



notes that the corrected period should be August 1 through September 19, 2005, as retirement payments “officially” began on August 1, 2015.

### **FACTUAL HISTORY**

On March 21, 2012 appellant, then a 61-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging a right ankle injury as a result of walking in the course of his federal employment. On May 17, 2012 OWCP accepted his claim for temporary aggravation of degenerative joint disease of the right ankle. On February 13, 2015 it expanded the claim to include right ankle arthritis, stiffness in the joints of the right ankle and foot, and right ankle sprain.

By letter dated May 27, 2015, appellant was placed on the periodic rolls for compensation, effective April 15, 2015. Each 28 days, appellant was paid a gross amount of \$3,421.20 and a net amount of \$3,026.28.<sup>2</sup> Enclosed with this letter was a Form EN1049, which stated, “You must report to OWCP any retirement income you receive from any Federal agency. 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).”

The record establishes that appellant retired on July 17, 2015. He noted to OWCP on September 4, 2015 that he had not yet received a check from the Office of Personnel Management (OPM), but that they had accepted his retirement. An OWCP representative advised appellant that he had to elect between OPM and OWCP benefits.

On September 21, 2015 appellant elected to receive OPM benefits with an effective date of July 17, 2015.

By notice dated October 7, 2015, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$7,096.33 occurred from July 17 through September 19, 2015, as it paid him compensation on the periodic rolls for that period, yet appellant had elected to receive OPM benefits for that period. It made the preliminary finding that appellant was at fault in the creation of the overpayment, as he was aware that he could not receive benefits from OPM and OWCP simultaneously. OWCP afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

By letter dated October 7, 2015, OWCP notified OPM that appellant had elected to receive OPM benefits. It noted that OPM was to commence monthly annuity payments effective July 17, 2015 and requested that OPM reimburse OWCP in the amount of \$7,096.33 for benefits paid during the period July 17 through September 19, 2015.

On November 4, 2015 OPM replied to OWCP’s letter of October 7, 2015. It noted that it began payments to appellant effective August 1, 2015, even though he separated from federal

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<sup>2</sup> A review of appellant’s compensation history reveals that his net compensation increased to \$3,056.88 effective June 28, 2015.

service on July 17, 2015. OPM requested guidance as to how this gap would impact the amount of overpayment.

By decision dated December 11, 2015, OWCP finalized appellant's overpayment of compensation in the amount of \$7,096.33 for the period July 17 through September 19, 2015. It found that he was at fault in the creation of the overpayment because he was aware he could not receive OPM and OWCP benefits simultaneously. OWCP directed recovery of the overpaid amount by withholding \$100.00 from his continuing OPM payments effective December 13, 2015.

### **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 duty.<sup>3</sup> FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>4</sup>

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.<sup>5</sup> 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.<sup>6</sup> The employee has the right to elect the monetary benefits that is most advantageous.<sup>7</sup> The election, once made, is revocable.<sup>8</sup> Concurrent wage-loss compensation and OPM benefits constitute a prohibited dual benefit.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Appellant was placed on the periodic rolls for compensation starting April 15, 2015. His continuing payment every four weeks was a net amount of \$3,056.88. On September 21, 2015 appellant elected to receive OPM benefits and stated that the effective date of this election was July 17, 2015. OPM informed OWCP by letter dated November 4, 2015 that the effective date of election was August 1, 2015, because it did not begin payments until that date.

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> *Id.*

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (February 1995).

<sup>7</sup> *Id.*

<sup>8</sup> 20 CFR § 10.421(a).

<sup>9</sup> *Supra* note 4.

The evidence reflects that appellant received \$7,096.33 in compensation benefits from July 17 through September 19, 2015. On appeal appellant contested the amount of overpayment and the period, noting that OPM payments commenced August 1, 2015, not July 17, 2015.

The Board finds that OWCP correctly determined that appellant received an overpayment of compensation for the period from August 1, 2015 through September 19, 2015. However, the Board also finds that this case is not in posture for decision on the issue of whether an overpayment existed for the period from July 17 through August 1, 2015. The letter from OPM is unclear as to the effective date. As such, the Board thus affirms in part the December 11, 2015 decision as to the fact of overpayment from August 1 through September 19, 2015, but remands for further review of the alleged overpayment from July 17 through August 1, 2015. As such, the case shall be remanded to OWCP to clarify what effect OPM's November 4, 2015 letter would have on the fact or amount of overpayment for the period from July 17 through August 1, 2015. After such further development as necessary, OWCP shall issue an appropriate decision as to fact and amount of overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides that adjustment 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.<sup>10</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

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<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

<sup>12</sup> 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

<sup>13</sup> *Id.* at § 10.433(b).

## ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of this overpayment because he accepted dual benefits while knowing that he was not permitted to receive both OWCP and OPM benefits at the same time.

The Board finds that OWCP correctly determined that appellant was at fault in the creation of the overpayment from August 1 through September 19, 2015. Appellant knew or should have known that receipt of dual benefits from OPM and OWCP was not permissible, because the Form EN1049 enclosed with his May 27, 2015 notification of being placed on the periodic rolls advised him as such. Hence, OWCP properly found appellant at fault in the creation of the overpayment.

As the Board explained in *B.G.*,<sup>14</sup> appellant is at fault for accepting OPM annuity benefits for a period already covered by FECA disability payments. OWCP notified him on May 27, 2015 that a person who receives compensation benefits under FECA is not permitted to receive retirement benefits. It advised appellant again telephonically on September 4, 2015 that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time.

Notwithstanding this notice, appellant made an election on September 21, 2015 to receive OPM retirement benefits retroactive to July 17, 2015. Because he had already received FECA disability benefits from at least August 1, 2015, his election to receive OPM annuity benefits beginning July 17, 2015 was, in effect, an election to receive a prohibited dual benefit under 5 USC § 8116. Appellant's receipt of the retroactive OPM annuity benefits created an overpayment of compensation and, at the time he accepted those OPM benefits, he knew or should have known, based on past and recent notices, that he was not permitted to receive both FECA disability benefits and OPM annuity benefits for the same period. He is therefore at fault in creating the overpayment. The Board will affirm OWCP's finding of fault for the period appellant received dual benefits.<sup>15</sup>

The Board further finds that the issue of appellant's fault in the creation of the alleged overpayment from July 17 through August 1, 2015 is not in posture for decision. After such further development as necessary, OWCP will issue a *de novo* decision on this issue.

The Board notes that it does not have jurisdiction to review OWCP's determination that the overpayment would be recovered by deducting \$100.00 from appellant's continuing OPM retirement benefits. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>16</sup> Appellant is not in receipt of continuing compensation under FECA.

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<sup>14</sup> Docket No. 14-2002 (issued August 13, 2015).

<sup>15</sup> On remand of the case OWCP shall determine whether the period of overpayment due to receipt of dual benefits began on July 17, 2015 or August 1, 2015.

<sup>16</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

**CONCLUSION**

The Board finds that OWCP has established fact of overpayment for the period from August 1 through September 19, 2015. The Board further finds that this case is not in posture for decision on the issue of fact of overpayment for the period from July 17 through August 1, 2015. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment from August 1 through September 19, 2015, but that this case is not in posture for decision on the issue of fault for the alleged overpayment from July 17 through August 1, 2015. The Board finds the amount of overpayment is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case remanded for further action in conformance with this decision.

Issued: July 14, 2016  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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