

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

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M.J., Appellant )

and )

DEPARTMENT OF HEALTH & HUMAN )  
SERVICES, SOCIAL SECURITY )  
ADMINISTRATION, Dallas, TX, Employer )

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**Docket No. 11-2142  
Issued: May 2, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 23, 2011 appellant filed a timely appeal of an April 22, 2011 Office of Workers' Compensation Programs (OWCP) decision finding an overpayment, for which she was at fault. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,795.96 for the period January 1 to March 12, 2011; and (2) whether she was at fault in the creation of the overpayment such that it is not subject to waiver.

On appeal, appellant alleged that she notified OWCP of her intent to elect Office of Personnel Management (OPM) benefits and that OWCP failed to timely stop payment in order to avoid an overpayment. She argued that she was not at fault in the creation of the overpayment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 5, 1994 appellant, then a 43-year-old claims representative, filed an occupational disease claim alleging that she developed carpal tunnel syndrome and de Quervain's tenosynovitis. OWCP accepted her claim for bilateral carpal tunnel syndrome on September 9, 1994. By decision dated June 20, 1995, it found that appellant's reemployment as a modified social insurance specialist effective February 17, 1995 fairly and reasonably represented her wage-earning capacity. On May 20, 1998 appellant filed a separate claim alleging that she developed tennis elbow due to factors of her federal employment. OWCP accepted bilateral epicondylitis in addition to bilateral carpal tunnel syndrome on March 24, 2000. On October 13, 2000 appellant received schedule awards for 12 percent impairment of each of her upper extremities.

On May 20, 2010 appellant was released to return to work three days a week, eight hours a day. In a letter dated November 5, 2010, she informed OWCP that she was "considering retiring at the end of this year." Appellant noted that once she was entitled to her Civil Service annuity her workers' compensation benefits would stop. The claims examiner responded on December 9, 2010 and informed her that she would have to elect between OWCP and Office of Personnel Management (OPM) benefits. On January 4, 2011 appellant informed the claims examiner by telephone that she retired effective December 31, 2010. In a letter dated December 31, 2010 and received by OWCP on January 7, 2011, she informed OWCP that she retired effective December 31, 2010 and requested that her OWCP payments cease. Appellant telephoned OWCP on February 16, 2011 and stated that she retired under OPM on January 1, 2011 and was still receiving compensation benefits. She asked that her OWCP benefits cease. Appellant completed an election form on February 17, 2011 and elected OPM benefits effective January 1, 2011.

In a letter dated February 28, 2011, OPM stated that appellant had elected to receive retirement benefits and indicated that OWCP benefits ended on March 12, 2011 and that reimbursement was due OWCP from January 1 to March 12, 2011 in the amount of \$3,795.96.

On March 10, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,795.96 because she continued to receive compensation benefits after selecting OPM benefits from January 1 to March 12, 2011. It determined that she was at fault in the creation of the overpayment because she made an informed retroactive election on February 17, 2011 to receive OPM benefits effective January 1, 2011. OWCP determined that appellant received compensation benefits in the amount of \$1,497.00 every 28 days and that the period for which she was overpaid was 71 days resulting in an overpayment in the amount of \$3,795.96.

In a letter dated March 12, 2011, appellant agreed that she had received an overpayment in the amount of \$3,795.96, but did not agree that she was at fault in the creation of the overpayment. She stated that she requested that her compensation benefits cease by letter dated December 31, 2010. Appellant requested an appeal on the issue of fault.

By decision dated April 15, 2011, OWCP found that appellant was at fault in the creation of an overpayment in the amount of \$3,745.96 as she received both compensation and retirement

benefits during the period January 1 to March 12, 2011. It issued a corrected decision on April 22, 2011 and listed the amount of overpayment as \$3,795.96.

**LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>2</sup> 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.<sup>3</sup>

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, 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.<sup>4</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>5</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>6</sup>

**ANALYSIS -- ISSUE 1**

Appellant began receiving OPM benefits on January 1, 2011. She did not complete a formal election form until February 17, 2011 and elected OPM benefits effective January 1, 2011. As such, any wage-loss compensation appellant received from OWCP after January 1, 2011 constitutes an overpayment of compensation.<sup>7</sup> The record shows that OWCP continued to pay her compensation until March 12, 2011; thus she received an overpayment. Appellant has agreed that she received an overpayment in the amount of \$3,795.96 and this aspect of the case is not in dispute.

**LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA<sup>8</sup> provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the

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<sup>2</sup> *Id.* at §§ 8101-8193, 8102.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at § 8116(a)

<sup>5</sup> 20 C.F.R. § 10.421(a).

<sup>6</sup> *Id.*

<sup>7</sup> *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>8</sup> 5 U.S.C. §§ 8101-8193, 8129(a).

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 FECA or would be against equity and good conscience.”<sup>9</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of OWCP’s regulations<sup>10</sup> provide in relevant part:

“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.”

### **ANALYSIS -- ISSUE 2**

In this case, OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. In order for OWCP to establish that appellant was at fault in creating the overpayment of compensation, it must establish that, at the time she received the compensation check in question, she knew or should have known that the payment was incorrect.<sup>11</sup>

Appellant has repeatedly stated that she was aware that she was not entitled to receive compensation benefits from OPM and OWCP concurrently. In a letter dated November 5, 2010, she informed OWCP that she was considering retiring and noted that once she was entitled to her Civil Service annuity her workers’ compensation benefits would stop. This letter indicates that appellant was aware that she was not entitled to receive dual benefits. In a letter dated December 31, 2010, appellant informed OWCP that she retired effective December 31, 2010 and requested that her OWCP payments cease. These letters indicate that she was aware that she was not entitled to receive OWCP benefits after January 1, 2011. Therefore, appellant accepted payments after January 1, 2011 which she knew were incorrect. The fact that OWCP was negligent in making payments to a claimant does not relieve the claimant of fault in accepting incorrect payments.<sup>12</sup>

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<sup>9</sup> *Id.* at § 8129(b).

<sup>10</sup> 20 C.F.R. § 10.320(b).

<sup>11</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

<sup>12</sup> *Neill D. Dewald*, 57 ECAB 451 (2006).

On appeal, appellant alleged that she was not at fault because she notified OWCP of her election of OPM benefits and continued to receive compensation from OWCP. The Board has held that although OWCP failed to respond to the information provided by an appellant, that does not relieve her of the continuing obligation to return payments which she knew or should have known were incorrect.<sup>13</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$3,795.96, which she knew she was not entitled to receive OWCP benefits after January 1, 2011 and that she was at fault in the creation of the overpayment even though she notified OWCP of her receipt of OPM benefits beginning January 1, 2011.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>13</sup> *Id.*