

that the Form OWCP-20 expired as of October 31, 2003 and, thus, he was within his rights to forego completion of the form. Appellant asserts that he was not at fault in creating the overpayment as he mailed his February 2, 2012 election of benefits form to OWCP which clearly requested a switch to OPM retirement benefits. He contends that OWCP had adequate time to make the necessary changes to his claim and that repayment of the overpayment would cause additional financial hardship.

FACTUAL HISTORY

OWCP accepted that on March 26, 1999 appellant, then a 44-year-old letter carrier, sustained a neck sprain and contusion of the left occipital head areas as a result of a motor vehicle accident. It authorized a C3-4 and C4-5 discectomy, decompression and fusion which were performed on November 21, 2001.²

On February 2, 2012 appellant elected to receive retirement benefits from OPM effective March 31, 2012. He acknowledged that "I understand that I am not entitled to receive FECA benefits and CSRS/FERS [Civil Service Retirement System/Federal Employees' Retirement System] benefits concurrently (except for a schedule award)." The record reveals that appellant continued to receive wage-loss compensation through April 7, 2012.

On June 13, 2012 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$817.38 from March 31 through April 7, 2012. Appellant received FECA benefits and OPM retirement benefits during this period. He was found at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known to be incorrect. OWCP requested that appellant complete an enclosed Form OWCP-20 and submit supporting financial documents. It notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

An overpayment computation worksheet indicated that, from March 31 through April 7, 2012, appellant received gross FECA wage-loss compensation totaling \$2,860.84. He should have received compensation in the amount of \$2,043.46, resulting in an \$817.38 overpayment.

Appellant did not respond to the June 13, 2012 preliminary overpayment determination.

In a July 16, 2012 decision, OWCP finalized the preliminary overpayment determination. It found that appellant received an overpayment of \$817.38 from March 31 through April 7, 2012 and that he was at fault in creating this overpayment as he accepted a payment that he knew was incorrect. OWCP directed repayment of the overpayment in full.

² Following his March 26, 1999 accepted employment injuries and authorized surgery, appellant returned to work in a modified mail handler position, effective March 4, 2006. In a September 7, 2004 decision, OWCP granted him a schedule award for 23 percent impairment of the left upper extremity for the period November 21, 2002 to April 6, 2004. In an October 1, 2009 decision, it reduced appellant's compensation on the grounds that his actual wages as a modified mail handler fairly and reasonably represented his wage-earning capacity. On May 5, 2010 OWCP accepted that he sustained a recurrence of disability on March 18, 2010. Appellant did not return to work.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8116(a) states that, while an employee is receiving workers' compensation benefits, 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.⁴ Section 10.421(a) of OWCP's 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

OWCP paid appellant compensation based on his loss of wage-earning capacity as of October 1, 2009. On February 2, 2012 appellant elected to receive OPM retirement benefits, effective March 31, 2012, but continued to receive compensation benefits from OWCP through April 7, 2012. He was not entitled to receive compensation from OWCP under FECA and retirement benefits from OPM concurrently.⁷ There is no dispute that appellant received such dual benefits. Thus, the Board finds that he received an overpayment of compensation.

OWCP calculated the amount of the overpayment by reducing the amount of compensation appellant was paid, \$2,860.84, by the amount he should have been paid, \$2,043.46, during the period March 31 through April 7, 2012. The Board finds that OWCP properly calculated that he received an overpayment of compensation in the amount of \$817.38. Thus, the Board finds that appellant received an overpayment of \$817.38 for the stated period.

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

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ *Id.*; *see also D.P.*, Docket No. 11-1841 (issued July 11, 2012).

would defeat the purpose of FECA or be against equity and good conscience.⁸ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁹

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.”¹⁰

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment because he was aware or should have been aware that he was not entitled to dual benefits following the effective date of his election of OPM retirement benefits. The record establishes that on February 2, 2012 appellant elected to receive OPM retirement benefits in lieu of compensation benefits under FECA, effective March 31, 2012. The election form specifically advised that he was not entitled to receive FECA benefits and OPM retirement benefits concurrently except for a schedule award. The Board notes that appellant's schedule award for 23 percent impairment of the left upper extremity had expired prior to the submission of his election form. In signing the election form, he thereby acknowledged that he was no longer entitled to compensation benefits under FECA as of February 2, 2012. Once appellant made this election he knew or should have known that acceptance of compensation benefits for periods after February 2, 2012 was incorrect. The fact that OWCP may have been negligent in continuing to issue appellant wage-loss checks after he elected OPM benefits does not excuse his acceptance of such checks.¹¹ As appellant accepted compensation benefits from OWCP which covered the period March 31 through April 7, 2012, the Board finds that he was at fault in creating the overpayment for this period and is not entitled to waiver.¹²

The Board notes that, with respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from

⁸ 5 U.S.C. § 8129(b).

⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *M.J.*, Docket No. 11-2142 (issued May 2, 2012); *Neill D. Dewald*, 57 ECAB 451 (2006); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹² *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

continuing compensation benefits under FECA.¹³ 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.¹⁴

On appeal, appellant contended that he was not at fault in creating the overpayment as he mailed his February 2, 2012 election form to OWCP which clearly set forth his election of OPM retirement benefits. He stated that OWCP had adequate time to make the necessary changes to his claim. The fact that OWCP may have been negligent in issuing payments after appellant's election of OPM retirement benefits does not mitigate fault.¹⁵ The Board finds that appellant was at fault in the creation of the overpayment.

On appeal, appellant contended that he was within his rights by refusing to complete the OWCP-20 form because it was either incorrect or not associated with his case and the form had expired as of October 31, 2003. He submitted evidence on appeal in support of his contentions. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued its final merit decision in the case.¹⁶

Appellant further contended on appeal that recovery of the overpaid compensation would cause additional financial hardship. As noted, the Board does not have jurisdiction over the recovery of compensation in this case as appellant is not in receipt of continuing compensation benefits.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$817.38 for the period March 31 through April 7, 2012 because he concurrently received dual compensation benefits from OPM and under FECA. The Board further finds that OWCP properly found that he was at fault in creating the overpayment and not entitled to waiver of recovery.

¹³ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁴ *Cheryl Thomas*, *supra* note 13.

¹⁵ *See* cases cited, *supra* note 11.

¹⁶ *See* 5 U.S.C. § 501.2(c)(1).

¹⁷ *Cheryl Thomas*, *supra* note 13.

ORDER

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

Issued: January 23, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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