

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

B.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Richmond, VA, Employer**

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**Docket No. 20-1415
Issued: April 14, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 16, 2020 appellant filed a timely appeal from a June 23, 2020 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.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$33,425.69, for the period May 20, 2019 through March 28, 2020 because she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the June 23, 2020 decision, OWCP and the Board received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

wage-loss compensation benefits; and (2) whether OWCP properly found appellant at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances of the case as set forth in the Board's prior decision and order are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

On March 26, 1997 appellant, a 43-year-old letter sorting machine operator, filed a traumatic injury claim (Form CA-1), alleging that she sustained injuries to her neck, back and both arms, while in the performance of duty. On August 11, 1997 OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent right carpal tunnel release surgery on August 28, 1997. OWCP paid her total disability compensation on the periodic rolls.

In a letter dated October 2, 1997, OWCP advised appellant of her weekly compensation rate on the periodic rolls. It further informed her that she must report any retirement income received from any federal agency, as federal employees who receive wage-loss compensation benefits under FECA are not permitted to concurrently receive benefits under certain other federal programs, including the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS).

In a handwritten statement entitled "Letter of Intent" to OWCP dated January 4, 2019, appellant elected to receive retirement benefits through OPM.

On January 24, 2019 OWCP informed OPM that it received appellant's claim for compensation under FECA and requested that OPM complete an EN1101 questionnaire addressing whether she submitted an application for disability annuity or any other OPM benefits, the status of such claim, and whether the application was allowed.⁴

Subsequently, in a form dated February 27, 2019, a representative of OPM's Retirement Services Program indicated that OPM had received appellant's application for OPM benefits and indicated that it disallowed the application. To the question of "[i]s payment presently being made," OPM checked "No" in response.

In a memorandum to the file dated April 25, 2019, an OWCP senior claims examiner indicated that on January 16, 2019 a letter was received from the claimant requesting OPM retirement benefits. On January 24, 2019 OWCP sent a letter to OPM advising that a claim for compensation under FECA had been filed with regard to the claimants work injury. It requested that OPM complete a questionnaire addressing whether the claimant had applied for disability annuity or any other benefits. On March 26, 2019 OWCP indicated that it had received an application for disability annuity from the claimant, but the application was disallowed by OPM.

³ Docket No. 00-2795 (issued September 14, 2001).

⁴ On January 31, 2019 appellant responded to OWCP's January 24, 2019 request and noted with a checkmark "No" that an application for disability annuity and/or lump-sum annuity had not been submitted. She noted "N/A" in response to the status of an application and whether the application was permitted and/or payment made.

A memorandum of telephone call (Form CA-110) related that appellant called OWCP on January 14, 2020 to follow up on her election of benefits. Appellant indicated that she never received an official election form, but submitted a personal letter requesting OPM benefits.

On January 16, 2020 OWCP sent appellant an election of benefits form (Form CA-1102). It explained that she could not receive FECA benefits while also receiving OPM benefits under the CSRS or FERS.

On February 4, 2020 OWCP received appellant's election of benefits form (Form CA-1102) dated January 25, 2020, in which she indicated that she was electing to receive benefits from OPM under CSRS or FERS in preference to any benefits which she might be entitled to under FECA. However, appellant did not provide an effective date of her election.

On March 6, 2020 OWCP requested clarification from appellant as to the effective date of her election. On March 17, 2020 appellant noted that the effective date of her election was January 7, 2019. She indicated that she had not received a lump-sum annuity as part of an alternative annuity under CSRS.

An OWCP compensation termination fiscal worksheet dated April 16, 2020, noted that the effective date of the periodic rolls termination was March 28, 2020, due to appellant's election of January 7, 2019, as the effective date for the receipt of her OPM benefits. It also noted that an overpayment in the amount of \$33,425.69 had been created as she continued to be paid FECA compensation after her effective election date for the period May 20, 2019 through March 28, 2020.

In a letter dated April 16, 2020, OWCP informed OPM that appellant had elected to receive OPM retirement benefits, effective January 7, 2019, in lieu of wage-loss compensation benefits under FECA. It requested that OPM commence monthly annuity payments, effective January 7, 2019, and to process her health benefits enrollment forms, which it was transferring to OPM. OWCP attached a copy of the election form completed by appellant on March 10, 2020.

On May 4, 2020 OWCP issued a preliminary overpayment determination that an overpayment of compensation was created in the amount of \$33,425.69, for the period May 20, 2019 through March 28, 2020, because appellant received prohibited dual benefit payments. It explained that the overpayment occurred because she concurrently received both FECA benefits and OPM retirement benefits during this period, which resulted in a prohibited dual benefit payment. Appellant was found to be at fault in the creation of the overpayment because she was aware or should have been aware that she was not entitled to FECA compensation subsequent to the effective date of her election of OPM retirement benefits. OWCP provided her an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) and afforded her 30 days to respond.

OWCP received an April 19, 2020 EN1032, in which appellant reported that during the past 15 months she had not received a regular retirement check from OPM or a disability retirement check from OPM. Appellant reported being assigned a "[Civil Service Active] CSA" number.

In a letter to OWCP and OPM dated April 29, 2020, appellant indicated that OWCP was requesting reimbursement for compensation that she did not receive. She indicated that her

compensation was suspended on September 26, 2018 and reinstated on May 20, 2019. Appellant noted that for several months during that time period she received no compensation.

In an accompanying letter dated May 9, 2020, appellant explained she received an OWCP notice of suspension of compensation and medical benefits on September 27, 2018 for failure to attend a second opinion evaluation. She indicated that she was unable to attend an appointment with Dr. James Schwartz, an orthopedic surgeon, on November 18, 2017, due to multiple ongoing medical issues. Appellant attached an OWCP second opinion referral letter to Dr. Schwartz dated October 27, 2017, and an explanation of benefits from Anthem Blue Cross and Blue Shield of Virginia for treatment received on November 18, 2017. She further indicated that she never received the OWCP letter dated May 24, 2018, which provided her 14 days to justify her failure to attend the second opinion evaluation. With regard to the November 27, 2018 referral evaluation in Lynchburg Virginia, appellant found the travel distance of two hours away from her home unreasonable. Another referral appointment was scheduled for August 15, 2019; however, she could not find the location. Appellant asserted that she properly notified OWCP on January 4, 2019 of her election to receive OPM benefits and also submitted an election benefit Form CA-1102 on January 25, 2020. She submitted a copy of her January 4, 2019 handwritten statement, requesting OPM benefits and a copy of the January 24, 2019 letter and questionnaire from OWCP to OPM.

In a completed overpayment action request dated May 11, 2020, received on May 15, 2020, appellant contested OWCP's findings that an overpayment had occurred and that she was at fault in the creation of the overpayment, and she requested a possible waiver of the overpayment.

Appellant submitted a November 14, 2018 letter to OWCP, which explained that she was unable to attend the November 18, 2017 second opinion evaluation, because she was in the emergency room being treated for multiple ongoing conditions. In another letter to OWCP dated November 16, 2018, she indicated that the second opinion evaluation scheduled on November 27, 2018, was over two hours away from her home, which she determined was an unreasonable distance to commute for a medical examination. In an undated statement, appellant further explained that she was unable to attend the appointment with Dr. William C. Andrews, Jr., a Board-certified orthopedic surgeon, on August 15, 2019, because she got lost while attempting to find the location.

By decision dated June 23, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$33,425.69 for the period May 20, 2019 through March 28, 2020 and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. It requested that she repay the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his or her federal employment.⁵ Section 8116 limits the right of an employee to receive compensation.

⁵ 5 U.S.C. § 8102(a).

While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

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.⁷ The beneficiary must elect the benefit that he or she wishes to receive.⁸ OWCP's procedures also explain that the employee must make an election between FECA benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous. This policy also applies to reemployed annuitants.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$33,425.69 for the period May 20, 2019 through March 28, 2020.¹⁰

OWCP based its overpayment finding on its determination that appellant had received a prohibited dual benefit by receipt of OPM and FECA benefits for the period May 20, 2019 through March 28, 2020. While the record reflects that she received FECA benefits for this period, the Board finds that OWCP has not established that she also received OPM benefits for this period.¹¹

On January 4, 2019 appellant submitted a handwritten statement electing OPM retirement benefits in lieu of FECA benefits. In a form dated February 27, 2019, a representative of OPM's Retirement Services Program indicated that OPM had received appellant's handwritten application for OPM benefits and indicated that it disallowed the application and therefore she had not been paid through its program.

Additionally, in an OWCP memorandum dated April 25, 2019, a senior claims examiner indicated that on January 16, 2019 a letter was received from the claimant requesting OPM retirement benefits. On March 26, 2019 OPM indicated that it had received an application for disability annuity from the claimant, but the application was disallowed by OPM.

Subsequently, a Form CA-110 noted that appellant called OWCP on January 14, 2020 to follow up on her election of benefits. Appellant indicated that she never received an official election form, but submitted a personal letter requesting OPM benefits. On February 4, 2020 OWCP received her election of benefits form (Form CA-1102) dated January 25, 2020, in which

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (January 1997); *see also R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

¹⁰ *M.C.*, Docket No. 18-0074 (issued August 1, 2019).

¹¹ *See R.R.*, Docket No. 18-0032 (issued May 3, 2018).

she indicated that she was electing to receive benefits from OPM under CSRS or FERS in preference to any benefits which she might be entitled to under FECA. On March 17, 2020 appellant noted that the effective date of her election was January 7, 2019.

However, there is no evidence of record which establishes that appellant actually received OPM benefits for the period May 20, 2019 through March 28, 2020.¹²

It was not until April 16, 2020 that OWCP informed OPM that appellant again had elected to receive retirement annuity benefits, effective January 7, 2019, in lieu of FECA compensation and requested that OPM commence annuity payments effective retroactively to that date.¹³

Appellant asserted that she had yet to receive any monetary compensation from OPM. The record reflects that OWCP did not transfer her health benefit enrollment forms, or request that OPM commence monthly annuity payments, until April 16, 2020, citing a January 7, 2019 effective date. OWCP submitted a Form CA-1102 to OPM on April 16, 2020 after OPM advised that the January 4, 2019 handwritten statement had been disallowed and that no OPM annuity payments were provided to appellant. Given the two requests sent to OPM to commence annuity payments, establishes that appellant had not received OPM benefits for the period in question to establish that her receipt of FECA benefits amounted to prohibited dual payments.¹⁴

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹⁵ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP's procedures prohibit the concurrent receipt of FECA wage-loss benefits and a federal annuity.¹⁶

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period May 20, 2019 through March 28, 2020. 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.¹⁷ While

¹² *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

¹³ OWCP also requested that OPM reimburse OWCP in the amount of \$33,425.69 for FECA benefits paid during the period May 20, 2019 through March 28, 2020. However, its final overpayment decision instructed that appellant submit repayment in full. The record is also silent as to whether OPM reimbursed OWCP for FECA benefits paid to her during the period in question; *see S.F.*, Docket No. 17-1935 (issued August 13, 2018).

¹⁴ *Id.*

¹⁵ *Id.* at § 8116(a).

¹⁶ *Id.* at § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

¹⁷ *C.P.*, Docket No. 19-0732 (issued September 5, 2019) and *J.A.*, Docket No. 18-0259 (issued August 5, 2019); *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that she also received OPM benefits for that same period.¹⁸

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment of FECA compensation occurred.¹⁹

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$33,425.69 for the period May 20, 2019 through March 28, 2020.²⁰

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 14, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁸ *R.R.*, Docket No. 18-0032 (issued May 3, 2018). The election form signed by appellant on January 25, 2020 is insufficient to show that she actually began receiving OPM benefits at any time. *E.R.*, Docket No. 18-0084 (issued July 27, 2018).

¹⁹ *See J.A.*, *supra* note 17.

²⁰ In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.