

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Bernardino, CA, Employer**

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**Docket No. 14-134
Issued: May 1, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 22, 2013 appellant filed a timely appeal from a September 17, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which found that he received an overpayment of compensation. 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 the case.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$2,944.55 because he concurrently received Office of Personnel Management (OPM) retirement benefits while receiving FECA benefits for the period April 1 through May 1, 2013; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, appellant asserts that, because he told the claims examiner on March 8, 2013 that he had elected OPM retirement benefits and would no longer need workers' compensation, the overpayment decision was improper.

FACTUAL HISTORY

On May 15, 2010 appellant, then a 51-year-old distribution clerk, filed an occupational disease claim alleging that repetitive motion from tying and lifting heavy sacks at work caused plantar fasciitis and carpal tunnel syndrome. He did not stop work.² On June 21, 2010 OWCP accepted bilateral radial styloid tenosynovitis and bilateral plantar fibromatosis. On June 5, 2011 appellant filed a schedule award claim. On August 16, 2011 he notified OWCP that he was filing for disability retirement. On August 29, 2011 appellant filed a recurrence claim, beginning August 29, 2011. OWCP accepted the recurrence and he was placed on the compensation rolls effective April 8, 2012.

On April 4, 2012 OPM approved appellant's application for disability retirement. It informed him that he could not receive annuity payments from both OPM and OWCP for the same period of time and should elect which benefit to receive. OPM also indicated that appellant was eligible to receive an OPM annuity and schedule award compensation from OWCP.

On May 1, 2012 appellant was granted schedule awards for two percent impairment of each upper and lower extremity. The awards for a total of 24 weeks, to run from April 21 to October 5, 2012. The decision stated that, after the ending date of the award, appellant's entitlement to compensation would be based solely on disability for work due to the accepted injury. OWCP informed him that compensation for disability could not be paid for any period during which he was receiving retirement benefits from OPM. On June 28, 2012 appellant agreed to accept a lump-sum payment for the schedule awards.

Appellant informed OWCP by telephone on May 3, 2012 that he had elected disability retirement effective April 9, 2012. He was referred for vocational rehabilitation on May 15, 2012. A 24-week instructional program in business office and computer applications was approved, to begin October 8, 2012. On October 29, 2012 appellant advised OWCP that he wanted his compensation restored. He was returned to the periodic compensation rolls.

In March 2013, appellant dropped out of school and informed OWCP that he would no longer participate in vocational rehabilitation due to personal reasons. On March 20, 2013 he informed OWCP that he had submitted a letter of intent to OPM and would be retiring effective April 1, 2013 and receive benefits through OPM. By letter dated April 24, 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. As he was entitled to receive both, he must elect which benefit to receive. Appellant submitted an undated election form, received by OWCP on May 2, 2013, advising that he elected OPM retirement benefits effective April 1, 2013. The form stated: "I understand that I am not entitled to receive FECA benefits and CSRS/FERS benefits concurrently (except for a schedule award)."

² In a subsidiary claim OWCP accepted left shoulder conditions of disorder of bursae and tendons and adhesive capsulitis, sprain of shoulder and upper arm and left superior glenoid labrum lesion.

A telephone conference was held with appellant on May 7, 2013 a vocational rehabilitation counselor and two OWCP claims examiners participating. Appellant noted that he had begun receiving retirement payments from OPM, effective April 1, 2013. He was informed that his FECA benefits would be terminated effective April 1, 2013 and an overpayment letter would be sent to him. Appellant acknowledged that there was an overpayment and was informed that he could elect FECA benefits in the future.

On July 19, 2013 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$2,944.55 had been created for the period April 1 through May 4, 2013. The overpayment occurred because appellant received FECA benefits and OPM retirement benefits during this period. He was found at fault because he accepted a payment which he knew or should have known to be incorrect. OWCP provided him with an overpayment action request and overpayment questionnaire. An overpayment worksheet reflects that appellant received FECA compensation totaling \$2,944.55 for the period April 1 through May 4, 2013.

Appellant requested a telephone conference. He contended that, the overpayment occurred through no fault of his because, prior to receiving the overpayment, he verbally told the claims examiner that he had chosen to retire under OPM and had sent him a March 8, 2013 letter confirming his decision. Appellant also submitted a completed overpayment questionnaire. A telephone conference was held on August 30, 2013 with him and an OWCP claims examiner participating. The claims examiner explained that OWCP could not terminate benefit payments until he completed an election form.

By decision dated September 17, 2013, OWCP finalized the overpayment decision, finding that appellant was at fault in the creation of an overpayment of compensation in the amount of \$2,944.55. Appellant was instructed to forward \$120.00 per month in repayment.

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 of FECA defines the limitations on the right to receive compensation benefits.⁴ 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 for under FECA.⁵ Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8116(a).

retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

ANALYSIS -- ISSUE 1

Appellant's occupational disease claim was accepted for bilateral upper and lower extremity conditions and he was paid wage-loss compensation benefits under FECA. He applied for OPM retirement that became effective on April 1, 2013 and received OPM benefits effective that day. Appellant also received FECA benefits through May 4, 2013 totaling \$2,944.55. He thus received simultaneous OPM and FECA benefits for the period April 1 through May 4, 2013. This constituted payment of dual benefits that is prohibited by statute. OWCP properly determined that an overpayment of compensation in the amount of \$2,944.55 had been created for this period. In a telephone conference held on May 7, 2013 appellant did not dispute that there was an overpayment.

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.⁸ As appellant received \$2,944.55 in FECA benefits while concurrently receiving OPM retirement benefits for the period April 1 through May 4, 2013, an overpayment of compensation in that amount was created.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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."¹⁰

Section 10.433(a) of OWCP's regulations provide that OWCP:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ *See supra* note 5; *see also supra* note 6.

⁹ *A.F.*, Docket No. 13-2038 (issued February 10, 2014).

¹⁰ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;
- (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. (This provision applies only to the overpaid individual).¹¹

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹²

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment, that he accepted a payment that he knew or should have known was incorrect. For OWCP to establish that he was at fault, it must establish that, at the time appellant accepted the compensation question, he knew or should have known the payment was incorrect.¹³

Appellant made an election to receive OPM retirements in lieu of FECA benefits, effective April 1, 2013. In the May 7, 2013 telephone conference, he acknowledged receiving OPM retirement benefits that day. The Board finds that, under 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.¹⁴ Appellant asserted on appeal that he disagreed with the overpayment decision. While OWCP issued wage-loss compensation for total disability for the period April 1 through May 5, 2013 after he began receiving benefits from OPM, it informed him in the overpayment conference that it could not stop his wage-loss compensation until it received a completed election form, which was received by OWCP on May 2, 2013. Even if the overpayment resulted from negligence on the part of OWCP, this does not excuse the employee from accepting payments which he knew or should have known were incorrect.¹⁵

The schedule award decision dated May 1, 2012 clearly informed appellant that, after the ending date of the award, his entitlement to compensation would be based solely on disability

¹¹ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹² *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹³ *See Sinclair L. Taylor*, *supra* note 11.

¹⁴ *See J.J.*, Docket No. 13-1635 (issued February 18, 2014).

¹⁵ *Id.*

due to the accepted injury and that compensation could not be paid for any period during which he was receiving retirement benefits from OPM. On the election form completed by him, he attested to the fact that he was not entitled to receive FECA benefits and CSRS/FERS benefits concurrently, except for a schedule award.

The facts in this case establish that appellant accepted wage-loss compensation from April 1 through May 4, 2013 while also in receipt of OPM retirement benefits. The schedule award decision and election form establish that he knew or should have known that he was not entitled to accept FECA compensation for a period in which he was also receiving retirement benefits through OPM. For these reasons, OWCP properly found that appellant was at fault because he knew or should have known the receipt of dual benefits was improper. As appellant was at fault under the third fault standard outlined above, he is not entitled to waiver of the overpayment of compensation. Furthermore, as he is no longer receiving FECA compensation, the Board does not have jurisdiction with respect to recovery of the overpayment.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount \$2,944.55 for the period April 1 through May 4, 2013 because he received dual FECA and OPM compensation benefits. The Board further finds that he was at fault in the creation of the overpayment of compensation and, therefore, is not entitled to waiver.

¹⁶ See *Desiderio Martinez*, 55 ECAB 245 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2014
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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