

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

R.A., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
FEDERAL EMERGENCY MANAGEMENT)
AGENCY, Biloxi, MS, Employer)

Docket No. 15-75
Issued: March 9, 2015

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 14, 2014 appellant, through his attorney, filed a timely appeal from a September 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$233,110.23 overpayment of compensation; and (2) whether he was at fault in creating the overpayment, thereby rendering him ineligible for consideration of waiver.

FACTUAL HISTORY

On April 6, 2007 appellant, a 58-year-old National Flood Insurance Program specialist (mitigation), sustained a traumatic injury in the performance of duty when he was involved in a

¹ 5 U.S.C. § 8101 *et seq.*

car accident while in the performance of duty. OWCP accepted his claim for right rotator cuff sprain, right ankle deltoid ligament sprain, and left lateral meniscus tear.

Appellant received compensation for temporary total disability on the periodic rolls. When OWCP placed him on the periodic rolls, it notified him in a letter dated September 19, 2007 that he was not permitted to receive workers' compensation benefits concurrently with retirement benefits:

“You must report any retirement income, disability income, or compensation benefits from any [f]ederal agency. This is because a recipient of compensation benefits under the [F]ederal Employees' Compensation Act is not permitted to receive benefits under certain other [f]ederal programs, including the Civil Service [R]etirement [P]rogram.”

On the Form EN1032 he completed on July 8, 2008, appellant indicated that he had received a regular retirement check during the past 15 months. He disclosed this information each year thereafter.

In 2013 appellant informed OWCP that he received regular retirement benefits from the Department of the Army. He explained that he was never in the military, but worked as a firefighter and was now receiving regular retirement benefits. The Office of Personnel Management (OPM) confirmed that appellant was in receipt of regular monthly retirement benefits since 2003 for his civilian service with the Department of the Army.

OWCP made a preliminary determination on December 10, 2013 that appellant received an overpayment of compensation in the amount of \$233,110.23, which represented all the wage-loss compensation he had received since the date of injury. It found that he received retirement benefits concurrently with workers' compensation benefits, in violation of 5 U.S.C. § 8116. OWCP also found that appellant was at fault in creating the overpayment because he was aware or reasonably should have been aware that he could not receive retirement benefits at the same time as workers' compensation under FECA. It noted its September 19, 2007 letter to appellant specifically addressing this dual benefit situation.

Appellant submitted copies of an Application for Waiver of Civilian/Military Annuity Reduction. The application advised that, under the Federal Employee Pay Comparability Act, the employing establishment was granted authority to waive the civilian/military retirement reduction during the first 120 days of a Presidential Disaster Declaration. The application also advised: “Waivers must be approved on a case-by-case basis by the Director, Office of Human Resources Management.”

Appellant completed Part A, certifying that he declined employment activation with the National Flood Insurance Program unless a waiver for reduction of his civilian/military annuity was granted. He further certified his understanding that this waiver would be in effect only for the first 120 days from the date of the Presidential Disaster Declaration. Appellant signed the application in April 2007.

An employing establishment manager completed Part B, which indicated that the date of the Presidential Disaster Declaration was August 29, 2005. He justified the waiver by explaining that the unique skills and abilities of the candidate were needed to support the disaster recovery

effort. The manager certified that the employment of the annuitant “should be made” without a penalty to his civilian/military retirement annuity during the first 120 days of the disaster because it was critical to the disaster response and recovery mission of the employing establishment. He signed the application in April 2007.

Part C was not completed, signed, or dated by the Director of the Office of Human Resources Management.

During a telephonic hearing before an OWCP hearing representative, appellant’s representative argued that OWCP was more at fault for the creation of the overpayment than appellant. He also argued that compensation was a replacement for wages, and if the waiver meant no reduction in wages, there should be no reduction in compensation.

In a decision dated September 10, 2014, OWCP hearing representative finalized the preliminary findings. She found that appellant had received an overpayment of \$233,110.23, as he could not collect retirement benefits and compensation for wage loss at the same time. The hearing representative noted that the application for waiver did not expressly extend to wage-loss compensation, and it applied for only 120 days, after which appellant’s salary would be reduced because of his receipt of retirement benefits.

OWCP hearing representative further found that appellant was at fault in creating the overpayment. Notwithstanding his disclosures on EN1032 forms, appellant should have known that the compensation payments he received were incorrect because OWCP’s September 2007 letter clearly explained that he could not receive wage-loss compensation and retirement benefits concurrently. As appellant was at fault, he was not eligible for waiver, and as he was no longer receiving compensation from OWCP, the hearing representative found the debt due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² While an employee is receiving compensation, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.³ Thus, a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he wishes to receive, and the election, once made, is revocable.⁴

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.421(a).

⁵ 5 U.S.C. § 8129(a).

ANALYSIS -- ISSUE 1

When appellant began receiving compensation for wage loss resulting from his April 6, 2007 work injury, he was in receipt of federal retirement benefits from his work as a firefighter with the Department of the Army. In a letter dated September 19, 2007, OWCP notified him that he was not permitted to receive both. By statute, a beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.

Appellant submitted an Application for Waiver of Civilian/Military Annuity Reduction; however, the application was not approved. The form made clear that waivers must be approved on a case-by-case basis by the Director of the Office of Human Resources Management. However, Part C, where the Director was to approve or disapprove appellant's application, was left blank. The evidence, therefore, shows only that appellant requested a waiver, not that a waiver was granted approved.

Also, any waiver of the retirement reduction would extend only for the first 120 days from the date of the Presidential Disaster Declaration. On each copy of the application that appellant submitted, the date of the Presidential Disaster Declaration was August 29, 2005. Accordingly, if the waiver were approved, it would have expired long before appellant received his first compensation payment in September 2007.

Further, the evidence appellant submitted to OWCP does not show that the Federal Employee Pay Comparability Act grants any authority to OWCP to waive the retirement reduction. OWCP is bound by section 8116(a) of FECA. Appellant argues that compensation is a replacement for wages, and therefore the authority granted to the employing establishment should also be extended to OWCP, but this would bring the two statutes into conflict. FECA explicitly prohibits the concurrent receipt of wage-loss compensation and a federal retirement annuity, and the Board finds that OWCP has no authority to waive the provisions of the statute.

In the case of *C.M.*,⁶ the claimant received compensation benefits for wage loss concurrently with retirement benefits from OPM. The Board held that she received dual benefits that were prohibited by statute, thereby creating an overpayment: "The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibit the receipt of FECA wage-loss benefits and a federal annuity."

As appellant received wage-loss compensation concurrently with a federal retirement annuity, in violation of section 8116(a) of FECA, the Board finds that he received a prohibited dual benefit and an overpayment of compensation. Appellant's compensation payment history confirms that he received \$233,110.23 in gross compensation through December 14, 2013. The Board will therefore affirm OWCP's September 10, 2014 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation

⁶ Docket No. 14-696 (issued December 18, 2014).

benefits is responsible for taking all reasonable measures to ensure that payments he received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he knew or should have known to be incorrect; or (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁷

Whether or not OWCP 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 is being overpaid.⁸

The fact that OWCP may have erred in making the overpayment does not, by itself, relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁹

ANALYSIS -- ISSUE 2

When OWCP placed appellant on the periodic rolls in September 2007, it notified him that he was not permitted to receive wage-loss compensation concurrently with a federal retirement annuity. As appellant was already in receipt of a federal retirement annuity, he should have known that the payments he would soon begin to receive from OWCP were incorrect.

Appellant argued that he was granted a special waiver to receive both a federal retirement annuity and compensation for wage loss. But as discussed above, the evidence does not support this assertion. The approval section of the application was left blank and, by its own terms, the waiver would have expired long before appellant began to receive wage-loss compensation. The application gave no indication that OWCP was granted any authority to waive the provisions of FECA. Notwithstanding what he alleges he knew, the Board finds that appellant should have known, after receiving OWCP's September 19, 2007 correspondence, that he could not collect his federal retirement annuity and compensation for wage loss concurrently.

Appellant argued that he truthfully and consistently disclosed that he was in receipt of regular retirement checks, and that OWCP was therefore more negligent than he in allowing the payments to continue. However, the standard is not one of comparative negligence. The fact that OWCP erred in making the payments does not relieve the individual who received the overpayment of liability for repayment if the individual was also at fault in accepting the overpayment.

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

⁹ *Id.* at § 10.433(a).

The Board finds that appellant was at fault in creating the overpayment on the basis that he accepted payments which he knew or should have known to be incorrect. Accordingly, the Board will affirm OWCP's September 10, 2014 decision on the issue of fault.

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.¹⁰ Because collection of the overpayment in this case cannot be made by adjusting later payments -- appellant is no longer receiving wage-loss compensation -- the Board has no jurisdiction to review the issue of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received a \$233,110.23 overpayment of compensation. The Board also finds that he was at fault in creating the overpayment and is therefore not eligible for consideration of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁰ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).