



## **FACTUAL HISTORY**

OWCP accepted that on August 1, 2007 appellant, then a 56-year-old rural mail carrier, sustained a head laceration and a broken wrist, leg and foot when a privately-owned vehicle collided with her carrier's vehicle in the performance of duty. Appellant stopped work that day. Her claim was accepted for left forehead flap laceration, right wrist fracture, left knee tibial plateau fracture, left ankle laceration, and left foot fractures of the second, third and fourth metatarsals. Appellant received disability compensation.

On December 5, 2007 appellant returned to limited duty as an administrative assistant.<sup>2</sup>

On October 1, 2008 appellant stopped work again. On January 23, 2009 she returned to limited duty as a modified rural carrier. On April 29, 2009 OWCP issued a loss of wage-earning capacity determination based on appellant's new position as a modified rural carrier.

Appellant submitted various claims for disability compensation from April 27, 2009 to October 22, 2010.

In EN1032 forms dated October 30, 2009 and October 19, 2010, OWCP advised appellant, as part of its annual periodic review, to report any retirement benefits, either disability or regular, that she received from OPM, the Foreign Service, or any other federal disability or retirement system except for benefits under FECA as it constituted a dual benefit.

On February 9, 2011 OWCP received a January 26, 2011 Notice of Separation indicating that appellant retired due to disability effective January 10, 2011.

In a letter dated February 10, 2011, the employing establishment advised OWCP that appellant retired on January 10, 2011 and attached a copy of her PS Form 50. It noted that she was currently on the periodic rolls.

An overpayment worksheet indicated that appellant received compensation in the amount of \$1,362.00 every 28 days, at a daily rate of \$48.64. As appellant was overpaid 34 days, calculations resulted in an overpayment of \$1,653.86. It was noted that she retired on January 10, 2011, but received compensation benefits through February 12, 2011.

On March 15, 2012 OWCP issued a preliminary determination that appellant received an overpayment in the amount of \$1,653.86 for the period January 10 to February 12, 2011 because she continued to receive compensation benefits after she retired on OPM disability benefits effective January 10, 2011. It determined that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to compensation for total disability when in receipt of disability retirement benefits. OWCP pointed out that appellant was advised in OWCP's October 19, 2010 Form EN1032 as part of OWCP's annual periodic review concerning other federal benefits and programs. It calculated that she received compensation

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<sup>2</sup> On February 12, 2008 OWCP issued a preliminary determination finding that appellant received an overpayment in the amount of \$790.60 for the period December 6 to 22, 2007. On March 3, 2008 it advised her that her overpayment of compensation in the amount of \$790.60 was repaid in full.

benefits in the amount of \$1,362.00 every 28 days or \$48.642857 per day. Appellant was overpaid for 34 days resulting in an overpayment in the amount of \$1,653.86. It requested that she complete an overpayment recovery questionnaire within 30 days. No response was received.

By decision dated April 16, 2012, OWCP finalized the overpayment in the amount of \$1,653.86 and found that appellant was at fault in the creation of the overpayment.

### **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.<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, 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.<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**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,653.86 for the period January 10 to February 12, 2011. Appellant retired due to disability effective January 10, 2011 and received compensation from OPM in addition to the wage-loss compensation she had been receiving under FECA during this period. The record establishes that she never completed an election of benefits and therefore received both OPM and OWCP benefits. Consequently, any wage-loss compensation appellant received from OWCP for a period beginning on or after January 10, 2011 constitutes an overpayment of benefits.

As appellant received \$1,362.00 in compensation benefits every 28 days, and received compensation which she was not entitled to receive for a period of 34 days, the Board finds that OWCP properly calculated that appellant received an overpayment of compensation in the amount of \$1,653.86. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$1,653.86 for the period January 10 to February 12, 2011.

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<sup>3</sup> 5 U.S.C. § 8102.

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.421(a).

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

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.<sup>7</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>8</sup>

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations 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 he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.<sup>9</sup>

## ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in creating the overpayment because she accepted a payment that she knew or should have known that she was not entitled to the compensation. The record establishes that she received two EN1032 forms, dated October 30, 2009 and October 19, 2010, instructing her to report any benefits she received from OPM. Thus, appellant knew or should have known that acceptance of compensation benefits for periods after her retirement on January 10, 2011 were incorrect. As she received compensation benefits from OWCP which covered the period January 10 through February 12, 2011, the Board finds that she was at fault in the creation of the overpayment and is not entitled to waiver.

On appeal, appellant alleged that she was not at fault because she contacted OWCP when she received a check with dates for the period January to September 2011 and was told that the payment had been made and her case was closed. The record indicates however that her last compensation check was issued February 12, 2011, in the same amount of \$1,362.00 she had previously received every 28 days, as a periodic rolls payment.

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<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>9</sup> 20 C.F.R. § 10.433(a).

The Board also notes that it has held that the fact that OWCP was negligent in making payments to a claimant does not relieve the claimant of fault in accepting incorrect payments.<sup>10</sup> Thus, the Board finds that appellant was at fault in the creation of the overpayment.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,653.86 during the period January 10 through February 12, 2011 because she received dual compensation benefits from OPM and under FECA. The Board further finds that OWCP properly found that she was at fault in the creation of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> *M.J.*, Docket No. 11-2142 (issued May 2, 2012); *Neill D. Dewald*, 57 ECAB 451 (2006).