

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

J.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nashua, NH, Employer**

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**Docket No. 13-1181
Issued: September 17, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2013 appellant filed a timely appeal from a March 27, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning 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 this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$23,080.25 for the period May 24 through December 15, 2012; and (2) whether appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On January 8, 2012 appellant, then a 57-year-old mail handler, filed an occupational disease claim alleging that she injured her right shoulder at work. OWCP accepted her claim for partial thickness tear of the right supraspinatus and partial thickness tear of the right

¹ 5 U.S.C. § 8101 *et seq.*

infraspinatus. Appellant stopped work on December 22, 2011, returned to full-time limited duty on February 23, 2012 and stopped work again on May 24, 2012 when she underwent authorized right shoulder surgery. She received appropriate compensation benefits.

In a July 19, 2012 notice of separation, the employing establishment indicated that appellant retired due to disability effective May 21, 2012. On July 29, 2012 appellant filed a claim for compensation, Form CA-7, for the period July 14 to 27, 2012. The employing establishment indicated that appellant was in a leave without pay status during the claimed period. It also advised that appellant elected disability retirement and took a terminal leave payment for 52.3 hours plus 8 hours of holiday pay. In July 27 and 30, 2012 supplemental rolls payment records, covering the periods June 30 to July 28, 2012 and July 29 to August 25, 2012, OWCP indicated that it would place appellant on the periodic compensation rolls as she had not returned to work.

In an October 12, 2012 CA-1032 form, appellant noted that she last worked for the employing establishment on May 21, 2012. Regarding whether she received any other federal benefits or payments, she circled “yes” and “no” regarding whether she had received a disability retirement check. Next to this, she noted an “automatic deposit of one check sent but was going to take back out of my account due to workers’ comp.”

On October 30, 2012 OWCP notified appellant that she was placed on the periodic rolls effective July 14, 2012.² Regarding retirement benefits, appellant was notified that she must report to OWCP any retirement income she receives from any federal agency. She was advised that this was because a person who receives compensation benefits under FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS).

In a November 1, 2012 telephone memorandum, OWCP noted leaving a message for appellant to advise her that she could not collect disability retirement and compensation for wage loss at the same time and that the employing establishment “could not make her sign up for disability.” In a November 16, 2012 telephone memorandum, OWCP noted that appellant called to remind OWCP to send her a benefit election letter.

In a letter dated November 20, 2012, OWCP advised appellant that her weekly compensation rate was \$802.15 and her gross monthly compensation was \$3,475.98. It noted that she was receiving or may be entitled to receive benefits provided by the Office of Personnel Management (OPM) under CSRS or FERS. OWCP indicated that Social Security Act (SSA) benefits had restrictions which included that FECA benefits would be reduced by SSA benefits paid on the basis of age and attributable to her federal service.³ It asked that appellant elect which benefits she desired.

² OWCP payment records indicate that appellant received wage-loss compensation on the supplemental rolls from May 24 through July 28, 2012 and that she received wage-loss compensation on the periodic rolls from July 29 through December 15, 2012.

³ A wage-earning capacity Form 816 was attached, which indicated that appellant’s pay rate when her disability began was \$1,069.53 and it was also her current weekly pay rate for her job and step when injured. OWCP calculated her four-week compensation amount to be \$3,2098.59.

On November 29, 2012 appellant completed an election form in which she elected to receive CSRS or FERS benefits, effective November 20, 2012, in preference to any benefits to which she was entitled under FECA.

In a December 21, 2012 compensation termination sheet, OWCP noted that from November 20 to December 15, 2012, appellant received \$2,895.68 in compensation. It indicated that this amount was an overpayment as appellant had elected OPM benefits.

On February 6, 2013 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$23,080.25 for the period May 24 through December 15, 2012. It explained that their records indicated that she had retired and began collecting OPM benefits effective May 21, 2012, but also collected workers' compensation benefits through OWCP from May 24 through December 15, 2012. OWCP informed appellant that it appeared that she was at fault in the creation of the overpayment, because she accepted a payment that she knew or reasonably should have known was incorrect. In an attached memorandum to file, it indicated that appellant received compensation in the amount of \$23,080.25 for the period May 24 through December 15, 2012. OWCP indicated that this was the amount paid and the amount of the overpayment. It informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence or a precoupment hearing on the issues of fault and a possible waiver.

On February 9, 2013 appellant requested a telephone conference on the issues of fault and possible waiver of the overpayment. She explained that she wished to contest the overpayment as she disagreed that an overpayment occurred. In a letter dated February 10, 2013, appellant responded to the proposed notice of overpayment in the amount of \$23,080.25. She denied that she had retired collecting OPM benefits since May 21, 2012. Appellant explained that she opted for OWCP benefits in lieu of OPM payments when she had her injury. She advised that OPM provided her with a direct deposit payment of \$3,586.60 into her account for the period May 22 through July 30, 2012; however, it was made in error. Appellant explained that she promptly notified OPM of the mistake and she was informed that the payment would be retracted from her account.⁴ She indicated that the funds were still in her account waiting to be retracted. Appellant advised that every time she contacted OPM, she spoke to someone different and she was advised that it was in the process of being retracted. She also confirmed that this payment was the only payment she had ever received from OPM. Appellant indicated that in December OWCP submitted paperwork to OPM, indicating that she was going to start collecting from OPM in lieu of OWCP. She explained that she had not knowingly misled OWCP in any way and had followed instructions that she was given by both agencies. Appellant indicated that she was caught in the middle of paperwork that was being processed. She provided a copy of the check.

In letters dated February 14, 2013, addressed to appellant and OPM, OWCP noted that appellant had elected to receive benefits provided by CSRS effective November 20, 2012. It requested that she forward a check in the amount of \$2,895.68 as reimbursement for compensation paid from November 20 through December 15, 2012.

⁴ Appellant explained that she was initially advised to provide a cashier's check and then told to redeposit the check.

In a February 14, 2013 telephone memorandum, OWCP noted that appellant was contacted regarding her election, which was effective November 20, 2012. It indicated that she was advised that “she still got paid from us through December 15, 2012 and I notified OPM that they needed to reimburse us \$2,895.68.” Appellant was advised that the overpayment finding of \$23,080.25 “was an error.” OWCP noted that she was advised that she would receive another letter regarding the amount that she was overpaid.

On February 15, 2013 OWCP received appellant’s overpayment questionnaire. Appellant submitted supporting financial information reflecting monthly expenses of \$3,651.00 and total monthly income of \$5,387.00.

In a March 27, 2013 telephone memorandum, OWCP noted contacting an OPM representative who “confirmed claimant has been receiving retirement benefits since May 22, 2012.”

By decision dated March 27, 2013, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$23,080.25 for the period May 24 through December 15, 2012, based on her receipt of compensation for disability after her return to work. It further found that she was at fault in the creation of the overpayment, as she accepted a payment which she knew or reasonably should have known was incorrect.⁵

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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.⁶ Section 8129(a) of FECA provides, in pertinent part, that when “an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁷

Section 8116(d)(2) of FECA⁸ provides for 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, except 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.⁹ The implementing regulations provide that a beneficiary may not receive wage-loss

⁵ OWCP noted that it confirmed with OPM, in a memorandum of telephone call on that same date, that appellant received benefits since May 22, 2012.

⁶ 5 U.S.C. § 8102.

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(d)(2).

⁹ *Id.* at § 8116(a).

compensation concurrently with a federal retirement or survivor annuity.¹⁰ The beneficiary must elect the benefit that he or she wishes to receive.¹¹

ANALYSIS -- ISSUE 1

OWCP found that appellant had received an overpayment in the amount of \$23,080.25 for the period May 24 through December 15, 2012 because she received wage-loss compensation from OWCP and OPM benefits for the same period. It advised her that she retired and began collecting benefits effective May 21, 2012 and collected benefits through OWCP from May 24 through December 15, 2012. OWCP indicated that appellant was at fault because she accepted a payment which she know or reasonably should have known was incorrect.

The Board finds that there is insufficient evidence to support that appellant received a \$23,080.25 overpayment of compensation from May 24 through December 15, 2012. Although appellant retired from the employing establishment due to disability effective May 21, 2012, there is no evidence in the record that she elected to receive OPM or other federal benefits at that time. The record indicates that appellant did not elect to receive OPM benefits until November 20, 2012. While appellant acknowledges receiving an OPM direct deposit payment of \$3,586.60 covering May 22 through July 30, 2012, she characterizes this as an error and indicated that she was working with OPM to return this payment. The record also contains a March 27, 2013 telephone memorandum in which OWCP noted contacting an OPM representative and confirming that appellant had received retirement benefits since May 22, 2012. However, there is no other evidence from OPM documenting receipt of payments beyond the one payment acknowledged by appellant. Furthermore, OWCP, in a February 14, 2013 telephone memorandum, characterized the \$23,080.25 overpayment finding as “an error.”

As appellant did not elect disability retirement benefits until November 20, 2012, OWCP has not met its burden of proof to waive an overpayment in the amount of \$23,080.25 for the period May 24 through December 15, 2012.¹² OWCP has not otherwise provided sufficient documentation to show the extent of appellant’s receipt of disability retirement benefits while she was also in receipt of wage-loss compensation. This does not mean that appellant did not receive any overpayment of compensation, only that the period of and the amount of the overpayment found by OWCP are not established by the evidence in the record.¹³

¹⁰ 20 C.F.R. § 10.421(a).

¹¹ *Id.*

¹² See *Kenneth E. Neidiger*, Docket No. 92-1692 (issued November 4, 1993) (OWCP found the claimant had elected OPM benefits effective February 1 to June 3, 1990, causing an overpayment, but the Board reversed where the evidence did not establish that appellant selected OPM benefits during that period).

¹³ As noted, *infra*, the record indicates that, from November 20 to December 15, 2012, appellant received \$2,895.68 in net compensation after she elected retirement benefits. Also as noted, *infra*, the employing establishment indicated that it made a “terminal leave payment for 52.3 hours plus eight hours of holiday pay” to appellant. However, the employer did not submit any further evidence documenting this payment or confirming that it covered a period for which appellant also received wage-loss compensation. OWCP regulations provide that an employee may not receive compensation for total disability concurrent with severance or separation pay and FECA provides that an employee may not receive wage-loss compensation until the use of the annual and sick leave ends. 20 C.F.R. § 10.421(c); 5 U.S.C. § 8118(c).

The Board finds that OWCP has not established that appellant received retirement benefits for the same period she received wage-loss compensation from OWCP. For these reasons, the evidence of record is not sufficient to establish that appellant received an overpayment of compensation in the amount of \$23,080.25.¹⁴

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$23,080.25 for the period May 24 through December 15, 2012.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 17, 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

¹⁴ Given the Board's finding that OWCP did not establish the existence of an overpayment, it is not necessary to consider the second issue of the present case.