

FACTUAL HISTORY

On October 24, 1998 appellant, then a 40-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging an injury to the side of her left hand as a result of grabbing a sack of mail on October 22, 1998. OWCP accepted her claim for left wrist tendinitis.² It paid medical and compensation benefits. As of August 24, 2013, appellant's compensation was deposited directly into her bank account.

In a record of a telephone conversation dated March 14, 2013, appellant noted that she was planning to retire with an effective date of March 29, 2013. She stated that it was not disability retirement from the Office of Personnel Management (OPM), but instead "normal retirement."

By letter dated March 14, 2013, OWCP informed appellant that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time, and that she needed to elect which benefit to receive. Appellant completed an election form on April 5, 2013 and elected FECA benefits effective March 30, 2013.

On April 18, 2013 an OWCP representative told appellant that her compensation would continue as usual because she had elected FECA benefits in lieu of retirement.

By decision dated July 17, 2013, OWCP found that appellant was no longer totally disabled and that the position of information clerk fairly and reasonably represented her wage-earning capacity. Appellant was advised that she had a \$688.89 per week loss of wage-earning capacity. In a Form CA-1032 dated April 4, 2013, she stated that she was not in receipt of retirement benefits. In a Form CA-1032 dated April 3, 2014, appellant again stated that she was not in receipt of retirement benefits.

In a record of a telephone conversation dated April 29, 2014, a claims examiner noted that, following a conversation with an OPM representative, she had determined that OPM received incorrect information from the employing establishment and that, as a result, appellant had been receiving compensation from both OPM and OWCP since April or May 2013.

By letter dated April 30, 2014, OWCP again informed appellant that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time, and that she needed to elect which benefit to receive. With this letter, it enclosed another election form to complete. Appellant completed the form on May 12, 2014, electing Civil Service Retirement System (CSRS) or Federal Employees' Retirement System (FERS) benefits effective April 1, 2013.

On June 3, 2014 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$37,103.74 because she continued to receive compensation benefits after electing OPM benefits from April 1, 2013 through May 31, 2014. It determined that she was at fault in the creation of the overpayment because she made an informed retroactive election on May 15, 2014 to receive OPM benefits effective April 1, 2013.

² OWCP's acceptance letter for the present claim does not appear in the case record.

OWCP determined that appellant received compensation benefits in the amount of \$2,239.00 every 28 days and that the period for which she was overpaid was 426 days, resulting in an overpayment in the amount of \$37,103.74.

By letter dated June 26, 2014, appellant disagreed that an overpayment had occurred and that she was at fault in the creation of any overpayment. She stated that she had elected FECA benefits in March 2013, and that OPM stated that OWCP would send her election form to OPM notifying them of her election. Appellant noted that in the second week of April, she had an additional deposit in her account. She stated that OPM told her that they were not sending her anything. Appellant noted that OWCP reduced her payments in the same time period, so she thought it was permissible to receive these additional payments. She stated that she spoke to a representative at OPM, who told her that she should not be receiving both OPM and FECA benefits and that OPM had never received the election form from OWCP. Appellant argued that she was without fault because she received misinformation from OWCP and it did not relay the relevant information to OPM.

By decision dated July 16, 2014, OWCP found that appellant was at fault in the creation of an overpayment in the amount of \$37,103.74 as she received both compensation and retirement benefits during the period April 1, 2013 through May 31, 2014.

LEGAL PRECEDENT -- ISSUE 1

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 duty.³ FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.⁵ When a claimant is entitled to disability benefits under FECA and annuity benefits from OPM under either the CSRS or FERS, the employee must make an election between FECA benefits and OPM benefits.⁶ The employee has the right to elect the

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (February 1995).

monetary benefits that is most advantageous.⁷ The election, once made, is revocable.⁸ Concurrent wage-loss compensation and OPM benefits constitute prohibited dual benefits.⁹

ANALYSIS -- ISSUE 1

The evidence of record establishes that OWCP informed appellant by letter dated March 14, 2013 that OPM and FECA benefits were not payable for the same period of time. Appellant completed a formal election form on April 5, 2013 and elected FECA benefits effective March 30, 2013. However, she began receiving OPM benefits on April 1, 2013. The record indicates that OWCP continued to pay appellant compensation until May 31, 2014. On May 12, 2014 appellant elected CSRS or FERS benefits retroactively effective to April 1, 2013. As such, any wage-loss compensation she received from OWCP after April 1, 2013 constituted an overpayment of compensation.¹⁰ Appellant was not eligible to receive wage-loss compensation and retirement benefits from OPM for the same time period.¹¹ An overpayment arose after her retroactive election of retirement benefits, as she was not entitled to the amount paid by OWCP for the period April 1, 2013 through May 31, 2014. Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$37,103.74 for the period April 1, 2013 through May 31, 2014.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that 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 this subchapter or would be against equity and good conscience.¹² No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹³

On the issue of fault, 20 C.F.R. § 10.433(a) provides that 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.¹⁴

⁷ *Id.*

⁸ 20 C.F.R. § 10.421(a).

⁹ *Supra* note 4.

¹⁰ *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹¹ 20 C.F.R. § 10.421(a).

¹² 5 U.S.C. § 8129(b).

¹³ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹⁴ 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that 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.¹⁵

ANALYSIS -- ISSUE 2

OWCP denied appellant's request for waiver of recovery of the overpayment because it found that she was at fault in creating the overpayment. In this case, it applied the third standard in determining appellant's fault. In order for OWCP to find that she was at fault in creating the overpayment of compensation, appellant must establish that, at the time she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁶

On appeal and before OWCP, appellant alleged that she should not be held to be at fault in the creation of the overpayment because OWCP failed to properly notify OPM of her election of benefits, and because OPM began paying her benefits without her authorization. She stated that because OWCP had recently reduced her compensation based on her income, she thought that the payments were due to her. Appellant noted that she had realized there was extra money being deposited into her bank account in April 2013, called OPM to determine whether it was the source of this extra money, and was told that it did not come from OPM.

The case record reveals that OWCP received a form dated April 5, 2013 electing FECA benefits effective March 31, 2013; however, this election of benefits was later superseded by a form dated May 12, 2014 electing OPM retirement benefits effective April 1, 2013. By letters dated March 14, 2013 and April 30, 2014, OWCP informed appellant that she was not entitled to receive dual benefits.

The Board finds that, in these circumstances, a claimant, who makes an election of benefits between FECA and OPM may be charged with knowledge that subsequent dual payments are incorrect.¹⁷ Appellant received dual payments from OWCP and OPM for the period April 1, 2013 through May 31, 2014. She did not submit any probative evidence to support the allegation that OPM had erroneously informed her that the payments to her account were not from OPM. The July 17, 2013 decision to reduce appellant's compensation based upon her wage-earning capacity as an information clerk did not state that the reduction would be accompanied by an increase in compensation, it noted the specific amount of compensation she would receive every 28 days. Thus, appellant's apparent belief that the additional income deposited into her account was related to this reduction in compensation had no basis. The case

¹⁵ 20 C.F.R. § 10.433(b).

¹⁶ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹⁷ *See C.G.*, Docket No. 12-936 (issued April 22, 2013) (where appellant was receiving wage-loss compensation benefits by direct deposit and elected to receive OPM benefits and thereafter received dual benefits creating an overpayment of compensation, the Board found that she was at fault because she was aware that she could not be in receipt of dual benefits after her election of benefits).

record does not contain evidence that appellant sought to advise or question OWCP regarding this additional income during the period of the overpayment.

Even if an overpayment results from negligence on the part of OWCP, this does not excuse an employee from accepting payments which she knew or should have known were incorrect.¹⁸ Appellant should have known that these payments were incorrect, whether or not she had been told by OPM that they did not originate in that agency. She had no reason to believe that OWCP would be sending her additional compensation after it had issued a decision reducing her compensation. Appellant did not submit any probative evidence to support that she was unable to understand that she could not accept FECA wage-loss compensation at the same time as she received OPM retirement benefits.¹⁹ As he is not without fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.²⁰

For these reasons, OWCP properly found that appellant accepted wage-loss compensation from April 1, 2013 through May 31, 2014 while also receiving retirement benefits from OPM which he or she knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$37,103.74 overpayment of compensation may not be waived.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation from April 1, 2013 to May 31, 2014 and that appellant was at fault in creating the overpayment.

¹⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹⁹ See *P.L., (G.L.)*, Docket No. 09-1488 (issued March 2, 2010) (where the Board held that appellant did not submit any medical or factual evidence establishing that he was mentally incompetent to understand that he was receiving an overpayment of compensation or lacked the capacity to complete the EN1032 forms dated 1986 to 2008).

²⁰ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

²¹ As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2014
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