

Office of Personnel Management (OPM) retirement benefits; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly determined that appellant abandoned her request for a prerecoupment hearing.

FACTUAL HISTORY

On January 9, 2002 appellant, then a 47-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a back injury when she picked up a tray of mail while in the performance of duty. She stopped work on January 9, 2002 and returned to work in a limited-duty capacity on January 12, 2002. Appellant's accepted conditions include lumbar strain, lumbar intervertebral disc displacement, and consequential chronic pain disorder. OWCP also authorized a January 15, 2003 laminectomy and fusion at L5-S1, and subsequent removal of instrumentation.

OWCP paid appellant wage-loss compensation until February 10, 2004 when she returned to a full-time modified-duty position. By decision dated December 22, 2004, it found that her actual earnings as a modified sales service and distribution associate fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation benefits to zero.

Between 2009 and 2015 OWCP paid appellant compensation for intermittent wage loss due to attending medical appointments and sporadic work hours. On October 10, 2015 appellant stopped work again because the employing establishment could no longer accommodate her work restrictions. OWCP paid her wage-loss compensation for temporary total disability and placed appellant on the periodic compensation rolls effective December 13, 2015.

Appellant retired from federal service on September 15, 2016.

In a letter dated September 29, 2016, the employing establishment informed OWCP that the OPM approved appellant's retirement effective September 15, 2016. It requested that OWCP provide him with an election of benefits form as she was not entitled to OPM and FECA benefits. The employing establishment provided a similar letter to appellant.

In a November 14, 2016 letter, OWCP advised appellant that it was informed that she was receiving or may be entitled to benefits from OPM under the Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS). It explained that any benefits paid by OPM (including any lump-sum payment made as part of an alternative annuity under CSRS) and benefits for wage-loss paid by OWCP were not payable for the same period of time. OWCP explained that individuals entitled to both OWCP and OPM benefits must elect which benefits to receive. It noted that the election was not irrevocable and could be changed should appellant decide that the benefits of the other plan were more advantageous. OWCP attached an election form for appellant to complete.

On November 22, 2016 OWCP received appellant's completed election form indicating that she wished to receive OPM retirement benefits, effective November 20, 2016.

In a Form CA-1032 dated November 24, 2016, appellant indicated that she had not received a regular or disability retirement check during the past 15 months.

An OWCP compensation termination fiscal worksheet dated January 20, 2017 noted that the effective date of the termination was November 20, 2016, and that an overpayment in the amount of \$4,429.97 had been created as she continued to be paid FECA compensation for 49 additional days.

In a letter dated January 25, 2017, OWCP informed OPM that appellant had elected to receive OPM benefits effective November 20, 2016 in lieu of FECA compensation. It requested that OPM commence monthly annuity payments effective that date. OWCP also noted that appellant had received FECA compensation from November 20, 2016 through January 7, 2017 and requested reimbursement in the amount of \$4,429.79 for FECA benefits paid for that.

On April 10, 2017 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,429.97 for the period November 20, 2016 through January 7, 2017. It explained that the overpayment occurred because she received both FECA benefits and OPM retirement benefits during this period. OWCP noted that it had requested that OPM reimburse it for the \$4,429.92, but as of April 10, 2017 OPM had not responded. Appellant was found at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP provided an overpayment action request and an overpayment recovery questionnaire form (Form OWCP-20). It afforded appellant 30 days to respond.

On April 15, 2017 appellant requested a prerecoupment hearing before a hearing representative from OWCP's Branch of Hearings and Review. She indicated that she was not at fault in the creation of the overpayment because she was informed by an OWCP case manager that she was entitled to compensation as she had not yet received her retirement payment. Appellant provided a partially completed Form OWCP-20, which indicated that she had funds totaling \$5,020.00.³

By decision dated May 15, 2017, OWCP informed appellant that its preliminary determination of an overpayment of compensation in the amount of \$4,429.97 and finding of fault was correct. It noted that she had not responded to the April 10, 2017 preliminary determination. OWCP advised appellant that OPM would provide OWCP with the full amount of the overpayment.

On June 15, 2017 OWCP received a reimbursement payment of \$4,429.97 from OPM.

Appellant replied to OWCP's May 15, 2017 decision in a letter dated June 12, 2017, received on June 16, 2017. She explained that when she received a direct deposit in her bank account, she promptly called OWCP and was told that as long as she had not received any money from OPM then she was entitled to keep the money. Appellant noted that she was following the rules told to her and expressed frustration that she was being punished for someone else's mistake.

In a September 12, 2017 notice, OWCP's Branch of Hearings and Review scheduled a prerecoupment hearing for 9:30 a.m. Eastern Standard Time (EST) on October 13, 2017. It

³ Appellant indicated that she had \$20.00 cash on hand, \$1,000.00 in her checking account, and \$4,000.00 in her savings account.

provided appellant with a toll-free number and passcode for the telephonic hearing. The notice was mailed to appellant's address of record.

On October 13, 2017 appellant failed to participate in the telephonic prerecoupment hearing.

By decision dated October 31, 2017, an OWCP hearing representative found that appellant failed to appear at the prerecoupment hearing and had, therefore, abandoned her request. She determined that appellant had failed to contact OWCP prior to or subsequent to the scheduled hearing to explain her failure to appear. The hearing representative also finalized the April 10, 2017 preliminary overpayment determination, finding an overpayment of compensation in the amount of \$4,429.97 for the period November 20, 2016 through January 7, 2017. She also determined that appellant was not entitled to waiver of the recovery of the overpayment because she was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving workers' compensation benefits, 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 FECA.⁵ Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

OWCP procedures also explain that the employee must make an election between OWCP benefits and OPM benefits. The employee has the right to elect the monetary benefit which is more advantageous. This policy also applies to reemployed annuitants.⁸

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.100.4a (January 1997); *see also R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$4,429.79 for the period November 20, 2016 through January 7, 2017.

Appellant retired from federal service on September 15, 2016. On November 22, 2016 OWCP received her completed election form indicating that she wished to receive OPM retirement benefits effective November 20, 2016. Appellant continued to receive FECA wage-loss compensation benefits through January 7, 2017. An OWCP compensation termination fiscal worksheet dated January 20, 2017 noted that the effective date of the termination of FECA benefits was November 20, 2016, and that an overpayment in the amount of \$4,429.97 had been created as she continued to be paid FECA compensation for 49 additional days.

On May 15, 2017 OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$4,429.97 for the period November 20, 2016 through January 7, 2017. It explained that the overpayment occurred because appellant received both FECA benefits and OPM retirement benefits during this period. OWCP also determined that appellant was at fault in the creation of the overpayment.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP procedures prohibits the concurrent receipt of FECA wage-loss benefits and a federal annuity.¹⁰

The Board finds that OWCP has not met its burden of proof to establish that appellant was in receipt of a prohibited dual benefit during the period in question. It was not until January 25, 2017 that OWCP informed OPM that appellant had elected to receive retirement annuity benefits effective November 20, 2016 in lieu of FECA compensation and requested that OPM commence annuity payments effective retroactively to that date. This establishes that appellant had not received retirement annuity payments commencing November 20, 2016. Moreover, appellant consistently maintained that she had not been in receipt of OPM benefits and on June 15, 2017 OPM reimbursed OWCP in the amount of \$4,429.97, which is the amount of the purported overpayment. The Board has previously held that the mere fact that a claimant received FECA benefits after the effective date of an OPM election will not establish receipt of a prohibited dual benefit.¹¹

⁹ *Supra* note 6.

¹⁰ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, *supra* note 8.

¹¹ *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

Therefore, the Board finds that the evidence of record does not support a finding of fact of overpayment as OWCP had not received evidence of appellant's receipt of annuity payments from OPM, which would have established a prohibited dual benefit.¹²

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$4,429.79 for the period November 20, 2016 through January 7, 2017.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 5, 2019
Washington, DC

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

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

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

¹² In light of the Board's findings as to issue 1, issues 2 and 3 are moot.