

United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
HUNTER HOLMES McGUIRE MEDICAL
CENTER, Richmond, VA, Employer

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Docket No. 13-1955
Issued: January 29, 2014

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2013 appellant timely appealed the July 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.²

ISSUE

The issue is whether appellant received an overpayment of \$5,070.48 for the period January 13 to April 6, 2013.

¹ 5 U.S.C. §§ 8101-8193 (2006).

² The record on appeal contains evidence received after OWCP issued its July 11, 2013 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2012).

FACTUAL HISTORY

Appellant, a 57-year-old health technician, injured her right shoulder in the performance of duty on July 26, 2005.³ OWCP accepted her claim for right rotator cuff tear. Between 2006 and 2008, appellant underwent multiple surgeries involving both shoulders. She had been working part-time limited duty, but stopped work entirely on December 28, 2010. In October 2011, OWCP expanded appellant's claim to include left arm chronic pain syndrome as a consequential injury. It also placed her on the periodic compensation rolls effective September 25, 2011.

In October 2011, the Office of Personnel Management (OPM) approved appellant's application for disability retirement under the Federal Employees' Retirement System. Appellant informed OWCP of OPM's recent determination but elected to continue receiving FECA wage-loss compensation.

In January 2013, appellant opted to receive OPM benefits in lieu of continued FECA wage-loss compensation. The effective date of her election was January 13, 2013. Appellant elected OPM retirement benefits in anticipation of receiving a schedule award. OWCP had previously advised her that FECA wage-loss compensation and schedule award benefits could not be paid concurrently, but appellant would not be precluded from receiving a schedule award concurrent with OPM retirement benefits.

On February 6, 2013 OWCP advised OPM that appellant elected to receive retirement benefits effective January 13, 2013. It also requested that OPM provide information regarding the start date of annuity payments.

On February 9, 2013 OWCP disbursed a payment of \$1,824.28 for the 28-day period of January 13 to February 9, 2013.⁴ In advance of this disbursement, it alerted appellant of the possibility of an overpayment due to the timing of her OPM election.

During a February 12, 2013 telephone conversation, OWCP advised appellant that she would be incurring an overpayment for "dual benefits." The notes (CA-110) further reflect that appellant "alleged poverty due to lapse in payment from OPM." OWCP agreed to keep appellant on the periodic rolls until her OPM payments commenced. Appellant reportedly agreed to immediately notify OWCP once her OPM payment commenced. She also agreed to return any overpayments. Additionally, appellant inquired about filing a schedule award (Form CA-7) for her left side.⁵

An OWCP payment report dated February 15, 2013 indicated that appellant was initially removed from the periodic rolls because of OPM selection, but she was being added back because OPM payment had not yet started.

³ Appellant was pushing a 380-pound patient on a stretcher at the time of injury.

⁴ The comment section of OWCP's February 9, 2013 payment report noted "elected OPM benefits."

⁵ Appellant formally filed for a schedule award on February 25, 2013.

Over the next two months, OWCP continued to pay appellant wage-loss compensation for temporary total disability. The two additional periodic rolls payments covered the period of February 10 to April 6, 2013, and her compensation for this period was \$3,246.20. During this timeframe, OWCP referred appellant to vocational rehabilitation and continued to develop her schedule award claim.

On April 24, 2013 OWCP terminated appellant's wage-loss compensation retroactive to January 13, 2013. That same day, OWCP sent another letter to OPM advising that, effective January 13, 2013, appellant had elected to receive OPM benefits in lieu of FECA compensation benefits. OWCP also requested reimbursement from appellant of \$5,070.48, which represented the amount of FECA benefits paid during the period January 13 to April 6, 2013.

In a May 1, 2013 telephone conversation, appellant advised OWCP that she had not yet received any OPM benefits. OWCP advised that it had notified OPM of her election of benefits.

On May 3, 2013 OWCP granted appellant a schedule award for 17 percent right upper extremity impairment.⁶ The award covered a period of 53.04 weeks beginning April 7, 2013.

On May 24, 2013 OWCP issued a preliminary finding of overpayment in the amount of \$5,070.48. It explained that the overpayment occurred because appellant received compensation after electing OPM benefits effective January 13, 2013. Additionally, OWCP indicated that appellant appeared at fault in the creation of the overpayment because she accepted payment that she either knew or reasonably should have known to be incorrect.

In June 2013, appellant requested a lump-sum payout on her recent schedule award. Although she had not responded to OWCP's May 24, 2013 preliminary overpayment determination, appellant made several follow-up inquiries with OWCP regarding her request for a lump-sum payment. On June 25, 2013 OWCP explained the terms and amount of the lump-sum settlement and appellant signed a written agreement on July 1, 2013.⁷

On July 11, 2013 OWCP issued a formal decision finding that appellant received an overpayment of \$5,070.48 for the period January 13 through April 6, 2013. It noted that the May 24, 2013 preliminary determination was uncontested. OWCP also found appellant at fault in the creation of the overpayment. Lastly, it informed her that the entire overpayment would be withheld from her lump-sum schedule award payment.

In a letter dated July 16, 2013, OWCP advised appellant that it anticipated issuing her a check on July 19, 2013 in the amount of \$13,316.23. The disbursement represented the previously agreed upon lump-sum (\$18,386.71) schedule award minus the \$5,070.48 overpayment. OWCP explained that the overpayment was based on appellant "continuing to receive OWCP disability benefits ... after [she] began receiving OPM benefits on [January 13,

⁶ Appellant previously received a schedule award for eight percent impairment of her right upper extremity.

⁷ Appellant agreed to accept a sum of \$18,386.71 for the remaining period of the schedule award; June 30, 2013 to April 13, 2014.

2013].” It disbursed the funds on July 19, 2013 in accordance with its July 16, 2013 representation.

Appellant challenged OWCP’s finding of overpayment. She indicated that the reason she switched from FECA to OPM benefits was because she had been told she could not receive a schedule award while she was on automatic pay roll. Appellant also noted that, while she elected to receive OPM retirement benefits in January 2013, OPM did not send her first check until July 1, 2013.⁸

LEGAL PRECEDENT

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.⁹ When a claimant is entitled to disability benefits under FECA and annuity benefits from OPM under either the Civil Service Retirement System or the Federal Employees’ Retirement System, the employee must make an election between FECA benefits and OPM benefits.¹⁰ The employee has the right to elect the monetary benefit that is most advantageous.¹¹ The election, once made, is revocable.¹² While concurrent wage-loss compensation and OPM benefits constitute a prohibited dual benefit, a schedule award for permanent impairment under 5 U.S.C. § 8107 is payable concurrent with an OPM annuity.¹³

ANALYSIS

Effective January 13, 2012, appellant elected to receive OPM disability retirement benefits in lieu of FECA wage-loss compensation which she had been receiving. However, OWCP continued to pay wage-loss compensation for the period January 13 to April 6, 2013. Appellant received \$5,070.48 in compensation benefits for the designated period, which OWCP declared an overpayment. OWCP also found her at fault in the creation of the purported overpayment.

If established, an overpayment would arise due to receipt of a prohibited dual benefit, not merely because appellant continued to receive FECA wage-loss compensation after the effective date of her OPM election. The current record is devoid of any evidence that appellant received OPM retirement benefits covering the period January 13 to April 6, 2013.

⁸ Appellant provided OPM payment records with her appeal; however, this evidence was not part of the record when OWCP issued its July 11, 2013 overpayment decision. Consequently, the Board cannot consider appellant’s newly submitted evidence. *See supra* note 2.

⁹ 5 U.S.C. § 8116(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997).

¹¹ *Id.*

¹² 20 C.F.R. § 10.421(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.6b (February 1995).

Since electing OPM benefits in January 2013, appellant repeatedly advised OWCP that she had not received payment from OPM. In fact, during a February 12, 2013 telephone conversation OWCP agreed to keep her on the periodic rolls until her OPM payments commenced. As recently as May 1, 2013, appellant again advised OWCP that she had not yet received any OPM benefits.

OWCP wrote to OPM on February 6 and April 24, 2013 advising of appellant's election of retirement benefits effective January 13, 2013. In the first letter, it requested information regarding the start date of annuity payments. The April 24, 2013 correspondence advised OPM that appellant received \$5,070.48 in FECA benefits for the period January 13 to April 6, 2013, and OWCP requested reimbursement from OPM. There is no record of OPM having responded to OWCP's February 6 and April 24, 2013 correspondence. Appellant indicated that OPM sent her first check on July 1, 2013.¹⁴

The Board finds that OWCP has not established that appellant was overpaid \$5,070.48 for the period January 13 through April 6, 2013. The current record does not include any documentation of her having received benefits from both OPM and OWCP for the period January 13 to April 6, 2013. The mere fact that appellant received FECA benefits after the effective date of her OPM election will not suffice.¹⁵ Thus, there is no evidence that she received a prohibited dual benefit.

CONCLUSION

OWCP failed to establish that appellant was overpaid \$5,070.48 for the period January 13 through April 6, 2013.

¹⁴ There is no indication that this payment was retroactive to January 13, 2013.

¹⁵ An election of benefits is revocable, and OWCP verbally agreed to continue payments until appellant received her OPM benefits.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 29, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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