

FACTUAL HISTORY

On October 13, 2011 appellant, then a 47-year-old transportation security officer screener, filed a traumatic injury claim (Form CA-1) alleging that on September 27, 2011 she sustained a right wrist strain when she attempted to push a passenger's carryon luggage, weighing approximately 40 pounds, from a table to a jammed x-ray conveyor belt. OWCP accepted the claim for right wrist sprain, lunotriquetral ligament tear, right wrist synovitis, and internal derangement of the right wrist. Appellant stopped work intermittently for medical treatment. On March 12, 2012 she underwent an authorized right wrist surgery consisting of an arthroscopic evaluation, synovectomy, and debridement of the lunotriquetral ligament tear.

Appellant stopped work from March 11 through June 5, 2012 and received wage-loss compensation benefits for that period. On August 16, 2012 she stopped work again to undergo a second surgery.³

By letter dated December 10, 2014, OWCP informed appellant that, under FECA, she was receiving a gross weekly compensation of \$518.24 and gross 28-day compensation of \$2,072.94. Appellant was informed that she might also be entitled to receive benefits provided by the Office of Personnel Management (OPM) under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS). OWCP provided her an election of benefits (Form CA-1105) and requested she select either FECA benefits or retirement benefits as except for a schedule award, she was not entitled to receive both FECA and CSRS/FERS benefits concurrently. No further information was received from appellant at the time.

By letter dated October 22, 2015, OPM notified appellant that her application for disability retirement under FERS had been approved. It informed her of the required process before she could begin receiving her annuity payments.

By letter dated December 1, 2015, the employing establishment notified OWCP that appellant had elected disability retirement in lieu of "OWCP wage compensation." It noted that she had filed for disability retirement on December 16, 2014 with a requested effective date of December 31, 2014. The employing establishment reported that OPM approved the claim on October 22, 2015; however, it had not been able to confirm the start date of appellant's annuity with OPM, or whether she would receive interim annuity retroactively.

On March 15, 2016 OWCP received appellant's election form (Form CA-1105) to receive OPM benefits, rather FECA benefits, effective December 31, 2014.

By letter dated March 15, 2016, OWCP informed OPM that appellant elected to receive OPM benefits effective December 31, 2014 in lieu of FECA compensation benefits. It requested OPM commence monthly annuity payments effective December 31, 2014, and to reimburse OWCP in the amount of \$9,960.13 for FECA benefits paid during the period December 31, 2014 through March 5, 2016.

³ Appellant received wage-loss compensation for part-time disability from June 5, 2012 through March 5, 2016.

By notice dated April 8, 2016, OWCP made a preliminary determination that of an overpayment of compensation in the amount of \$9,960.13 for the period December 31, 2014 through March 5, 2016 as appellant had elected OPM benefits effective December 31, 2014. It found that she was with fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect, noting that her signed CA-1105 election form dated March 15, 2016 retroactive to December 31, 2014 demonstrated that she was aware of her choice between the two benefit programs and that any FECA benefits she had received after December 31, 2014 would have been a prohibited dual payment. Appellant was informed of her options if she wished to contest the fact or amount of overpayment or request a waiver of recovery and was provided with an overpayment recovery questionnaire (Form OWCP-20).

In an attached memorandum, OWCP explained that if there were overlapping payment dates from both OWCP and OPM, an overpayment would still ensue, regardless of whether or not appellant had actually received benefits from OPM. It noted that, although OPM indicated that she had not received a benefit payment yet, OWCP was still required to declare an overpayment for the period of dual benefits. OWCP stated that it had requested reimbursement from OPM for the dual benefit, but that it was still appellant's responsibility to repay the debt. It determined that her total gross compensation for the period December 31, 2014 through March 5, 2016 was \$11,848.85. During this period, however, deductions were made for miscellaneous dental/vision premiums in the amount of \$1,888.72 which was credited against the gross overpayment amount, bringing the net overpayment total to \$9,960.13.

In an April 8, 2016 CA-110 form telephone note, OWCP's claims examiner noted that, although OPM disability retirement approval occurred on October 22, 2015, it was unclear when or whether appellant was actually in receipt of OPM benefits. The claims examiner called OPM to clarify and was informed by OPM that as of April 28, 2016, if had paid no benefits.

On April 29, 2016 appellant requested a telephone conference with the district office on the issues of fault and possible waiver of recovery of the overpayment. She contested the overpayment because it occurred through no fault of her own and requested a waiver, stating that she was not aware of any overpayment being made.

In support of her claim, appellant submitted an April 29, 2016 overpayment recovery questionnaire where she argued that she was not aware of an overpayment and had not been receiving payment from any entity since OWCP stopped her payments. She reported that she had not received any money from disability retirement and repaying the amount would cause her severe financial hardship.

In a June 20, 2016 CA-110 telephone note, OWCP's claims examiner noted that appellant had called to report that she had received a payment from OPM, but that it had deducted over \$9,000.00 of that payment from the gross amount. The claims examiner noted that no financial information was provided and that appellant should try to gather that information.

In an August 1, 2016 CA-110 telephone note, the claims examiner reported that appellant felt that OPM should not have withheld the full amount based on a preliminary determination.

Appellant reported that she had not received benefits from OPM or OWCP, and just received a check from OPM for \$288.00, but did not understand who was paying what. The claims examiner informed appellant that she would try to get in touch with OPM regarding the current status.

In an August 25, 2016 CA-110 telephone note, the claims examiner informed appellant that the claims examiner could not contact OPM. As such, she would issue a final decision on the overpayment and appellant could pursue her appeal rights.

By decision dated September 28, 2016, OWCP finalized overpayment of compensation in the amount of \$9,960.13 for the period December 31, 2014 through March 5, 2016 as appellant had elected OPM benefits retroactive to December 31, 2014, but remained in receipt of OWCP compensation benefits through March 5, 2016. It revised the preliminary determination's finding of fault, explaining that she was without fault in the creation of the overpayment because it was reasonable that she was not or could not have been aware that she was in receipt of dual benefits and not entitled to the payments received. OWCP stated that, as appellant had not been paid any OPM benefits during the entire period of the overpayment from December 31, 2014 through March 5, 2016, it was reasonable to conclude that she was not aware of the prohibited dual payment.

OWCP determined that the overpayment was not subject to waiver of recovery, however, because OPM had collected the full amount of the overpayment from the OPM annuity. It explained that, prior to June 20, 2016, appellant had not received any payment from OPM; however, OPM had recently issued retroactive OPM benefits, but the overpayment amount had been withheld, leaving her with only \$288.00 in retirement benefits for that period. OWCP noted that OPM had advised appellant of the withholding of OWCP benefits based on the election of benefits letter OPM had received on March 15, 2016. OPM advised her that it would wait 30 days before issuing a check to OWCP. As such, the circumstances did not warrant waiver of recovery of the overpayment.

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.⁴ 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.”⁵

Section 8116(a) of FECA provides that while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

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.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 is most advantageous.⁹ The election, once made, is revocable.¹⁰ Concurrent wage-loss compensation and OPM benefits constitute a prohibited dual benefit.¹¹

ANALYSIS

The Board finds that the case is not in posture for decision regarding fact or amount of overpayment for the period December 31, 2014 through March 5, 2016.¹²

Appellant had been placed on periodic rolls beginning January 13, 2013 and received continuing payments every four weeks. By letter dated October 22, 2015, OPM notified her that her application for disability retirement under FERS had been approved. On December 15, 2014 OWCP received appellant's election of OPM benefits retroactive to December 31, 2014.

The Board notes that, at the time of OWCP's April 8, 2016 preliminary overpayment determination, appellant had not yet received any benefit payments from OPM. The employing establishment's December 1, 2015 letter related that it had not been able to confirm the start date of her annuity with OPM, or whether she would receive interim annuity retroactively. The requested effective date of the disability retirement was December 31, 2014, but the claim was not approved until October 22, 2015. In an April 8, 2016 CA-110 telephone note, an OWCP claims examiner related that it was unknown when OPM actually began paying benefits.

Subsequent to the preliminary determination, appellant notified an OWCP claims examiner *via* telephone that she had received a \$288.00 check from OPM, which she believed was the remaining amount of a retroactive payment which had deducted over \$9,000.00 for the overpayment.¹³

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.*

¹⁰ 20 C.F.R. § 10.421(a).

¹¹ *Supra* note 6.

¹² *J.J.*, Docket No. 14-0785 (issued September 3, 2014).

¹³ *H.T.*, Docket No. 16-0482 (issued July 14, 2016).

The Board finds that there is sufficient confusion as to whether there was an overpayment of compensation for the period December 31, 2014 to March 5, 2016 and whether OPM has already collected the overpayment from appellant as to warrant remanding the case for further development. OWCP procedures place the responsibility on the claims examiner to carefully review the file in situations where a dual benefit might possibly occur, including the responsibility of contacting OPM.¹⁴

As such, the Board finds that this case is not in posture for decision on the issue of whether an overpayment continued to exist as of September 28, 2016, the date of the finalization of the preliminary determination of an overpayment of compensation in the amount of \$9,960.13 for the period December 31, 2014 through March 5, 2016.¹⁵ The evidence of record does not clearly establish that appellant received OPM benefits and FECA benefits for the same time period. Although there was a payment of \$288.00 to her from OPM, with some indication that OPM had deducted a significant amount of the overpayment, it is unclear for what period the deduction was made or for what amount. As such the case is premature for the Board to make a finding.

Therefore, OWCP's determination that appellant received a dual benefit and overpayment of compensation will be set aside.¹⁶ The case is remanded for further development. On remand, OWCP should consult with OPM regarding the period of retirement coverage and payment of benefits. After it has further developed the case record, a *de novo* decision shall be issued.¹⁷

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant received an overpayment of compensation.

¹⁴ *Supra* note 8 at Chapter 2.1000.3 (February 1995).

¹⁵ *Supra* note 13.

¹⁶ *F.F.*, Docket No. 16-0063 (issued June 24, 2016).

¹⁷ As the case is not in posture regarding the fact of overpayment, the issues of waiver and recovery are moot.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: November 16, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board