

FACTUAL HISTORY

This case has previously been before the Board on appeal. The relevant facts follow. On May 6, 1996, appellant, then a 47-year-old air traffic controller, filed two traumatic injury claims alleging he developed an emotional condition after witnessing two fatal airplane crashes on April 12 and 16, 1996. OWCP accepted his claim for post-traumatic stress disorder (PTSD) and authorized compensation benefits beginning May 6, 1996. Appellant returned to work on March 16, 1998 working four hours a day.

By decision dated May 22, 1998, OWCP found that his light-duty position fairly and reasonably represented his wage-earning capacity. Appellant returned to full duty on August 1, 1999. On August 30, 1999 OWCP reduced his compensation effective August 15, 1999 based on his actual earnings. By decision dated October 6, 1999, it found that appellant's full-time employment as an air traffic control support specialist fairly and reasonably represented his wage-earning capacity. OWCP reduced his compensation benefits to \$536.00 every four weeks. It informed appellant that receipt of OWCP benefits for loss of wage-earning capacity and receipt of an annuity from the Office of Personnel Management (OPM) constituted a dual benefit and that he should advise OWCP immediately if he received OPM benefits.

On August 29, 2006 OWCP made a preliminary determination that appellant received an overpayment of compensation as his dependent graduated from high school on June 9, 2004. It finalized the overpayment decision on January 5, 2007. Appellant requested review by the Board and by decision dated August 6, 2007, the Board found that he received an overpayment of compensation in the amount of \$640.36 as he improperly received augmented compensation, that he was at fault in the creation of the overpayment and that OWCP properly required recovery by deducting \$400.00 from his continuing compensation payments every 28 days.² The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant completed a Form CA-1032 on May 15, 2008 and indicated that he had not received OPM benefits in the last 15 months. He completed a Form CA-1032 on May 15, 2009 and indicated that he had been assigned a CSA number and had received a regular retirement check. On May 25, 2010 appellant completed a Form CA-1032 and indicated that he worked from January 1 through December 31, 2009. He stated that he received a regular retirement check during the past 15 months.

The employing establishment notified OWCP on December 29, 2010 that appellant had voluntarily retired effective June 30, 2008. Appellant completed a Form CA-1032 on May 17, 2011 and indicated that he had been employed since January 1, 2010. He also stated that he had received regular retirement checks.

OWCP conducted a telephone conference with appellant on August 16, 2011. Appellant stated that he married on June 8, 2008. He further stated that he was receiving OPM benefits and that these benefits began on July 1, 2008. Appellant completed a Form CA-1032 on May 7,

² Docket No. 07-862 (issued August 6, 2007).

2012 and indicated that he had worked from January 1, 2011 to the present and that he was receiving regular retirement benefits.

On May 24, 2012 OWCP provided appellant with an election of benefits to choose between OWCP and OPM benefits.

By decision dated June 28, 2012, OWCP terminated appellant's compensation benefits on the grounds that he refused to make an election between OPM and OWCP benefits and therefore presumptively chose OPM. On July 5, 2012 it received appellant's election of benefits form in which he selected OPM benefits effective July 1, 2008.

OWCP determined on July 11, 2012 that appellant had received an overpayment of compensation in the amount of \$31,540.20 for the period July 1, 2008 through May 5, 2012 and requested reimbursement from OPM.

In a letter dated February 28, 2013, OWCP found that appellant had received an overpayment of compensation in the amount of \$2,977.50 because he received dual benefits between January 1 and May 5, 2012 while receiving both OPM and OWCP benefits. It found that appellant was without fault in the creation of the overpayment. Appellant requested a prerecoupment hearing on March 12, 2013.

An OWCP hearing representative remanded the case on June 10, 2013 finding that an overpayment had occurred, but that the period of the overpayment began on July 1, 2008. The hearing representative further found that appellant was at fault in the creation of the overpayment as he was advised in the October 6, 1999 decision that receipt of OWCP and OPM benefits constituted dual benefits and that an election was necessary. The hearing representative remanded the case for a new preliminary finding with the corrected period, amount and finding of fault.

OWCP issued a preliminary finding of overpayment on June 12, 2013 and found that appellant received an overpayment of compensation in the amount of \$31,526.25 for the period July 1, 2008 through May 5, 2012 because he simultaneously received payments from OWCP and OPM retirement benefits. OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known was incorrect.

Appellant requested a prerecoupment hearing on July 9, 2013. He stated that he believed that the overpayment occurred through no fault of his own and that he had notified all parties annually after his retirement. Appellant argued that the employing establishment should have notified OWCP of his OPM retirement benefits and that the notification of October 6, 1999 was not sufficient for him to realize that he was receiving dual benefits. As a part of this process appellant completed an overpayment recovery questionnaire and indicated that his monthly income was \$8,759.00 and that his civil service benefits were \$10,000.00 per month for a total monthly income of \$18,759.00. He indicated that he supported his wife and paid his ex-wife \$1,500.00 a month. Appellant stated that he paid a monthly rent or mortgage of \$5,727.00, that food was \$1,200.00 per month, and that he spent \$400.00 on clothing as well as \$1,700.00 on utilities and \$200.00 on miscellaneous expenses. In addition to his court ordered spousal support

of \$1,500.00, he also had credit card and automobile expenses of \$2,650.00 for total monthly expenses of \$13,327.00. Appellant listed his assets as cash of \$13,000.00, checking account balance of \$3,600.00, savings account of \$5,200.00, stocks and bonds of \$101,000.00 and personal property of \$50,000.00 for total assets of \$172,800.00.

By decision dated April 1, 2014, OWCP's hearing representative found that appellant failed to notify OWCP of his election of OPM benefits on July 1, 2008. He informed OWCP on May 15, 2009 that he was receiving OPM benefits. On May 24, 2012 OWCP provided appellant with an election form and explained that he had received dual benefits resulting in an overpayment. It terminated compensation benefits effective June 28, 2012. OWCP found an overpayment of compensation in the amount of \$31,526.25 for the period July 1, 2008 through May 5, 2012 for which appellant was at fault. The hearing representative affirmed the amount of the overpayment and further found that appellant received a letter from OWCP dated October 6, 1999 which informed him that he was not entitled to receive both OWCP and OPM benefits. She found that appellant knew or should have known that he was not entitled to keep both OPM and OWCP benefits, resulting in a finding of fault.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA³ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States.⁵ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for PTSD and he was paid wage-loss compensation benefits under FECA. He applied for OPM retirement that became effective on July 1, 2008. Appellant continued to receive OWCP benefits through May 5, 2012 totaling \$31,526.25. He thus received simultaneous OPM and FECA benefits for the period July 1, 2008 through May 5, 2012. This constituted payment of dual benefits that is prohibited by statute. OWCP properly determined that an overpayment of compensation in the amount of \$31,526.25 had been created for this period. The Board therefore finds that appellant has received an overpayment of compensation as he received prohibited dual benefits for the period July 1, 2008 through

³ 5 U.S.C. §§ 8101-8193, 8102.

⁴ *Id.*

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

May 5, 2012. Appellant did not dispute this amount, instead arguing that he was not at fault in the creation of the overpayment.

The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibit the receipt of FECA wage-loss benefits and a federal annuity.⁸ As appellant received \$31,526.25 in FECA benefits while concurrently receiving OPM retirement benefits for the period July 1, 2008 through May 5, 2012 an overpayment of compensation in that amount was created.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹⁰ provides that, where an overpayment of compensation has been made "because of an error of fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 FECA or would be against equity and good conscience."¹¹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of OWCP's regulations¹² 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 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."

ANALYSIS -- ISSUE 2

In this case, OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. It held that he accepted a payment that he knew of should have

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

⁹ *J.A.*, Docket No. 14-134 (issued May 1, 2014).

¹⁰ 5 U.S.C. §§ 8101-8193, 8129(a).

¹¹ *Id.* at § 8129(b).

¹² 20 C.F.R. § 10.320(b).

known was incorrect. For OWCP to establish that appellant was at fault in creating the overpayment of compensation, it must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.¹³

OWCP found that appellant was at fault in the creation of the overpayment as he was aware or should have been aware that he was not entitled to dual benefits. The record establishes that on October 6, 1999 he was informed in writing that receipt of OWCP payments for loss of wage-earning capacity and receipt of an annuity from OPM constituted a dual benefit and he was instructed to immediately contact OWCP if he did receive such benefits from OPM. Appellant began receiving both OPM and OWCP benefits on July 1, 2008. Therefore the record indicates that he knew or should have known that acceptance of both benefits was improper. As appellant continued to accept compensation benefits from both OWCP and OPM through May 5, 2012, the Board finds that he was at fault in the creation of the overpayment and is not entitled to waiver.¹⁴

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to OWCP's recovery of an overpayment under the Debt Collection Act.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount \$31,526.25 for the period July 1, 2008 through May 5, 2012 because he received dual compensation benefits from OPM and under FECA. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment and that he is therefore not entitled to waiver of recovery of the overpayment.

¹³ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹⁴ *A.F.*, Docket No. 13-2038 (issued February 10, 2014).

¹⁵ *See Lewis George*, 45 ECAB 144, 154 (1993).

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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