

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

C.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer

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**Docket No. 12-936
Issued: April 22, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 20, 2012 appellant, through her attorney, filed a timely appeal of a March 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (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 \$1,056.78 for the period November 11 through 19, 2011; and (2) whether appellant was at fault in the creation of the overpayment and thus not entitled to waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant disagreed with the finding of fault and alleged that her election of the Office of Personnel Management (OPM) benefits during a period of wage-loss compensation was not in fact an overpayment as she had not yet received OPM benefits.

FACTUAL HISTORY

On October 21, 2002 appellant, then a 40-year-old mail processor, filed a traumatic injury alleging that she sustained an injury to her neck, shoulder and arm when a door fell on her in the performance of duty. On November 19, 2002 OWCP accepted her claim for right shoulder arm sprain/strain and cervical sprain/strain and chest wall strain. Appellant's claim was expanded to include the additional condition of right shoulder partial supraspinatus tear on January 29, 2003. She underwent a right rotator cuff repair on August 31, 2004. OWCP accepted the additional conditions of right shoulder bursitis and right shoulder impingement on April 4, 2005. Appellant returned to light-duty work on February 9, 2006. She elected to receive direct deposit of her FECA benefits on January 5, 2007. OWCP entered appellant on the periodic rolls on February 15, 2007. Appellant accepted another light-duty position working 20 hours a week on April 7, 2008.

In a decision dated September 28, 2010, OWCP accepted that appellant had sustained a recurrence of total disability on September 16, 2010 due to the National Reassessment Process (NRP) at the employing establishment.

On March 24, 2011 appellant indicated that she was pursuing disability retirement under OPM. In a letter of that date, OWCP informed her of her current entitlement to compensation benefits and the necessity to elect either OPM or OWCP benefits. Appellant responded on March 31, 2011 and stated that she had applied for disability retirement and requested additional information regarding the date of her entitlement to OPM benefits and the amount of OPM benefits. On April 8, 2011 OWCP informed her that she was not entitled to receive OPM retirement benefits and compensation under FECA from OWCP. It directed appellant to elect a benefit and provide the date of her election. On November 2, 2011 OPM approved her application for disability retirement. Appellant partially completed an election of benefits form on November 11, 2011 indicating that she wished to receive retirement benefits, but without providing an effective date of the election. OWCP received this letter on November 15, 2011. Appellant completed a letter dated November 11, 2011, received by OWCP on November 16, 2011, stating that she elected OPM benefits effective November 11, 2011.

Appellant informed OWCP by letter dated November 18, 2011 that she intended to elect OPM benefits as of the date of the form, November 11, 2011. She further stated, "If dual compensation should occur it is without any intent on my part and I will reimburse any amounts over paid." In a letter dated November 22, 2011, OWCP stated that appellant had been removed from the periodic rolls based on her selection of OPM retirement benefits effective November 11, 2011. It stated that an overpayment had been established as she received a compensation check for the period October 23 through November 19, 2011.

OWCP calculated that appellant had received an overpayment in the amount of \$1,056.78. In a letter dated December 5, 2011, appellant again confirmed her election of OPM

retirement benefits effective November 11, 2011 and stated that she would reimburse OWCP for the overpayment from October 23 through November 19, 2011.

OWCP issued a preliminary determination on January 5, 2012 that appellant had been overpaid in the amount of \$1,056.78 because she elected OPM retirement benefits effective November 11, 2011, but continued to receive wage-loss compensation for temporary total disability through November 19, 2011. It found that she was at fault in the creation of the overpayment. OWCP noted that appellant was entitled to receive compensation in the amount of \$2,258.29 for the period October 23 through November 10, 2011, but received compensation through November 19, 2011 in the amount of \$3,328.00 resulting in a gross overpayment of \$1,069.71. It reduced this overpayment by the deductions of basic life insurance and optional life insurance to reach the net overpayment of \$1,056.78. OWCP requested that appellant complete an overpayment recovery questionnaire and provide additional financial information as well as select any appeal rights.

In a letter dated January 6, 2012, OWCP requested that OPM reimburse \$1,056.78 for the overpayment of compensation from November 11 through 19, 2011.

Appellant responded to OWCP on January 30, 2012 and stated that she became eligible for OPM benefits on November 2, 2011 and that OWCP received her election form on November 14, 2011 before she received compensation for the period October 23 through November 19, 2011. She stated that she had not yet received any OPM benefits and therefore had not received concurrent payments.

By decision dated March 2, 2012, OWCP finalized the overpayment decision and determined that appellant had received an overpayment in the amount of \$1,056.78 for the period November 11, 2011, when she elected to receive OPM benefits, through November 19, 2011 when her FECA benefits ended. It found that she was at fault in the creation of the overpayment as she “consciously made the decision to receive benefits [through OPM] while still in the receipt of benefits under ... FECA.” OWCP determined that as appellant was at fault she was not entitled to waiver. It also found that she had not provided any financial information and it requested that she repay the debt in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA² 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, 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,

² 5 U.S.C. §§ 8101-8193, 8102.

³ *Id.*

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 concurrently with a federal retirement or survivor annuity.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶

ANALYSIS -- ISSUE 1

Appellant received compensation benefits for total disability through November 19, 2011. She completed an election form dated November 11, 2011 received by OWCP on November 15, 2011, but failed to complete the section requesting the effective date of her election. Appellant mailed a separate letter to OWCP dated November 11, 2011 in which she stated that she had elected OPM retirement benefits effective November 11, 2011. OWCP received this letter on November 16, 2011. In letters dated November 18 and December 5, 2011, appellant again informed OWCP that she intended to elect OPM benefits on November 11, 2011 going forward.

The record establishes that appellant elected to receive OPM benefits effective November 11, 2011. The record further establishes that she received FECA benefits through November 19, 2011. Appellant has therefore received an overpayment payment of wage-loss compensation from November 11 through 19, 2011. She is not entitled to receive benefits concurrently from two sources, namely FECA and OPM retirement. Thus, the Board finds appellant's election of OPM benefits and FECA benefits created a prohibited dual benefit for this period, thus resulting in an overpayment of compensation.

OWCP provided the calculations and the Board finds that it properly calculated the amount of overpayment as \$1,056.78. Appellant has not disputed the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁷ 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 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

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ 5 U.S.C. § 8101-8193, 8129(a).

against equity and good conscience.”⁸ 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 regulations⁹ 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.”

The Board has found a claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹⁰ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹¹

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in the creation of a \$1,056.78 overpayment for the period November 11 through 19, 2011. It based its fault finding on her election of OPM benefits which she received after the effective date of OPM benefits. As such, OWCP was unable to prevent payment as of the election date of November 11 through 19, 2011. Therefore, it found that appellant had accepted a payment, which she knew or should have known was incorrect.

Appellant was aware that she could not be in receipt of dual benefits after her election date of November 11, 2011, however, on appeal, she disagreed with the fact of the overpayment on the grounds that she had not received a concurrent payment from OPM on or before November 19, 2011. She argued that she was never in actual receipt of dual benefits.

⁸ *Id.* at § 8129(b).

⁹ 20 C.F.R. § 10.320(b).

¹⁰ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹¹ *See K.H.*, Docket No. 06-191 (issued October 20, 2006).

Appellant originally made her application for OPM benefits sometime on or about March 2011. However, for reasons unknown she did not make OWCP aware of her election until November 16, 2011. The record reflects that, due to appellant's late notification, OWCP issued a payment covering the period November 11 through 19, 2011. Appellant argued that the only payment she actually received for that specific period was under FECA. The Board recognized in *Franklin L. Bryan*¹² the distinction between theoretical retroactive benefits and actual receipt of retroactive benefits. In that case, the Board found that the employee, although he was aware of the prohibition of receiving simultaneous benefits, did not actually receive and accept a dual payment from two entities during the period in question. In this appeal, the record is absent of any evidence that OPM paid benefits to appellant for the period November 11 to 19, 2011, the period covered by the last payment from FECA. On January 6, 2012 OWCP sent a correspondence to OPM notifying them of the amount of overpayment and requesting that it reimburse \$1,056.78 from her initial payments. There is no evidence of a response, nor evidence of reimbursement in the record. Although appellant was aware that she could not receive both FECA and OPM benefits simultaneously, there is no fiscal evidence that she actually received a payment from OPM for the period in question.

Accordingly, OWCP's determination of fault in creating the overpayment is set aside and the case remanded for a determination of whether appellant is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,056.78 for the period November 11 through 19, 2011 and remands the case for OWCP to appropriately consider the issues of fault, and if appropriate, waiver of recovery of the overpayment.

¹² 56 ECAB 310 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded for further development consistent with this decision of the Board.

Issued: April 22, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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