

FACTUAL HISTORY

OWCP accepted that on June 9, 2005 appellant, then a 54-year-old nurse, twisted her back as a falling patient grabbed her to steady himself, causing a lumbosacral sprain/strain and an aggravated L4-5 herniated disc with lumbar myelopathy. She stopped work on June 9, 2005 and returned to full-time light-duty work on June 13, 2005. As of July 10, 2006, appellant worked as a staff nurse (discharge planner) at retained pay. The job required sedentary clerical duties within her physical restrictions.

By decision issued September 22, 2006, OWCP determined that appellant's actual earnings in the discharge planner position fairly and reasonably represented her wage-earning capacity. It calculated that appellant had two percent loss of wage-earning capacity, entitling her to \$52.83 every four weeks in wage-loss compensation. The first compensation check covered the period July 9 to September 30, 2006. OWCP included a Form EN1049, which stated, "you may not receive OWCP benefits for loss of wage-earning capacity for the same time period as receiving OPM benefits. If you receive any benefits from OPM, you should advise this office immediately. You will be asked to make an election between the two benefits."

Appellant worked as a discharge planner at the employing establishment through June 26, 2008. She received wage-loss compensation under the wage-earning capacity determination and for periodic medical appointments.³ On April 13, 2009 appellant was reassigned as a nurse performing clerical duties, at the same rate of pay as the discharge planner position.

The record establishes that appellant retired on May 31, 2013. Beginning June 1, 2013 appellant received retirement benefits through the Office of Personnel Management (OPM).

In a March 19, 2015 letter, OWCP notified appellant that she was entitled to wage-loss compensation beginning June 1, 2013. It instructed her to elect either FECA benefits or OPM retirement payments to avoid a prohibited dual benefit.

On July 7, 2015 an OPM official confirmed that appellant was receiving monthly OPM retirement benefits from June 1, 2013 onward.

On July 28, 2015 appellant elected to receive OPM benefits, effective July 16, 2015. She telephoned OWCP on August 4, 2015, stating that she was unsure if she had chosen the proper election date. OWCP sent appellant a new election form to submit should she wish to change her date of election. On August 10, 2015 appellant elected to receive OPM retirement benefits with an effective date of June 1, 2013.

³ Appellant stopped work on June 26, 2008. She underwent right hip arthroplasty on an unspecified date. Appellant filed a claim for a recurrence of disability (Form CA-2a) on July 18, 2008. OWCP developed the claim as a request for modification of the September 22, 2006 wage-earning capacity determination. By decision dated September 3, 2008, it denied modification of the wage-earning capacity determination. In a June 23, 2009 letter, appellant requested reconsideration, contending that the accepted June 9, 2005 incident also caused a right hip injury. By decision dated September 2, 2009, OWCP denied modification of its prior decision, finding that appellant had not established a material worsening of the accepted injury.

In an August 18, 2015 memorandum and accompanying August 4, 2015 worksheet, OWCP calculated that from June 1, 2013 to March 7, 2015, appellant was paid \$1,441.50 in FECA wage-loss compensation benefits on the supplemental rolls, during which time she also received OPM retirement benefits.

By notice dated September 3, 2015, OWCP advised appellant that it made a preliminary finding of an overpayment of compensation in the amount of \$1,441.50 for the period June 1, 2013 to March 3, 2015, as she had received OPM retirement benefits and FECA payments concurrently. It made the preliminary finding that appellant was at fault in creating the overpayment, as she accepted compensation payments that she knew or reasonably should have known were incorrect. OWCP afforded appellant 30 days to submit information regarding her income, assets, and expenses, request a prerecoumment hearing, or request a conference. It enclosed an overpayment recovery questionnaire (Form OWCP-20).

Appellant did not respond to the preliminary notice of overpayment.⁴

By decision dated December 22, 2015, OWCP finalized the \$1,441.50 overpayment for the period June 1, 2013 to March 3, 2015. It found that appellant had received FECA benefits concurrently with OPM retirement benefits for this period, a prohibited dual benefit. OWCP found appellant at fault in creating the overpayment as she had accepted FECA payments while in simultaneous receipt of OPM retirement payments. It further found that, as appellant was at fault in creating the overpayment, it was not subject to waiver. OWCP directed recovery of the overpayment by a single payment of \$1,441.50.

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 duty.⁵ FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁶

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.⁷ When a claimant is entitled to disability benefits under FECA and annuity benefits from OPM under either CSRS or FERS, the employee must make an election of benefits.⁸ The employee has the right to elect the monetary benefits that are most advantageous.⁹

⁴ Appellant submitted May 29, 2015 chart notes, received by OWCP on November 30, 2015. These documents do not address the overpayment issue.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (February 1995).

⁹ *Id.*

The election, once made, is revocable.¹⁰ Concurrent wage-loss compensation and OPM benefits constitute a prohibited dual benefit.¹¹

ANALYSIS -- ISSUE 1

Appellant began receiving wage-loss compensation under FECA on July 9, 2006 pursuant to a September 22, 2006 wage-earning capacity determination. Her continuing payment every four weeks began at a net amount of \$52.83. On August 10, 2015 appellant elected to receive OPM benefits effective June 1, 2013.

The evidence reflects that appellant received \$1,441.50 in compensation benefits from June 1, 2013 to March 7, 2015, and that she also received OPM retirement benefits for this period. This is based on OWCP's August 18, 2015 memorandum and accompanying August 4, 2015 worksheet. However, the period of overpayment OWCP used in its September 3, 2015 preliminary notice and December 22, 2015 decision ran from June 1, 2013 to March 3, 2015, four days less than the period for which OWCP provided a complete calculation. It did not explain why it changed the end date of the overpayment period from March 7, 2015 to March 3, 2015. Therefore, the Board finds that it is not clear as to whether the amount of the overpayment remains accurate.

As such, the Board thus affirms in part the December 22, 2015 decision as to fact of overpayment, but remands for further development regarding the amount of the overpayment. After such further development as necessary, OWCP shall issue an appropriate decision as to the amount of the overpayment.

As the case is not in posture for a decision regarding the amount of the overpayment, it is premature for the Board to address the issue of fault.

The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹² Appellant is not in receipt of continuing compensation under FECA.

On appeal, appellant asserts that she contacted OWCP some months after retiring and "requested to return check," but that an OWCP claims examiner instructed her not to. The Board notes that the record does not confirm this conversation.

CONCLUSION

The Board finds that OWCP has established fact of overpayment. The Board further finds that the case is not in posture for decision regarding the amount of overpayment or the issue of fault.

¹⁰ 20 C.F.R. § 10.421(a).

¹¹ 5 U.S.C. § 8116(a).

¹² *Judith A. Cariddo*, 55 ECAB 348 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2015 is affirmed in part regarding fact of overpayment and set aside in part regarding the amount of the overpayment. The case is remanded to OWCP for additional development consistent with this opinion.

Issued: March 14, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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