).

the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On March 13, 2013 appellant requested a decision based on the written evidence. He asserted that he was not at fault in creating the overpayment. In an accompanying statement, appellant maintained that he had not provided inaccurate information to OWCP regarding an overpayment or accepted a payment to which he was not entitled as he had not received any money from OPM. He related, "As I have stated, I have had my OWCP stopped and still have not received any benefits from OPM."

By decision dated April 29, 2013, OWCP determined that appellant received an overpayment of \$56,316.66 because he retroactively elected to receive compensation from OPM when he had already received compensation benefits from OWCP. It further found that he was at fault in creating the overpayment.⁵ OWCP determined that appellant should submit a check for the full amount of the overpayment as repayment.

On appeal appellant contends that he was not at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA⁶ defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁷ The implementing regulations provide that a "beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity."⁸ The beneficiary must elect the benefit that he or she wishes to receive.⁹

ANALYSIS -- ISSUE 1

On September 3, 2012 appellant elected to receive OPM retirement benefits retroactive to March 1, 2009 in lieu of compensation from OWCP. The record reflects that OWCP paid wage-loss compensation for partial disability from March 1, 2009 to February 9, 2013. As appellant elected to receive OPM retirement effective March 1, 2009, any wage-loss compensation received from OWCP for a period on or after that date constitutes an overpayment of benefits.¹⁰ Appellant is not eligible to receive wage-loss compensation and retirement benefits from OPM

⁵ In a telephone call dated April 29, 2013, appellant related that he had received a check from OPM and requested repayment information. The claims examiner indicated that he had already issued the overpayment determination requesting payment in full.

⁶ 5 U.S.C. § 8101 *et seq.*

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.421(a)

⁹ *Id.*

¹⁰ See *Franklin L. Bryan*, 56 ECAB 310 (2005).

for the same time period.¹¹ An overpayment arose after his election of benefits as he was not entitled to the amount paid by OWCP for the period March 1, 2009 to February 9, 2013. Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$56,631.66 for the period March 1, 2009 to February 9, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹² 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 OWCP’s implementing regulations¹³ provide that in determining whether a claimant is at fault, it 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

OWCP denied appellant’s request for waiver of recovery of the overpayment because it found that he was at fault in creating the overpayment. It determined that he knew or should have known that he could not receive retirement benefits from OPM and compensation from OWCP concurrently. However, the issue is not whether appellant was familiar with OWCP’s prohibition against receiving dual benefits, but whether he accepted a payment which he knew or should have known to be incorrect.¹⁴ On September 3, 2012 appellant elected benefits from OPM retroactive to March 1, 2009 in lieu of compensation from OWCP. On February 4, 2013 OWCP notified him that he was not entitled to receive workers’ compensation benefits and retirement benefits concurrently and enclosed an election form. On February 7, 2013 appellant again elected retirement benefits from OPM effective March 1, 2009. He did not, however, receive any payment from OPM from March 1, 2009 to February 9, 2013, the period of the overpayment. Although appellant was generally aware that he could not simultaneously receive OPM benefits and workers’ compensation payments, no payment was made by OPM during the period in question and there is no evidence that he accepted a payment during this period that he knew or should have known was incorrect.¹⁵ Accordingly, OWCP’s finding that he was at fault

¹¹ 20 C.F.R. § 10.421(a).

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.433.

¹⁴ See 20 C.F.R. § 10.433(a).

¹⁵ See *Franklin L. Bryan, supra* note 10.

in creating the overpayment will be set aside. The case will be remanded for a determination of whether appellant is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of \$56,316.66 for the period March 1, 2009 to February 9, 2013 because he received compensation from OWCP after he retroactively elected retirement benefits from OPM. The Board further finds that he was without fault in creating the overpayment. The case is remanded to OWCP for a determination of whether appellant is entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2013 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.

Issued: December 3, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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