

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

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**B.G., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
BORDER & CUSTOMS PROTECTION,  
Richford, VT, Employer**

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**Docket No. 12-1661  
Issued: January 2, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 1, 2012 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated July 13, 2012. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$1,962.08 for the period January 1 to 14, 2012 because she 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 ineligible for waiver of recovery.

**FACTUAL HISTORY**

Appellant, a 57-year-old border patrol officer, injured her right knee, right upper back, shoulder and neck when she slipped on a patch of ice on January 30, 2008. She filed a claim for benefits on January 31, 2008, which OWCP accepted for right brachial plexus contusion, upper-

back contusion, cervical strain and right cervical nerve root irritation. It paid compensation for total disability and placed appellant on the periodic rolls.

On December 10, 2011 appellant elected to receive benefits from OPM, effective January 1, 2012.

In a Form CA-1032 dated December 10, 2011, appellant notified OWCP that she was not receiving any other federal benefits or payments, including OPM benefits.

In a notice of proposed termination dated December 28, 2011, OWCP informed appellant that it was terminating her compensation because the medical evidence established that she no longer had any residuals or disability stemming from her work injury.

A January 30, 2012 OWCP worksheet determined that appellant had incurred an overpayment in the amount of \$1,962.08 for the period January 1 to 14, 2012.

In a decision dated May 15, 2012, OWCP terminated appellant's compensation benefits.

On May 16, 2012 OWCP made a preliminary determination that appellant received an overpayment in the amount of \$1,962.08 for the period January 1 to 14, 2012 due to her receipt of dual benefits from OPM and under FECA. It found that she was at fault in the creation of the overpayment. OWCP stated that appellant was aware or should have reasonably been aware that she was in receipt of compensation benefits while recovering OPM benefits. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. OWCP requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

By letter dated June 12, 2012, appellant contended that she was not responsible for the overpayment because the December 28, 2011 proposed termination notice indicated that she had 30 days to respond. She stated that because she received OPM benefits within this period, at a time when she believed she was having her compensation terminated, the overpayment should be waived.

In a decision dated July 13, 2012, OWCP finalized the overpayment of \$1,962.08. It found that she was at fault in the creation of the overpayment in the amount of \$1,962.08 for the period January 1 through 14, 2012. It directed recovery under the Debt Collection Act.

**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.<sup>1</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>2</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>3</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,962.08 for the period January 1 through 14, 2012. Appellant received dual compensation from OPM in addition to wage-loss compensation she had been receiving under FECA during this period. Consequently, any wage-loss compensation she received from OWCP for a period beginning on or after January 1, 2012 constitutes an overpayment of benefits. Appellant is not eligible to receive wage-loss compensation and disability retirement benefits from OPM for the same time period.<sup>4</sup> OWCP calculated the amount of the overpayment by taking the monthly compensation she was due for the period December 18, 2011 to January 14, 2012 and dividing it by half, to cover the two weeks she received the overpayment during January 1 to 14, 2012.

Although appellant argues that OWCP did not finalize the termination of her compensation benefits until May 15, 2012, this fact does not establish that appellant did not receive an overpayment of compensation. The overpayment was based upon her election of OPM benefits and continued acceptance of OWCP benefits during the January 2012 time period. Appellant was entitled to either OPM retirement benefits or OWCP benefits but not both.

Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$1,962.08 for the period January 1 through 14, 2012.

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

Section 8129 of FECA<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. § 8116(a).

<sup>2</sup> 20 C.F.R. § 10.421(a).

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

<sup>4</sup> 20 C.F.R. § 10.421(a); *see Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>5</sup> 5 U.S.C. § 8129(a)-(b).

<sup>6</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

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 the individual knew or should have known to be incorrect; or

Failed to provide information which the individual knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”<sup>7</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP 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 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>8</sup>

### 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 she knew or should have known that FECA benefits she received were incorrect. The record establishes that on December 10, 2011 she notified OWCP on her Form CA-1032 that she was not in receipt of any other federal benefits or payments, including OPM benefits. The form specifically advised appellant to report all other income received, including other agencies of the Federal Government; appellant checked a box indicating that she was not receiving income from other federal agencies. On the same date, December 10, 2011, appellant elected to receive retirement benefits from OPM, effective January 1, 2012. Appellant knew or should have known that her acceptance of compensation benefits for periods after January 1, 2012 was incorrect, as she had elected to receive OPM benefits commencing this period. She accepted payments after January 1, 2012. As appellant accepted compensation benefits from OWCP which covered the period January 1 through 14, 2012, the Board finds that she was at fault in the creation of the overpayment and is not entitled to waiver.<sup>9</sup>

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<sup>7</sup> 20 C.F.R. §10.433(a).

<sup>8</sup> *Id.* at § 10.433(b).

<sup>9</sup> *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

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.<sup>10</sup> 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.<sup>11</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,962.08 during the period January 1 through 14, 2012 because she received dual compensation benefits from OPM and under FECA. The Board further finds that OWCP properly found that appellant was at fault in the creation of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 13, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 2, 2013  
Washington, DC

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

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

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

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<sup>10</sup> *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>11</sup> *Cheryl Thomas*, *supra* note 10.