United States Department of Labor
Employees' Compensation Appeals Board

J.J, Appellant	)	
and	)	**Docket No. 13-1635**
	)	**Issued: February 18, 2014**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, San Diego, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant filed a timely appeal of the May 23, 2013 decision of the Office of Workers' Compensation Programs (OWCP) which found that she received an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an $11,173.55 overpayment of compensation for the period June 1 to August 27, 2011; and (2) whether it properly determined that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 16, 2007 appellant, then a 46-year-old lead aircraft mechanic, injured his back while picking up components. OWCP accepted his claim for a lumbar sprain, degeneration of a lumbar and lumbosacral intervertebral disc, displacement of a lumbar intervertebral disc without myelopathy and spinal stenosis of the lumbar region. Appellant stopped work on January 16, 2007 and returned on January 18, 2007. He worked intermittently thereafter. On April 24, 2009 OWCP accepted that appellant sustained a recurrence of total disability beginning February 13, 2009.

In a letter dated April 29, 2009, OWCP outlined appellant's entitlement to compensation benefits and his responsibility to return to work in connection with the accepted injury. Appellant was placed on the periodic compensation rolls. In an attached EN1049, it provided:

> "RETIREMENT BENEFITS. You must report to OWCP any retirement income you receive from any federal establishment. This is because a person who receives compensation benefits under FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS)."

Appellant received compensation by direct deposit payments.

On May 25, 2011 OWCP referred appellant for vocational rehabilitation services. In a September 12, 2011 telephone log, a rehabilitation counselor contacted OWCP to advise that appellant reported being approved for retirement benefits and receiving retirement checks. Appellant would not provide the rehabilitation counselor with a copy of the retirement benefit letter. On September 6, 2011 he completed an EN1032 form and noted under Part D, other federal benefits or payments, he had received a disability retirement check during the past 15 months.

In a September 13, 2011 memorandum, OWCP contacted appellant and spoke to his wife, who confirmed that he was receiving the Office of Personnel Management (OPM) benefits effective June 1, 2011. In a compensation termination sheet dated September 13, 2011, it noted that he was receiving OPM benefits effective June 1, 2011. OWCP found that for the period June 1 to August 27, 2011 appellant was also paid net OWCP compensation of $11,173.55.

In a September 14, 2011 letter, OWCP notified appellant of his current rate of compensation. It advised that it had been informed that "you are also receiving or may be entitled to receive benefits provided by OPM under the CSRS or the FERS." The letter stated:

> "Annuity benefits paid by OPM (including any lump[-]sum payment made as a part of an alternative annuity under CSRS) and benefits for wage loss paid by OWCP are not payable for the same period of time. Employees entitled to both OWCP and OPM benefits must elect which benefit to receive. This election is not irrevocable and can be changed should you decide that the benefits of the

> other plan are more advantageous. Should you elect OPM benefits, you will still be entitled to medical benefits for the effects of the injury on the date above at OWCP expense."

OWCP attached an election of benefits form to its letter and requested that he complete and return the form. The form stated: "I understand that I am not entitled to receive FECA benefits and CSRS/FERS benefits concurrently (except for a schedule award)."

In a letter dated November 15, 2011, appellant submitted a revised EN1032 and clarified the start of his retirement benefits as of May 31, 2011. He reported being confused because an OPM form dated May 31, 2011 noted that he was approved for interim payments until his disability retirement application process was completed. Appellant indicated that his disability retirement application was still in process. He noted that he received a disability retirement check effective May 31, 2011.

In an undated election benefits form, appellant elected to receive FECA benefits effective May 31, 2011.

In a letter dated January 9, 2012, OWCP notified appellant that it received his election of benefits form electing its benefits effective May 31, 2011. It also noted that his retirement was approved and he had received a retirement annuity since September 12, 2011. OWCP asked that appellant confirm his election and informed him that no action would be taken on his election form until it received a response. Appellant did not respond. In a May 14, 2012 letter, OWCP notified OPM that appellant elected to receive benefits from OPM effective May 31, 2011 in lieu of compensation benefits under FECA.

In a March 28, 2013 letter, OWCP informed appellant that it had preliminarily found that he received a $11,173.55 overpayment of compensation for the period June 1 to August 27, 2011, because he received FECA monetary compensation through August 27, 2011 after he started receiving OPM benefits. It found that he was at fault in creating the overpayment because he was aware or should have been reasonably aware that he was not entitled to receive FECA disability compensation and OPM annuity benefits for the same period. OWCP found that appellant willfully received dual benefit compensation from June 1 to August 27, 2011 and did not advise OWCP of his retirement benefits until three months after receipt.[2] It noted that on April 29, 2009 it advised him that a person who received FECA compensation benefits was not permitted to receive retirement benefits. OWCP advised appellant of his options if he disagreed with its preliminary findings, including a right to a prerecoupment hearing and instructed him to complete an enclosed overpayment recovery form and submit supporting documentation.

On April 26, 2013 appellant requested a decision based on the written evidence and waiver of the overpayment. He agreed that the overpayment occurred and did not dispute its amount. Appellant contented that he was totally disabled and in receipt of FECA benefits when he applied for disability retirement on November 10, 2010. He stated that he spent most of 2011

[2] The record shows that appellant received direct deposit payments covering May 8 to June 4, 2011 (issued on June 4, 2011); June 5 to July 2, 2011 (issued on July 2, 2011); July 3 to 30, 2011 (issued on July 30, 2011); and July 31 to August 27, 2011 (issued on August 27, 2011).

under the influence of prescribed narcotics for his pain. On May 31, 2011 OPM approved appellant's disability retirement and shortly thereafter his FECA benefits stopped and he thought that OPM and FECA had coordinated. Although he was informed of the 2009 correspondence from OWCP to notify it regarding his disability benefits, he did not remember it in 2011. Appellant vaguely recalled a conversation with a claims examiner in September 2011 but did not remember what he said. He was unaware that he could choose between FECA and OPM benefits and believed electing OPM benefits was mandatory. Appellant stated that his failure to make an election was based on a lack of understanding. He asserted that repaying the overpayment would cause financial hardship and that his disability retirement annuity, finalized on March 20, 2013, reduced his income from $3,673.00 to $1,905.00. Appellant submitted a May 31, 2011 letter from OPM approving his disability retirement application. A June 15, 2011 OPM letter advised that he was in an interim payment status while OPM completed processing his application. An April 26, 2013 overpayment questionnaire noted total monthly income of $7,779.00 and expenses of $8,880.51. Appellant submitted pay stubs from his wife's employer showing net pay of $2,163.34 and $2,083.62 from March 17 to April 13, 2013.

In a May 23, 2013 decision, OWCP found that appellant was at fault in receiving an $11,173.55 overpayment from June 1 to August 27, 2011 that occurred because he received FECA compensation benefits at the same time he received OPM retirement benefits. It found that he was at fault in creating the overpayment because he was aware or should have been reasonably aware that he was not entitled to receive FECA disability compensation and OPM benefits for the same period. Appellant notified OWCP on September 12, 2011 that he retired and was receiving OPM benefits effective June 1, 2011. OWCP advised that he knowingly received dual benefits from June 1 to August 27, 2011 and did not advise OWCP of his retirement benefits until three months later. It noted informing appellant on April 29, 2009, to advise if he received retirement benefits. OWCP requested that he either repay the overpaid amount in full or contact OWCP to arrange a repayment plan.

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.[3]

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 compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except 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.[4] The implementing regulations provide that a beneficiary may not receive wage-loss compensation

[3] 5 U.S.C. § 8102.

[4] *Id.* at § 8116(a).

concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive.[5]

ANALYSIS -- ISSUE 1

The record establishes that appellant's claim was accepted for several lumbar conditions and he was paid wage-loss compensation benefits under FECA. The record establishes that he also applied for retirement that became effective on May 31, 2011 and he received OPM benefits on June 1, 2011. The record supports that appellant simultaneously received OPM and FECA benefits for the period June 1 to August 27, 2011. OWCP properly determined that for the period June 1 to August 27, 2011, appellant received an overpayment in the amount of $11,173.55 due to his receipt of dual benefits. Appellant does not dispute that he received the overpayment in question, nor did he dispute the amount of the overpayment. OWCP explained how the overpayment occurred and provided this to him with the preliminary notice of overpayment. The Board finds that it properly determined the amount of the overpayment that covered the period June 1 to August 27, 2011.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that "[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[6] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[7]

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.[8]

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.[9]

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[5] 20 C.F.R. § 10.421(a).

[6] 5 U.S.C. § 8129(b).

[7] *Gregg B. Manston*, 45 ECAB 344 (1994).

[8] 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116 (1999).

[9] *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that he was with fault in creating the overpayment of compensation, it must establish that, at the time he accepted the compensation checks in question, he knew or should have known the payments were incorrect.[10]

In this case, appellant made an election of benefits to receive OPM benefits in lieu of FECA benefits prior to June 1, 2011. The record establishes that on September 13, 2011 OWCP contacted him and spoke to his wife who confirmed that he was receiving OPM benefits effective June 1, 2011. Similarly, a compensation termination sheet dated September 13, 2011, noted that appellant was receiving OPM benefits effective June 1, 2011. OWCP determined that for the period June 1 to August 27, 2011 he was also paid net OWCP compensation of $11,173.55.

The Board finds that, in these circumstances, a claimant, who makes an election of benefits, between FECA and OPM may be charged with knowledge that subsequent dual payments are incorrect.[11] As noted, OWCP erroneously issued wage-loss compensation for total disability for the period June 1 to August 27, 2011. Appellant was not entitled to monetary compensation for this period because he received disability retirement benefits from OPM. Even if the overpayment resulted from negligence on the part of OWCP, this does not excuse the employee from accepting payments which he knew or should have known were incorrect.[12] In an April 29, 2009 letter, OWCP advised appellant that he was placed on the periodic compensation rolls. An attached EN1049 OWCP notified him:

> "RETIREMENT BENEFITS. You must report to OWCP any retirement income you receive from any federal establishment. This is because a person who receives compensation benefits under FECA is not permitted to receive benefits under CSRS or FERS."

The form specifically notified appellant that he could not receive FECA benefits at the same time he received retirement benefits.

In response to the preliminary overpayment finding, appellant asserted that he was heavily medicated throughout the time in question and did not understand that he received an overpayment of compensation. He did not submit any probative evidence to support that he was unable to understand that he could not accept FECA wage-loss compensation at the same time he

[10] *See Claude T. Green,* 42 ECAB 174, 278 (1990).

[11] *See C.G.*, Docket No. 12-936 (issued April 22, 2013) (where appellant was receiving wage-loss compensation benefits by direct deposit and elected to receive OPM benefits and thereafter received dual benefits creating an overpayment of compensation, the Board found that she was at fault because she was aware that she could not be in receipt of dual benefits after her election of benefits).

[12] *See Russell E. Wageneck*, 46 ECAB 653 (1995).

received OPM retirement benefits.[13] As the employee is not without fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.[14]

The facts show that appellant willingly received wage-loss compensation from June 1 to August 27, 2011 while also in receipt of prohibited OPM retirement benefits. Appellant did not advise OWCP of his retirement benefits until September 12, 2011, three months after receipt of the benefits. This, together with the April 29, 2009 warning letter, establishes that he knowingly should have been aware that he was not entitled to accept wage-loss compensation for a period in which he was also receiving disability retirement benefits through OPM. The payments were incorrect.

For these reasons, OWCP properly found that appellant accepted wage-loss compensation from June 1 to August 27, 2011 while also receiving retirement benefits from OPM which he knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the $11,173.55 overpayment of compensation may not be waived.[15]

On appeal, appellant contends that he was incompetent to understand that he was receiving an overpayment of compensation. As explained, however, he did not submit any medical evidence establishing that he did not have the capacity to understand that he received incorrect payment during the period in question.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from June 1 to August 27, 2011 and that appellant was at fault in creating the overpayment.

[13] *See P.L.*, (*G.L.*), Docket No. 09-1488 (issued March 2, 2010) (where the Board held that appellant did not submit any medical or factual evidence establishing that he was mentally incompetent to understand that he was receiving an overpayment of compensation or lacked the capacity to complete the EN1032 forms dated 1986 to 2008).

[14] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

[15] As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board