

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

C.B., Appellant)

and)

U.S. POSTAL SERVICE, DAYTON)
PROCESSING & DISTRIBUTION CENTER,)
Dayton, OH, Employer)

Docket No. 20-1137
Issued: September 30, 2021

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 7, 2020 appellant filed a timely appeal from an April 13, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 appellant received an overpayment of compensation in the amount of \$7,096.35 because she concurrently received Office of Personnel Management (OPM)

¹ The Board notes that following the April 13, 2020 decision, OWCP 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.*

² 5 U.S.C. § 8101 *et seq.*

retirement benefits and FECA wage-loss compensation for the period June 18 through September 14, 2019 without an appropriate offset; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 21, 2003 appellant, then a 53-year-old postal clerk, filed an occupational disease claim (Form CA-2) alleging that she developed right shoulder pain and tenderness due to factors of her federal employment, including throwing magazine bundles, parcels, and bags. She did not stop work. OWCP assigned that claim OWCP File No. xxxxxx144 and, on August 6, 2004, accepted the claim for right shoulder rotator cuff tear and aggravation of degenerative rotator cuff disease under OWCP File No. xxxxxx144. Appellant underwent right shoulder surgery for torn rotator cuff, subacromial bursitis, acromioclavicular (AC) joint pain, fraying biceps tendon, and anterior acromial spur on January 9, 2007. She stopped work on January 8, 2007 and returned to work in a modified clerk position for four hours a day beginning on June 10, 2007. On November 14, 2007 OWCP expanded its acceptance of appellant's claim under OWCP File No. xxxxxx144 to include adhesive capsulitis of the right shoulder. On May 22, 2008 appellant again stopped work and underwent additional right shoulder surgery due to adhesions and severe subacromial bursitis. She returned to work four hours a day on August 11, 2008 and on October 6, 2008 was released to work six hours a day with restrictions regarding her right arm. Beginning May 26, 2010, OWCP paid appellant wage-loss compensation on the periodic rolls for her loss of earning capacity of two hours a day effective May 9, 2010.

On February 2, 2017 appellant filed a traumatic injury claim (Form CA-1) alleging that on that date she strained her left shoulder when pulling and lifting tubs of mail while in the performance of duty. She continued to perform limited-duty work with restrictions. OWCP assigned that claim OWCP File No. xxxxxx801 and on April 14, 2017 OWCP accepted it for left shoulder strain/sprain and tear of the supraspinatus tendon, left shoulder, rotator cuff. On June 27, 2017 appellant underwent left shoulder arthroscopy with subacromial decompression, bursectomy, biceps tenotomy, and debridement of the torn labrum.³

In a letter dated November 15, 2017, 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 July 1, 2019 letter, the employing establishment informed OWCP that appellant had voluntarily retired effective June 18, 2019. It noted that she retired under FERS and was entitled to receive Social Security Administration (SSA) age-related retirement benefits.

³ On August 21, 2017 OWCP administratively combined OWCP File Nos. xxxxxx144 and xxxxxx801, with the latter serving as the master file.

On July 1, 2019 OWCP provided appellant with an election of benefits form. On July 15, 2019 it received an election of benefits form, signed by appellant on July 8, 2019 in which she indicated that, effective June 18, 2019, she was electing to receive benefits from FECA.

In a November 29, 2019 letter, OWCP requested that OPM address whether appellant was currently receiving OPM retirement benefits. In a separate letter of even date, it informed appellant that she had elected to receive FECA benefits, effective June 18, 2019, and requested that she confirm whether this election was correct.

On January 14, 2020 OWCP received an election of benefits form, signed by appellant on December 16, 2019, in which she indicated that, effective June 18, 2019, she elected to receive OPM retirement benefits in lieu of any benefits, which she might be entitled to under FECA. Appellant reported that a lump-sum annuity had not been paid from OPM as part of an alternative annuity under CSRS, or as part of the death benefit under FERS.

OPM responded to OWCP's request for information on January 14, 2020 and noted that it had received an application for retirement benefits from appellant with an effective date of June 18, 2019, but that as of January 14, 2020 no retirement benefits had been paid.

In a February 27, 2020 memorandum to file, OWCP noted that OPM had not yet started paying benefits, but that it planned to proceed with the preliminary overpayment determination as appellant had continued to receive wage-loss compensation on the periodic rolls after June 18, 2019.

On February 27, 2020 OWCP issued a preliminary overpayment determination that an overpayment of compensation was created in the amount of \$7,096.35 because appellant received prohibited dual benefit payments for the period June 18 through September 14, 2019. It explained that the overpayment occurred because she concurrently received both FECA benefits and OPM retirement benefits during this period. OWCP found appellant at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known, to be incorrect. OWCP provided her an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and afforded her 30 days to respond. Appellant did not respond.

By decision dated April 13, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$7,096.35 for the period June 18 through September 14, 2019 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.⁴ Section 8116 limits the right of an employee to receive compensation:

⁴ 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.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'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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$7,096.35 for the period June 18 through September 14, 2019.

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 June 18 through September 14, 2019. While the record reflects that she received FECA wage-loss compensation for this period, the Board finds that OWCP has not established that she also received OPM benefits for this same period.⁹

On December 16, 2019 appellant elected OPM retirement benefits, effective June 18, 2019, in lieu of FECA benefits. However, there is no evidence of record which establishes that OWCP or OPM received the election forms prior to December 16, 2019. On January 14, 2020 OPM noted that it had received an application for retirement benefits from appellant with an effective date of June 18, 2019, but that as of January 14, 2020 no retirement benefits had been paid. Furthermore, on February 27, 2020 OWCP noted that OPM had not yet started paying benefits. OWCP was, therefore, aware that appellant had not received OPM benefits for the period in question to establish that her receipt of FECA benefits amounted to prohibited dual benefits.¹⁰ 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 While the record

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (January 1997); *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁹ *L.H.*, Docket No. 19-1485 (issued August 14, 2020); *R.R.*, Docket No. 18-0032 (issued May 3, 2018).

¹⁰ *Id.*

¹¹ *V.B.*, Docket No. 19-1874 (issued June 4, 2020); *J.A.*, Docket No. 18-0259 (issued August 5, 2019); *M.C.*, Docket No. 18-0074 (issued August 1, 2019).

reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that she also received OPM retirement benefits for that same period.¹²

The Board, thus, finds that OWCP improperly determined that appellant received an overpayment in the amount of \$7,096.35 for the period June 18 through September 14, 2019.¹³

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 30, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹² *Id.*

¹³ *G.M.*, Docket No. 17-0784 (issued August 23, 2017); *D.O.*, Docket No. 15-1004 (issued July 28, 2015).

¹⁴ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.