

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

A.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bell, CA, Employer**

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**Docket No. 13-967
Issued: December 5, 2013**

Appearances:
Steven Chavez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 26, 2013 appellant, through his representative, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated February 27, 2013. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$11,753.48 for the period May 3, 2011 through June 2, 2012 because he received dual compensation benefits from the Office of Personnel Management (OPM) and from OWCP; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and therefore ineligible for waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, then a 25-year-old coding clerk/data conversion operator, injured his right arm on June 30, 1988.

OWCP accepted a right elbow strain, right forearm strain, right epicondylitis and right ulnar nerve lesion.² Appellant returned to a modified job which entailed checking trailers at the back gate of his worksite. He was injured again in June 1999 and filed a recurrence of disability claim. Appellant returned to a modified job as a coding clerk one week later. He worked at this position until May 2009, when he left work because the employing establishment no longer had a job available within his medical restrictions. Appellant received wage-loss compensation for temporary total disability.

By letter dated October 25, 2010, OWCP informed appellant that it was placing him on the periodic rolls. The letter stated:

“RETIREMENT BENEFITS. You must report to OWCP any retirement income you receive from any [f]ederal [employing 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).”

By letter dated June 1, 2011, OPM advised appellant that he would receive retirement benefits.

In a letter to OWCP dated June 12, 2011, appellant advised that he had retired from the employing establishment and was receiving an annuity from OPM. He received his first OPM interim check but had also received payments from OWCP for his accepted employment injury. Appellant requested that the payments under FECA be discontinued. Accompanying this letter was a July 20, 2011 form letter that he submitted to his bank in which he requested that it place a stop payment on checks received from OWCP.

By letter dated September 28, 2011, appellant informed OPM that he had requested that OWCP release him from the compensation system and to stop payments to him. He noted that OWCP had not responded to his correspondence or telephone calls. In April 2011, appellant submitted paperwork with his employer to receive retirement pay effective May 2, 2011. He also contacted OWCP to advise that he was going to retire. Despite several attempts, OWCP sent direct deposit checks to appellant’s account. In July 2011, appellant contacted his bank and requested that OWCP checks be returned. Since then his bank had returned three checks.

On July 10, 2012 OWCP made a preliminary determination that appellant received an overpayment in the amount of \$14,025.54 due to his receipt of dual benefits from OPM and under FECA during the period May 3, 2011 through June 2, 2012. It found that he was at fault in the creation of the overpayment. OWCP acknowledged that it neglected to respond to

² The instant record contains no contemporaneous documentation pertaining to the original injury claim. The essential facts regarding appellant’s injury and the conditions accepted by OWCP are not contested.

appellant's inquiries with an election letter and that OPM informed OWCP in a June 1, 2011 letter that he was in receipt of retirement benefits as of May 3, 2011. It did not remove him from the periodic rolls or discontinue compensation payments until June 2, 2012. This resulted in an overpayment from May 3, 2011 to June 2, 2012.

OWCP found appellant to be at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. Although appellant returned several of the direct deposit checks from July 3, 2011 to June 2, 2012, which totaled \$15,858.90.³ OWCP calculated the amount of the overpayment by adding seven checks he received and did not return from May 3, 2011 to March 10, 2012,⁴ to total an overpayment of \$14,025.54. Appellant was advised that he could request a telephone conference or a precoupment hearing within 30 days if he disagreed that the overpayment. OWCP requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On August 8, 2012 appellant completed the overpayment questionnaire and requested a precoupment hearing, which was held on December 13, 2012. Following the hearing, he submitted documentation regarding his financial status.

In a statement received by OWCP on August 17, 2012, appellant acknowledged that he was obligated to pay back some of the compensation checks he received from OWCP. He contended that the amount of the overpayment was not correct and that OWCP's failure to respond to his requests to stop sending him direct deposit checks contributed to the overpayment. Appellant stated that he closed his bank account in January 2012 and should not be liable for the overpayment covering the period February 12 to March 10, 2012, which totaled \$2,272.06. He also noted that he was paying OWCP \$700.00 per month for a previous overpayment, for which he requested a credit.⁵

At the precoupment hearing, appellant's representative reiterated that appellant should not be liable for the check covering the period February 12 to March 10, 2012, as he had closed his bank account in January 2012. Appellant submitted letters dated as of March 2011 informing OWCP that he had elected to receive OPM retirement benefits. He testified that he had not saved any of the overpayment checks as he used the money to pay medical bills and had lost some of the money as well.

³ OWCP listed the returned direct deposit checks as follows: July 3 to 30, 2011, \$2,237.70; July 31 to August 27, 2011, \$2,237.70; August 28 to September 24, 2011, \$2,237.70; December 18, 2011 to January 14, 2012, \$2,237.70; January 15 to February 11, 2012, \$2,236.70; March 11 to April 7, 2012, \$2,335.70; April 8, to May 5, 2012, \$2,335.70; and May 6 to June 2, 2012, \$2,335.70, for a total amount of \$15,858.90.

⁴ OWCP calculated the total overpayment by adding the following checks which were not returned: May 3 to 7, 2011, \$530.00; May 8 to June 4, 2011, \$2,271.98; June 5 to July 2, 2011, \$237.70; September 25 to October 22, 2011, \$2,237.70; October 23 to November 19, 2011, \$2,237.70; November 20 to December 17, 2011, \$2,237.70; and February 12 to March 10, 2012, \$2,272.06.

⁵ See Docket No. 11-1101 (issued May 1, 2012).

In a decision dated February 27, 2013, an OWCP hearing representative finalized the overpayment of \$14,025.54 for the period May 3, 2011 to June 2, 2012. He reduced the amount of overpayment by \$2,272.06, which represented the amount of the check returned by appellant for the period February 12 to March 10, 2012. The hearing representative noted that appellant's bank account had been closed prior to that date and that the record established that the payment had been returned and cancelled on November 2, 2012. This resulted in a total overpayment of \$11,753.48.

The hearing representative noted appellant's contention that he was not at fault in the creation of the overpayment because he timely notified OWCP of his retirement date and had his bank return several of the direct deposit checks received after electing to receive OPM benefits. She found that appellant knew that he was not entitled to the compensation payments after his May 3, 2011 retirement election date. Appellant testified that he accepted the direct deposit checks and had used the money to pay medical expenses. Therefore, he accepted payments that he knew or should have known to be incorrect and was at fault in creation of the overpayment. The hearing representative determined that the overpayment should be repaid by appellant in monthly installments of \$190.00.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of FECA states that, while an employee is receiving workers' compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in return 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.⁶ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁷ The beneficiary must elect the benefit that he or she wishes to receive.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,753.48 for the period May 3, 2011 through June 2, 2012.

Appellant received dual compensation from OPM in addition to wage-loss compensation he had been receiving under FECA during this period. The evidence of record establishes that he received both OPM and OWCP benefits. Consequently, any wage-loss compensation appellant received from OWCP for a period beginning on or after May 3, 2011 constitutes an overpayment of benefits. He is not eligible to receive wage-loss compensation and disability retirement benefits from OPM for the same time period.⁹ The record shows that appellant received an

⁶ 5 U.S.C. § 8116(a).

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

⁹ *Id.*; see *Franklin L. Bryan*, 56 ECAB 310 (2005).

overpayment during the period in question because he received monthly checks for temporary total disability compensation, then received retroactive administrative payments from the employing establishment which covered the same period. The first check, covering the period May 3 to 7, 2011, was for net compensation of \$530.70; the next check, from May 8 to June 4, 2011, was in the amount of \$2,271.98. The next four checks, each in the amount of \$2,237.70, covered the periods June 5 to July 2, 2011, September 25 to October 22, 2011, October 23 to November 19, 2011 and November 20 to December 17, 2011, for a total overpayment of \$11,753.48. OWCP determined that the entire amount of OWCP compensation appellant had received constituted an overpayment because he had received retirement benefits from OPM for the same period.

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,753.48 for the period May 3, 2011 through June 2, 2012.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹⁰ provides that an overpayment must be recovered unless “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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.¹¹

In determining whether an individual is with fault, section 10.433(a) of OWCP’s regulations provide in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--

Made an incorrect statement as to a material fact which he or she individual knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”¹²

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s regulations provide in relevant part:

“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

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *Bonnye Mathews*, 45 ECAB 657 (1994).

¹² 20 C.F.R. § 10.433(a).

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."¹³

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment.

OWCP found that appellant was at fault in the creation of the overpayment as he was aware or should have been aware that he was not entitled to dual benefits. The record establishes that on October 25, 2010 he was informed that receipt of OWCP payments for loss of wage-earning capacity and receipt of an annuity from OPM constituted a dual benefit and that he was instructed to immediately contact OWCP if he did receive such benefits from OPM. As the hearing representative stated, appellant demonstrated his awareness that acceptance of compensation benefits for periods after May 3, 2011 was incorrect through his own efforts to contact OPM and OWCP and his instructing his bank to stop and return payments from OWCP. Therefore, the record indicates that appellant knew or should have known that acceptance of compensation benefits for periods after May 3, 2011 was incorrect. However, he continued to accept and spend payments after this date, which he knew or should have known were incorrect, as indicated by his August 17, 2012 statement and his hearing testimony. As appellant accepted compensation benefits from OWCP, which covered the period May 3, 2011 through June 2, 2012, the Board finds that he was at fault in the creation of the overpayment and is not entitled to waiver.¹⁴

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁵ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$11,753.48 during the period May 3, 2011 through June 2, 2012, because he received dual compensation benefits from OPM and under FECA. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment.

¹³ *Id.* at § 10.433(b).

¹⁴ *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

¹⁵ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁶ *Cheryl Thomas, id.*

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2013
Washington, DC

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

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

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