

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

FRANKLIN L. BRYAN, Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Toledo, OH, Employer**

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**Docket No. 04-2179
Issued: February 4, 2005**

Appearances:
Franklin L. Bryan, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 2, 2004 appellant filed a timely appeal of the July 22, 2004 merit decision of the Office of Workers' Compensation Programs, which found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$5,142.01 for the period July 7 to September 7, 2002; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 61-year-old safety and occupational health specialist, sustained an injury on June 1, 1998, which the Office accepted for thoracic and lumbar strains and radiculopathy with

stenosis at L3-4, L4-5 and L5-S1. The Office placed appellant on the periodic compensation rolls and he received appropriate wage-loss compensation.

On July 7, 2002 appellant requested that the Office stop payment of his workers' compensation benefits so that he could receive a disability retirement annuity from the Office of Personnel Management (OPM). He stated that he was aware that he could not receive retirement annuity payments during the same time he was receiving workers' compensation benefits. Appellant advised OPM on July 10, 2002 of his election to receive disability retirement benefits and indicated that he had asked the Office in writing to stop his workers' compensation benefits. On July 23, 2002 OPM informed appellant that before it could commence payment of benefits it needed documentation from the Office showing the termination date of his workers' compensation benefits. Appellant telephoned the Office on August 6, 2002 and afterwards he forwarded a copy of OPM's July 23, 2002 letter.

The employing establishment presented appellant with an August 7, 2002 job offer for part-time, limited-duty work as a safety and health clerk. In an August 8, 2002 letter, the Office found that the offered position was suitable to appellant's work capabilities. Appellant declined the offered position on August 16, 2002. He informed the employing establishment that he had previously elected to receive a retirement disability annuity from OPM.

The Office continued to pay wage-loss compensation through September 7, 2002. On September 11, 2002 the Office notified OPM of appellant's election to receive a retirement disability annuity effective July 7, 2002. The Office requested reimbursement from OPM of \$5,142.01 for compensation paid from July 7 to September 7, 2002.

On October 9, 2003 the Office made a preliminary determination that appellant had been overpaid benefits in the amount of \$5,142.01. The Office noted that appellant elected to receive OPM benefits effective July 7, 2002, but that it did not stop compensation benefits until September 7, 2002. The Office found that appellant was not at fault in creating the overpayment.

Appellant requested a waiver of overpayment and a hearing before the Office's Branch of Hearings and Review. In a decision dated April 27, 2004, the Office hearing representative found that appellant was at fault in creating the overpayment because he knew he was not entitled to receive workers' compensation benefits for any period after July 7, 2002. The hearing representative set aside the October 9, 2003 preliminary determination and remanded the case to the Office with instructions to issue a new preliminary determination with a finding that appellant was not without fault in the creation of the overpayment.

On May 4, 2004 the Office issued a preliminary determination finding that appellant was at fault in creating the \$5,142.01 overpayment. The Office explained that the hearing representative found that the record clearly reflected that appellant was aware that he could not receive annuity benefits during the same time he received workers' compensation benefits.

In a May 14, 2004 letter, appellant challenged the Office's determination of fault noting, among other things, that it delayed acting on his July 7, 2002 election of benefits for more than two months and the only monies he received during that timeframe were direct deposits from the Office. He also stated that during this same period he received nothing from OPM indicating

that his annuity had started, was about to start or that OPM had received any paperwork from the Office regarding his request.

In a decision dated July 22, 2004, the Office finalized the preliminary determination regarding the amount of overpayment and appellant's role in creating the overpayment. Because appellant was at fault in creating the overpayment, the Office determined that he was not entitled to waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act states that while an employee is receiving workers' compensation, he or she "may not receive salary, pay or remuneration of any type from the United States," except in return 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.¹ The implementing regulations provide that a "beneficiary may not receive wage-loss compensation concurrently with a Federal retirement or survivor annuity."² The beneficiary must elect the benefit that he or she wishes to receive.³

ANALYSIS -- ISSUE 1

On July 7, 2002 appellant elected to receive an OPM retirement disability annuity in lieu of wage-loss compensation he had been receiving under the Act. He informed OPM of his election on July 10, 2002. OPM advised appellant on July 23, 2002 that in order for him to receive benefits under the Federal Employees' Retirement System (FERS), OPM would need documentation from the Office showing the termination date of his workers' compensation benefits. The Office submitted the necessary documentation on September 11, 2002 and advised OPM that pursuant to appellant's instructions it should commence monthly payments effective July 7, 2002. Additionally, the Office informed OPM that it had already paid appellant wage-loss compensation for the period July 7 to September 7, 2002, which it considered to be an overpayment.

The record reflects that appellant received wage-loss compensation from the Office in the amount of \$5,142.01 for the period July 7 to September 7, 2002. Because appellant elected to receive an OPM retirement disability annuity effective July 7, 2002, any wage-loss compensation he received from the Office for a period beginning on or after July 7, 2002 constitutes an overpayment of benefits. Appellant is not eligible to receive wage-loss compensation and FERS benefits from OPM for the same time period.⁴ Accordingly, the Board finds that appellant

¹ 5 U.S.C. § 8116(a).

² 20 C.F.R. § 10.421(a) (1999).

³ *Id.*

⁴ *Id.*

received an overpayment of compensation in the amount of \$5,142.01 for the period July 7 to September 7, 2002.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless 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.⁵ Section 10.433 of the implementing regulations specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁷ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient “[a]ccepted a payment which he or she knew or should have known to be incorrect.”⁸

ANALYSIS -- ISSUE 2

The Office denied appellant’s request for a waiver of overpayment because it found that appellant was at fault in creating the overpayment. While the Office initially determined that appellant was not at fault, the hearing representative reversed this finding, noting that because appellant elected OPM annuity benefits effective July 7, 2002, he knew that he could not receive workers’ compensation benefits for any period after July 7, 2002. Appellant’s July 7, 2002 letter to the Office demonstrates his knowledge of the fact that he was not entitled to receive benefits from both the Office and OPM for the same time period. He clearly stated his understanding that the rules prohibited him from receiving “any annuity benefits during the same time” he was “in receipt of workers’ compensation benefits.” However, the issue is not whether appellant was familiar with the Act’s prohibition against receiving dual benefits, but whether appellant accepted a payment which he knew or should have known to be incorrect.⁹

Although he elected to convert to OPM disability retirement benefits on July 7, 2002, the Office did not submit the necessary documentation to OPM until September 11, 2002 more than two months after the request. The record reflects that the Office issued payment on July 13, August 10 and September 7, 2002, which covered the period June 16 to September 7, 2002. The record does not include evidence that OPM paid appellant disability retirement benefits prior to

⁵ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

⁶ 20 C.F.R. § 10.433(a) (1999).

⁷ *Id.*

⁸ 20 C.F.R. § 10.433(a)(3) (1999).

⁹ 20 C.F.R. § 10.433(a)(3) (1999).

the Office's September 11, 2002 notification.¹⁰ Appellant stated that the only benefits he received during the period July 7 to September 7, 2002 were from the Office.

The only correspondence appellant received from the Office between July 7 and September 11, 2002 was an August 8, 2002 letter advising that the Office found the employing establishment's recent limited-duty job offer suitable. The letter further stated that upon acceptance of the position appellant would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his date-of-injury position. A month later the Office abandoned its rehabilitation efforts and informed OPM of appellant's effective transfer date of July 7, 2002.

Because appellant had not received benefits from OPM between July 7 and September 7, 2002, he was not in receipt of a dual benefit when the Office paid wage-loss compensation on July 13, August 10 and September 7, 2002. There is no evidence that when appellant accepted these three payments he knew or should have known the payments to be incorrect. Although he 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. Accordingly, the Office's finding that appellant was at fault in creating the overpayment is 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 in the amount of \$5,142.01. The Board finds that appellant was without fault in accepting or creating the overpayment. The case is remanded to the Office for a determination of whether appellant is entitled to waiver of recovery of the overpayment.

¹⁰ In its July 23, 2002 letter, OPM informed appellant that before he could begin receiving benefits under FERS it would need documentation from the Office showing the termination date of workers' compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2004 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: February 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member