

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

V.Y., Appellant

and

DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Patuxent, MD, Employer

)
)
)
)
)
)
)
)
)

**Docket No. 10-848
Issued: March 28, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 12, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision concerning an overpayment dated November 2, 2009. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$45,104.89 for the period July 3, 2004 through November 22, 2008 because she received dual compensation benefits from the Office of Personnel Management (OPM) and the Office; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and therefore ineligible for waiver of recovery of the overpayment.

FACTUAL HISTORY

Appellant, a 53-year-old nursing assistant, injured her right arm in the performance of duty on January 29, 1996. The Office accepted the claim for right arm fracture. It paid

compensation for total disability and placed appellant on the periodic rolls. Appellant returned to work on July 1, 1996 and subsequently stopped work on October 9, 1996. She was separated from the employing establishment on November 3, 1997.

In a decision dated October 14, 2000, the Office informed appellant that it was adjusting her compensation because the medical evidence showed that she was no longer totally disabled for work. It determined that she would receive monthly compensation at the rate of \$617.26, based on her adjusted wage-earning capacity. The decision contained the following notice to appellant:

“You are advised that receipt of [the Office] payments for loss of wage-earning capacity and receipt of an annuity from [OPM] constitutes a dual benefit. If you receive such benefits from OPM, you should so advise this office immediately. You will be asked to make an election between the two benefits.”

Appellant began receiving an OPM benefit annuity on July 3, 2004.

In a decision dated November 14, 2008, the Office informed appellant that it was suspending her compensation because she failed to complete and submit the Form CA-1032 which it sent to her on August 21, 2008 pursuant to section 10.525(a) of the Office’s regulations. It advised her that if she completed and returned an enclosed Form CA-1032 her compensation benefits would be restored retroactively to the date they were suspended. Appellant did not respond to this letter.

In a Form CA-1032 dated January 2, 2009, received by the Office on January 8, 2009, appellant indicated that she was not receiving any other federal benefits or payments, including OPM benefits.

By letter dated June 4, 2009, OPM advised the Office that appellant was receiving OPM retirement benefits. It stated that she had received dual compensation from OPM, while she was simultaneously receiving benefits from the Office, for the period July 3, 2004, the commencing date of her annuity, through November 22, 2008, the date the Office suspended her compensation.

By letter dated July 28, 2009, the Office informed appellant that OPM had notified that she was receiving benefits from OPM. It stated that benefits paid by OPM and benefits for wage loss paid by the Office were not payable for the same period of time and that employees entitled to both the Office and OPM annuity benefits must elect which benefit to receive. The Office stated that it had enclosed two copies of election CA-1105-1288 forms; it instructed her to complete the forms and return them to the Office within 30 days.

An Office worksheet dated July 28, 2009 indicated that appellant had been paid the amount of \$45,104.89 for the period July 3, 2004 to November 22, 2008.

On July 31, 2009 appellant submitted a form letter to the Office in which she checked a box indicating that she had not received a lump-sum annuity from OPM.

By letters dated August 19 and September 9, 2009, the Office informed appellant that her July 31, 2009 letter did not provide sufficient indication as to whether she had elected to receive compensation from either the Office or OPM. It reiterated that she needed to complete and submit CA-1105-1288 forms. Appellant did not respond to this letter.

In response to an OPM inquiry, received by the Office on September 11, 2009, appellant stated, "I have not received any retirement or compensation at any time...." On October 1, 2009 the Office made a preliminary determination that appellant received an overpayment in the amount of \$45,104.89 due to her receipt of dual benefits from OPM and under the Federal Employees' Compensation Act during the period July 3, 2004 through November 22, 2008. It found that she was at fault in the creation of the overpayment. The Office stated that appellant was aware or should have reasonably been aware that she was receiving compensation that she was not entitled to receive. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. Appellant did not respond to this request within 30 days.

In a decision dated November 2, 2009, the Office finalized the preliminary determination regarding the overpayment of \$45,104.89. It found that appellant was at fault in the creation of the overpayment in the amount of \$45,104.89 for the period July 3, 2004 through November 22, 2008 and ordered her to repay the overpayment in full in monthly installments of \$300.00

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the 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

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$45,104.89 for the period July 3, 2004 through November 22, 2008. Appellant received dual compensation from OPM in addition to wage-loss

¹ 5 U.S.C. § 8116(a).

² 20 C.F.R. § 10.421(a).

³ *Id.*

compensation she had been receiving under the Act during this period. The evidence of record establishes that she never completed an election of benefits and therefore received both OPM and the Office benefits. Consequently, any wage-loss compensation appellant received from the Office for a period beginning on or after July 3, 2004 constitutes an overpayment of benefits. She is not eligible to receive wage-loss compensation and disability retirement benefits from OPM for the same time period.⁴ The Board finds that appellant received an overpayment of compensation in the amount of \$45,104.89 for the period July 3, 2004 through November 22, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that 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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁶

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provide in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--

Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

Failed to provide information which the individual knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”⁷

With respect to whether an individual is without fault, section 10.433(b) of the Office regulations provide in relevant part:

“Whether or not [the Office] 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

⁴ *Id.*, see *Franklin L. Bryan*, 56 ECAB 310 (2005).

⁵ 5 U.S.C. § 8129(a)-(b).

⁶ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁷ 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”⁸

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

The Office found that appellant was at fault in the creation of the overpayment as she knew or should have known that she was not entitled to dual benefits. The record establishes that on October 14, 2000 she was informed that receipt of the Office payments for loss of wage-earning capacity and receipt of an annuity from OPM constituted a dual benefit and that she was instructed to immediately contact the Office if she received such benefits from OPM. Appellant knew or should have known that acceptance of compensation benefits for periods after July 3, 2004 were incorrect. She accepted such payments after this date which she knew or should have known to be incorrect, as indicated by her incorrect responses to OPM inquiries and the January 2, 2009 CA-1032 forms on which she indicated that she was not receiving any other federal benefits or payments.⁹ As appellant accepted compensation benefits from the Office which covered the period July 3, 2004 through November 22, 2008, the Board finds that she was at fault in the creation of the overpayment and is not entitled to waiver.¹⁰

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹¹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹²

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$45,104.89 during the period July 3, 2004 through November 22, 2008 because she received dual compensation benefits from OPM and under the Act. The Board further finds that the Office properly found that she was at fault in the creation of the overpayment.

⁸ *Id.* at § 10.433(b).

⁹ *Lorenzo Rodriguez*, 51 ECAB 295, note 13 (2000). The Board notes that the Office apparently was not aware that appellant was receiving OPM benefits until it received OPM's June 4, 2009 letter.

¹⁰ *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

¹¹ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹² *Cheryl Thomas, id.*

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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