

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

D.R., Appellant

and

**DEPARTMENT OF THE INTERIOR, FISH &
WILDLIFE SERVICE, Denver, CO, Employer**

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**Docket No. 13-1531
Issued: October 21, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 5, 2013 appellant filed a timely appeal from the January 23, 2013 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 over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$2,016.50 overpayment of compensation; and (2) whether it properly determined that she was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

In March 2005, OWCP accepted that appellant, then a 46-year-old office automation assistant, sustained bilateral/lateral epicondylitis due to the repetitive computer-related duties of her job. It later accepted that she also sustained bilateral ulnar nerve lesions, bilateral chronic forearm tendinitis and other peripheral enthesopathies due to her work.²

In a January 25, 2011 letter, OWCP advised appellant that it had made a preliminary determination that she received a \$2,370.43 overpayment of compensation because she elected to receive an Office of Personnel Management (OPM) annuity in lieu of OWCP compensation starting retroactively on June 1, 2010 and improperly received both OPM and OWCP benefits for the period June 1 to December 18, 2010.³ It also informed her that it had made a preliminary determination that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to dual payments. Appellant was provided 30 days from the date of the letter to submit evidence and argument challenging the overpayment.

In a March 1, 2011 decision, OWCP determined that appellant received a \$2,370.43 overpayment of compensation and that she was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

In a March 28, 2011 letter, appellant advised OWCP that she had not yet received any payments from OWCP.

In a June 3, 2011 letter to appellant, Michelle Taylor, an OWCP senior claims examiner, advised that she had contacted OPM and confirmed that appellant had not actually received any OPM benefits to date.⁴ She indicated that she sent OPM a letter informing it of appellant's election and requesting that it withhold and forward the amount of \$2,370.43 to OWCP. Ms. Taylor stated, "Until further notice you are absolved of the debt in the amount of \$2,370.43. However please note that ... OWCP may take further action if OPM does not return the funds to our agency. You are advised to notify ... OWCP when you receive OPM benefits to ensure that the dual benefit is collected and resolved."

In a July 18, 2012 memorandum of a telephone conversation on that date, Paula Turachak, an OWCP employee, stated, "Called OPM at 8:45. Spoke to Cathy. She stated [claimant's] disability retirement began on July 1, 2010."

² Appellant initially was compensated for partial disability under an informal wage-earning capacity determination and in March 2010 she began receiving compensation on the periodic rolls. She filed for disability retirement effective in June 2010. In a December 2, 2010 letter, the employing establishment advised OWCP that appellant's disability retirement had been approved as of November 22, 2010.

³ The record contains a form, signed February 17, 2010, in which appellant elected to receive OPM benefits effective June 30, 2010.

⁴ The record contains a memorandum of a June 3, 2011 telephone conversation on that date in which Ms. Taylor advised that an OPM official told her that appellant had not yet begun to receive OPM benefits.

In a July 25, 2012 letter, OWCP advised appellant that it had made a preliminary determination that she received a \$2,016.50 overpayment of compensation because she elected to receive an OPM annuity in lieu of OWCP compensation starting retroactively on July 1, 2010 and improperly received both OPM and OWCP benefits for the period July 1 to December 18, 2010. It also informed her that it had made a preliminary determination that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to dual payments. Appellant was provided 30 days from the date of the letter to submit evidence and argument challenging the overpayment.

In a July 28, 2012 letter, appellant advised OWCP that she did not receive a dual payment causing an overpayment as alleged. She stated, "It is true that I elected to receive OPM annuity retroactively to [July 1, 2010]. However, OPM deducted the \$1,966.50 from my original retroactive payment as a collection, which I assume they forwarded to you.... I did not receive that money from OPM so I do not feel that I owe it back to you." Appellant submitted a portion of a document indicating that \$1,966.50 was deducted from her OPM benefits for the period February 1, 2010 to May 31, 2011 (in the amount of \$12,116.00) under the category "Government Claim Collection."

In a November 2012 letter to OPM, Ms. Taylor stated that appellant provided OWCP with a benefit statement which noted that she was retroactively paid an annuity beginning February 1, 2010 rather than July 1, 2010. She stated:

"The amount of the retro[active] payment was for \$12,116.00 prior to deductions. I am asking your office to verify when [appellant's] annuity actually started and the period that it covered so that this office can correctly calculate the dual entitlement and declare an overpayment. Further, there is indication that when OPM placed the retiree on your rolls, that your office withheld funds to repay FECA for at least part of this dual entitlement period in the amount of \$1,966.50. If so, please verify this as our office has no record of receiving these funds.

"To assist us with this claim, please provide the following information....

1. Provide the periods that OPM benefits were paid: From ____ To ____
2. Provide information as to whether or not OPM has refunded any money to FECA for any period covering from approximately February 1, 2010 to December 18, 2010."

There is no indication in the record that OPM responded to the November 9, 2012 letter from OWCP.

In a January 23, 2013 decision, OWCP determined that appellant received a \$2,016.50 overpayment of compensation. It also determined that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to dual payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁵ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.”⁶

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁷ In *Marcello A. Garcia*,⁸ the Board determined that OWCP improperly found an overpayment of compensation for a given period because OWCP had not shown that the claimant actually received both OPM benefits and OWCP wage-loss compensation for that period.

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$2,016.50 overpayment of compensation.

OWCP based its overpayment finding on its determination that appellant received impermissible dual benefits from both OPM and OWCP for the period July 1 to December 18, 2010. While the record reflects that appellant received OWCP benefits for this period, OWCP did not adequately show that appellant retroactively received OPM benefits for this period. OWCP appears to have based its finding that appellant received OPM benefits for the alleged period on a record of a July 18, 2012 telephone conversation in which an OWCP employee, stated, “Called OPM at 8:45. Spoke to Cathy. She stated [claimant’s] disability retirement began on July 1, 2010.” However, there is no document in the record clearly showing precisely when appellant actually received OPM benefits, the periods for which she received such benefits or the amounts of benefits she received. Moreover, appellant submitted a document indicating that \$1,966.50 was deducted from her OPM benefits for the period February 1, 2010 to May 31, 2011 under the category “Government Claim Collection.” Therefore, the evidence of record does not contain documents clearly showing that appellant actually received OPM benefits for the period July 1 to December 18, 2010 as alleged. As it was alleged that appellant received dual benefits during this period, OWCP has not established the

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

⁸ 43 ECAB 842 (1992).

fact of a \$2,016.50 overpayment for this period. The case should be remanded to OWCP for further development of this matter to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$2,016.50 overpayment of compensation.⁹

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 21, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

⁹ Given that the case is not in posture regarding whether OWCP properly determined that appellant received a \$2,016.50 overpayment of compensation, it is premature for the Board to consider whether OWCP properly determined that she was at fault in the creation of any overpayment.