

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

C.M., Appellant

and

**DEPARTMENT OF THE TREASURY,
BUREAU OF THE MINT, Philadelphia, PA,
Employer**

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**Docket No. 14-696
Issued: December 18, 2014**

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 7, 2014 appellant, through her representative, filed a timely appeal from the January 15, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Her appeal is also timely filed as to the August 29, 2013 OWCP decision denying her claim for osteoarthritis and synovitis of the left knee. 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 case.

ISSUES

The issues are: (1) whether appellant's claim should be accepted for osteoarthritis or synovitis of the left knee as causally related to her March 9, 1998 work injury; (2) whether she received an overpayment of compensation in the amount of \$5,394.79; and (3) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 9, 1998 appellant, then a 51-year-old packaging machine operator, filed a traumatic injury claim alleging that she slipped on water on the floor in the restroom. On May 19, 1998 OWCP accepted her claim for right wrist sprain and left knee internal derangement. It paid compensation and medical benefits.

By letter dated June 22, 2011, OWCP asked appellant to elect between Office of Personnel Management (OPM) retirement, or continuing benefits under FECA. This letter noted that benefits for wage loss paid by OWCP were not payable for the same period of time as annuity benefits paid by OPM. On June 23, 2011 appellant completed a form electing retirement benefits from OPM instead of benefits under FECA effective June 23, 2011. In a letter to OPM dated July 5, 2011, a copy of which was mailed to appellant, OWCP advised that she was elected to receive retirement benefits in lieu of compensation benefits and that it would cease paying compensation effective July 3, 2011.

In a telephone note dated July 29, 2011, a representative from OWCP noted that appellant inquired about a check for \$231.00 and whether she could cash it. The representative informed her that the checks she received were her compensation checks and that she was allowed to deposit them as part of her OWCP benefits. In a letter dated July 29, 2011, a claims examiner told appellant, "Pursuant to your inquiry, the checks for \$231[.00] you receive every 28 days are your OWCP compensation checks and you are entitled to them as an injured worker. Feel free to deposit these checks when they arrive every 28 days."

On March 12, 2012 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion with regards to whether she had any residuals of her accepted injuries and to determine any permanent impairment. In a report dated April 20, 2012, Dr. Draper diagnosed a left knee torn meniscus and mild osteoarthritis.

In a Form CA-1032, appellant completed on May 17, 2012, she advised OWCP that in the past 15 months she had received regular retirement checks.

In the June 8, 2012 work capacity evaluation, Dr. Draper was asked to list appellant's conditions and how they related to her injury and to explain causal relations. He noted that she had torn cartilage, ligament tear, exacerbation of arthritis, and chondromalacia in her left knee. Dr. Draper did not provide any further comment.

On June 14, 2012 OWCP issued a schedule award for two percent impairment of the left lower extremity. The period of the award was from June 3 to July 13, 2012. The decision was affirmed by an OWCP hearing representative on January 28, 2013. OWCP denied modification in a May 13, 2013 decision.

By letter dated March 18, 2013, appellant's representative request that OWCP accept the conditions of chondromalacia and aggravation of preexisting osteoarthritis based on a July 12, 2012 opinion by Dr. Ira Sachs, an osteopath, and a work capacity evaluation dated June 8, 2012. In the accompanying July 8, 2012 work capacity evaluation form, Dr. Sachs noted that appellant had a torn cartilage, ligament tear, exacerbation of arthritis, and chondromalacia in the left knee.

He advised that she was unable to work. In the July 12, 2012 progress note, Dr. Sachs, after conducting a physical examination, diagnosed appellant with left knee osteoarthritis and left knee synovitis with effusion.

In an April 12, 2013 letter, OWCP asked Dr. Draper to address whether appellant's left knee osteoarthritis or left knee synovitis were causally related to her accepted employment injury of March 9, 1998. In a May 4, 2013 response, Dr. Draper stated that he was aware that she had osteoarthritis of the left knee, but the condition was not causally related to the accident of March 9, 1998 or permanently aggravated by that accident. He noted that appellant was 65 years old and that it was not unusual for a patient of that age to have some mild osteoarthritis of the left knee. Dr. Draper determined that her mild osteoarthritis of the left knee was related to the aging process and not to the accepted injury in 1998. Consequently, appellant's osteoarthritis and synovitis of the left knee should not be added to the accepted conditions.

On May 16, 2013 OWCP made a preliminary determination that appellant was overpaid in the amount of \$5,394.79 for the periods June 23, 2011 to June 2, 2012, and July 14, 2012 to May 4, 2013. It found that she received dual benefits from both OWCP and OPM. The attached memorandum of record noted that appellant elected retirement benefits from OPM effective June 23, 2011. OWCP notified OPM of appellant's election on July 5, 2011; but FECA benefits were not terminated pending notification from OPM that it had commenced payment of benefits. As notification was not timely received from OPM, FECA benefits were not properly ceased. OWCP found that appellant was paid \$8,827.71 for the period June 23, 2011 to May 4, 2013. For the period June 3 to July 13, 2012, appellant received a schedule award of \$3,432.92 to which she was entitled. She was not entitled to the remaining \$5,394.79, which represented compensation benefits for the period June 23, 2011 to June 2, 2012 and July 14, 2012 to May 4, 2013, as this was a prohibited dual payment. OWCP made a preliminary determination that appellant was at fault in the creation of this overpayment as she should have known that she was not entitled to dual benefits from both OPM and OWCP. Appellant was advised to complete enclosed forms to request waiver and to provide financial information.

By letter dated May 23, 2013, appellant, through her representative, requested a telephonic hearing before an OWCP hearing representative. On July 29, 2013 she submitted completed financial forms. At the October 23, 2013 hearing, appellant's representative argued that it was the timing of the payments that confused appellant and she was not aware of any overpayment.

By decision dated August 29, 2013, OWCP denied appellant's claim for osteoarthritis and synovitis of the left knee.

In a note received on November 5, 2013, appellant noted that she thought the checks she received were for the injury to her left knee. She did not understand why checks for her left knee were stopped as she was still having problems and would need a knee replacement.

By decision dated January 15, 2014, an OWCP hearing representative determined that appellant received an overpayment of compensation in the amount of \$5,394.79. Appellant was found at fault in the creation of the overpayment and therefore not entitled to waiver of recover.

She was directed to make payments of \$500.00 a month to OWCP until the overpayment was paid in full.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that he or she sustained an injury in the performance of duty, the employee must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. The employee must also establish that such event, incident, or exposure caused an injury. Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, which the employee claims compensation, is causally related to the accepted injury.² To meet his or her burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.³ Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.⁴

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for right wrist sprain and internal derangement of the left knee. Appellant asked that her claim also be accepted for osteoarthritis and synovitis of the left knee. OWCP denied her claim for compensation for these conditions.

Dr. Sachs, appellant's treating osteopath, provided a work capacity evaluation form advising that appellant had a torn cartilage, ligament tear, exacerbation of arthritis, and chondromalacia in the left knee. In a July 12, 2012 note, he diagnosed osteoarthritis and synovitis of the left knee with effusion. Dr. Sachs did not explain how these conditions were related to appellant's employment injury of March 9, 1998. He did not address how the 1998 injury caused or contributed to the osteoarthritis and synovitis diagnosed some 14 years later. Dr. Draper stated that these conditions were not related to the 1998 work injury. In his April 12, 2013 letter, he advised that appellant's left knee osteoarthritis and synovitis were not causally related to the work injury of March 9, 1998. Dr. Draper noted that she was 65 years old and that the mild osteoarthritis of the left knee was related to the natural aging process and not to the employment injury.

The Board finds that appellant has not established that her left knee osteoarthritis or synovitis are causally related to her federal employment. There is no medical evidence in the record supporting a causal connection between these conditions and the March 9, 1988 work injury. The only medical evidence addressing this issue is from Dr. Draper, who determined they were not causally related to the accepted employment injury. The Board will affirm OWCP's decision denying appellant's claim for osteoarthritis and synovitis in her left knee.

² *D.M.*, Docket No 14-353 (issued April 21, 2014); *see also Leon Thomas*, 52 ECAB 202 (2001).

³ *See Gary J. Watling*, 52 ECAB 278 (2001).

⁴ *Albert C. Brown*, 52 ECAB 152 (2000).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) 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 her duty.⁵ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁶ Section 8116(a) provides 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 under FECA.⁷ 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.⁸ The beneficiary must elect the benefit that he or she wishes to receive.⁹

ANALYSIS -- ISSUE 2

On June 23, 2011 appellant elected retirement benefits from OPM instead of wage-loss compensation benefits under FECA. OWCP notified OPM of appellant's election, but did not receive timely confirmation from OPM of payment. It later received confirmation that OPM paid retirement benefits commencing June 23, 2011, which continued through May 4, 2013. OWCP found that appellant was paid a total of \$8,827.71 for the period June 23, 2011 to May 4, 2013. Appellant received a schedule award that covered the period June 3 to July 13, 2012 in the amount of \$3,432.92. Schedule awards, payable under 5 U.S.C. § 8107 for the permanent loss or loss of use of specified members, organs or functions of the body, are the only FECA monetary benefits payable concurrently with an OPM annuity.¹⁰ Appellant properly received her schedule award. She also received compensation benefits for wage loss for the period June 23, 2011 to June 2, 2012, and July 14, 2012 to May 4, 2013. Appellant was not entitled to receive wage-loss compensation concurrently with retirement benefits from OPM for the same period.¹¹ As she received concurrent OPM and FECA benefits for these periods, she

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.421(a).

⁹ *Id.*

¹⁰ *R.L.*, Docket No. 12-1383 (issued December 28, 2012).

¹¹ *R.M.*, Docket No. 14-428 (issued June 25, 2014).

received dual benefits that are prohibited by statute.¹² OWCP subtracted the \$3,432.92 schedule award to find an overpayment of \$5,394.79. It properly explained how the overpayment occurred and provided this information to appellant with the preliminary determination of overpayment.¹³

The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibits the receipt of FECA wage-loss benefits and a federal annuity.¹⁴ As appellant received \$5,394.79 in FECA benefits while concurrently receiving OPM retirement benefits for the periods June 23, 2011 to June 2, 2012, and July 14, 2012 to May 4, 2013, the Board finds an overpayment of compensation was created in that amount.¹⁵ The Board will affirm the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁶

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”¹⁷

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹⁸ Whether or not

¹² *J.A.*, Docket No. 14-134 (issued May 1, 2014).

¹³ *See J.J.*, Docket No. 13-1635 (issued February 18, 2014).

¹⁴ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a).

¹⁵ *J.A.*, Docket No. 14-134 (issued May 1, 2014); *A.F.*, Docket No. 13-2038 (issued February 10, 2014).

¹⁶ *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ 20 C.F.R. § 10.433(a).

OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹⁹

ANALYSIS -- ISSUE 3

OWCP found that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. With respect to whether an individual is with fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected could vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that in applying the tests to determine fault, OWCP should apply a reasonable person test.²⁰

The Board finds that appellant was at fault in the creation of the overpayment. Appellant was clearly informed in the June 22, 2011 letter asking her to make an election between OPM retirement benefits and FECA compensation benefits that wage-loss compensation was not payable for the same period as annuity benefits paid by OPM. On June 23, 2011 she completed a form electing retirement benefits instead of FECA compensation. In a July 5, 2011 letter, OWCP advised OPM appellant elected to receive retirement benefits in lieu of compensation benefits and it would cease payment of compensation effective July 3, 2011. The record establishes appellant was clearly informed that she could not receive FECA wage-loss compensation and OPM retirement benefits at the same time. As she was informed that she could not receive dual benefits and she knew or should have known that subsequent payment of FECA wage loss was incorrect. Thus, appellant was not without fault in the creation of the overpayment. She inquired whether she was entitled to deposit the checks and was erroneously informed in a July 29, 2011 telephone call and letter from OWCP that she could deposit the compensation checks. The record does not establish, however, that appellant informed OWCP at that time that she was also receiving concurrent OPM retirement benefits.

For these reasons, OWCP properly found that appellant was at fault because she knew or should have known that the receipt of dual benefits was incorrect. As appellant was at fault under the third fault standard outlined above, she is not entitled to waiver of recovery of the overpayment. As she is no longer receiving FECA wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment.²¹

CONCLUSION

The Board finds that appellant has not established that her claim should be expanded to include the conditions of osteoarthritis or synovitis of the left knee. The Board further finds that she received an overpayment of compensation in the amount of \$5,394.79 and, as she was at

¹⁹ *Id.*

²⁰ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

²¹ *See Desiderio Martinez*, 55 ECAB 245 (2004).

fault in the creation of the overpayment, she is precluded from waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 15, 2014 and August 29, 2013 are affirmed.

Issued: December 18, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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