

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

B.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wallingford, CT, Employer**

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**Docket No. 14-2002
Issued: August 13, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 17, 2014 appellant filed a timely appeal from the August 12, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$1,521.00 overpayment of compensation from August 1 through September 21, 2013; and (2) whether he was at fault in creating this overpayment.

FACTUAL HISTORY

On January 20, 2004 appellant, a 47-year-old motor vehicle operator, sustained an injury in the performance of duty when he fell from his truck's lift gate. OWCP accepted his claim for

¹ 5 U.S.C. § 8101 *et seq.*

lumbosacral sprain, cervical sprain, bilateral hand sprains, herniated lumbar disc, herniated cervical disc, and left carpal tunnel syndrome.

Appellant received compensation for temporary total disability on the periodic rolls. On June 8, 2004 OWCP notified him that a person who receives compensation benefits under FECA is not permitted to also receive retirement benefits. Appellant received this notification again on November 17, 2009 and January 11, 2010.

Appellant returned to part-time work in December 2012. OWCP reduced his compensation to reflect his partial loss of wage-earning capacity. In March 2013 appellant began receiving regular payments of \$819.00 on the periodic rolls.

Appellant took voluntary disability retirement effective July 30, 2013. OWCP notified him on August 9, 2013 that annuity benefits paid by the Office of Personnel Management (OPM) and benefits for wage loss paid by OWCP were not payable for the same period of time. Employees entitled to both had to elect which benefit to receive.

Pending an election, OWCP continued to issue compensation benefits for wage loss. On August 24 and September 21, 2013 it issued compensation checks of \$819.00. The checks covered the period July 28 to September 21, 2013.

An OPM form dated September 27, 2013 indicated that appellant had elected to receive compensation benefits. The form further indicated that the annuitant had not yet been paid any benefits and that there was no overpayment. There would be no request for recovery of debt from OWCP.

On October 12, 2013 appellant elected retirement benefits in preference to any benefits to which he might have been entitled under FECA. The effective date of his election was “annuity commencement date.” Appellant made the same election on December 27, 2013, this one with an effective election date of August 1, 2013.

The record reflects that on October 29, 2013 Form CA-110, Report of Telephone Contact, reported that appellant had called OWCP to advise that he had received the compensation checks for August and September. Appellant advised: “OPM said they cannot go back to July 30th.” He stated that he did not have any money and wanted to know “if we could do this ASAP.”

A later Form CA-110, report of telephone contact, documented that OPM had communicated with OWCP on December 5, 2013 to advise that it had not finalized appellant’s election; and to advise that appellant had been receiving interim OPM payments since July 31, 2013.

OWCP made a preliminary determination that appellant had received a \$1,521.00 overpayment of compensation from August 1 to September 21, 2013 because he had received benefits from OWCP and OPM for the same period, which was prohibited. It well explained how it calculated the amount of the overpayment. OWCP found that appellant was at fault in creating the overpayment, as he had been advised of the prohibition of receiving dual benefits on

January 11, 2010 and therefore was aware, or should have reasonably been aware, that dual benefits were prohibited.

Appellant contested the fault finding: “I really don’t know why this happened. I thought I filled out the correct election forms for OPM (which would be the obvious choice). Plus, never at any point did I receive money at the same time (OWCP and OPM).” He added: “When I received the two payments back in August and September that was the *only* money I had coming in. And at this time it would be a total hardship to pay this money back.” (Emphasis in the original.) Appellant completed an overpayment recovery questionnaire and attached financial documents.

In a decision dated August 12, 2014, OWCP finalized its preliminary determination. It found that appellant was at fault in creating an overpayment of compensation in the amount of \$1,521.00, as he knowingly accepted wage-loss compensation to which he was not entitled. As appellant was at fault, no waiver of recovery was authorized. OWCP instructed him to forward payment for the full amount of the debt.

Appellant argues on appeal that he thought he had submitted everything he needed to show financial hardship.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA prohibits the receipt of dual benefits, with certain exceptions:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.”²

Thus, a FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity. 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

² 5 U.S.C. § 8116.

Employees Retirement System, the employee must make an election between FECA benefits and OPM benefits. The employee has the right to elect the monetary benefit that is most advantageous.³ The election, once made, is revocable.⁴

ANALYSIS -- ISSUE 1

Appellant received FECA disability benefits from August 1 to September 21, 2013. OWCP had reduced his compensation for wage loss to reflect his return to part-time work, and he received regular payments of \$819.00 on the periodic rolls through September 21, 2013.

The question is whether appellant also received OPM annuity benefits for the same time period. As 5 U.S.C. § 8116 indicates, and as OWCP repeatedly notified appellant, while an employee is receiving compensation for wage loss from OWCP, he may not receive annuity benefits from OPM payable for the same period of time.

OPM called OWCP in December 2013 to advise that appellant had been receiving interim OPM payments from July 31, 2013 forward. This confirms that appellant received both FECA benefits and OPM benefits for the period August 1 to September 21, 2013.

Appellant argued that never at any point did he receive money at the same time from OWCP and OPM. He explained that when he received the two FECA payments in August and September 2013, that was the only money he had coming in. An OPM form dated September 27, 2013 tends to support appellant's argument. The form indicated that appellant was not paid retirement benefits and that there was no overpayment, at least currently. Appellant would later elect OPM benefits, however, retroactive to his annuity commencement date, or August 1, 2013. He made this election on October 12, 2013. Although OPM had not finalized his case by December 5, 2013, it appears that appellant began receiving interim retirement benefits from OPM in accordance with his election.

The question is not whether payments from OWCP and OPM arrived at the same time. The question is whether appellant ultimately received dual benefits for the same period. As he elected OPM retirement benefits retroactive to a period already covered by FECA disability payments, the Board finds that appellant received an overpayment of compensation. His election and receipt of annuity benefits from OPM retroactive to August 1, 2013 created a prohibited dual benefit under 5 U.S.C. § 8116. The Board will therefore affirm OWCP's August 12, 2014 decision on the issue of fact of overpayment.

The amount of overpayment is not in dispute. OWCP's preliminary determination clearly explained how the overpayment totaled \$1,521.00 from August 1 through September 21, 2013. The Board will therefore affirm OWCP's August 12, 2014 decision on the issue of amount of overpayment.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997).

⁴ 20 C.F.R. § 10.421(a).

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating it. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he knew or should have known to be incorrect; or (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁵

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 is being overpaid.⁶

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment under the third standard, namely, that he accepted a payment which he knew or should have known to be incorrect. Specifically, OWCP concluded that appellant was with fault in creating the overpayment as he knowingly accepted wage-loss compensation to which he was not entitled. The problem with this finding is in its wording. When OWCP issued the periodic compensation checks on August 24 and September 21, 2013, the payments were correct. Appellant was fully entitled to them, and he properly accepted them. He had not yet elected OPM retirement benefits in preference to any benefits to which he might be entitled under FECA. That election would not be made until October 12, 2013. Thus, when appellant accepted these two compensation checks there was no dual benefit, no overpayment, and no basis for a finding of fault.

However, the Board finds that appellant is at fault under the third standard, but not for accepting wage-loss compensation. Appellant is at fault for accepting OPM annuity benefits for a period already covered by his August 24 and September 21, 2013 FECA disability payments. OWCP notified him on June 8, 2004, November 17, 2009, and January 11, 2010 that a person who receives compensation benefits under FECA is not permitted to receive retirement benefits. It notified appellant again on August 9, 2013 that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time.

Notwithstanding this notice, appellant made an election two months later, on October 12, 2013, to receive OPM retirement benefits retroactive to his annuity commencement date, or August 1, 2013. Because he had already received FECA disability benefits from July 28 to September 21, 2013, his election to receive OPM annuity benefits beginning August 1, 2013

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

was, in effect, an election to receive a prohibited dual benefit under 5 U.S.C. § 8116. Appellant's receipt of the retroactive OPM annuity benefits created an overpayment of compensation, and at the time he accepted those OPM benefits, he knew or should have known based on past and recent notices, that he was not permitted to receive both FECA disability benefits and OPM annuity benefits for the same period. He is therefore at fault in creating the overpayment based on the fact that he accepted a payment which he knew or should have known to be incorrect. The Board will therefore affirm OWCP's August 12, 2014 decision on the issue of fault.

The Board thus interprets the word "payment" under the third standard for fault to mean any payment that creates a prohibited dual benefit under 5 U.S.C. § 8116. This is the first time the Board has explicitly interpreted this language. In several recent cases, the Board has found the employee not at fault in similar circumstances because the employee was entitled to FECA payments at the time of acceptance. Therefore, the third standard of fault did not appear to apply.

Thus, in *D.M.*, Docket No. 14-548 (issued February 20, 2015), the claimant received compensation payments through March 9, 2013. On March 13, 2013 she elected OPM benefits in lieu of FECA wage-loss benefits retroactive to October 1, 2012. OWCP found that the claimant was at fault in creating an overpayment beginning October 1, 2012 because she knew or should have known that she was not entitled to OPM and FECA benefits for the same period. The Board reversed that finding as the employee was entitled to FECA benefits at the time she accepted the payments.⁷

In *M.R.*, Docket No. 14-844 (issued November 21, 2014), the claimant accepted wage-loss compensation on September 21, 2013. On October 16, 2013 he elected OPM retirement benefits retroactive to September 1, 2013. As there was no evidence that he should have known that the September 21, 2013 compensation was incorrect when he accepted that payment, the Board found that the record did not support OWCP's finding of fault.⁸

In other cases, the Board has not had to rule on the issue of fault because OWCP itself found that the claimants were not at fault after a retroactive election of benefits. In *S.G.*, Docket No. 12-779 (September 17, 2012), for example, the claimant was receiving regular FECA compensation when she elected to receive retirement benefits from OPM retroactive to July 1, 2011. While this created an overpayment of compensation for the period July 1 to December 17, 2011, OWCP found that the claimant was without fault. Likewise, in *J.N.*, Docket No. 11-1613 (issued February 7, 2012), the claimant was receiving regular FECA compensation

⁷ On April 6, 2013 the claimant received compensation for the period March 10 through April 6, 2013. Although her receipt of that payment occurred after the election, it appears that the Board found her not at fault with respect to that payment because she first received OPM retirement benefits in September 2013, which meant that she was not in actual receipt of dual benefits when she accepted FECA compensation. See *Franklin L. Bryan*, 56 ECAB 310 (2005) (although the claimant was aware of the prohibition of receiving simultaneous benefits, he did not actually receive and accept a dual payment from two entities during the period in question).

⁸ The claimant received a second payment on October 19, 2013, three days after he elected OPM benefits. With respect to that payment, the Board found that he was not at fault for other reasons, citing *Tammy Craven*, 57 ECAB 689 (2006).

when, on August 13, 2008, he elected to receive retirement benefits from OPM retroactive to September 27, 2005. This created an overpayment of compensation from September 27, 2005 to September 30, 2008. OWCP found, however, that the claimant was not at fault.⁹

But implicitly interpreting the word “payment” to mean a FECA payment has created an anomaly in cases involving a retroactive election of benefits. If the employee first accepts the correct payment of FECA benefits and then elects retroactive OPM benefits on top of the compensation already paid, the cases above would hold the employee without fault, even if the employee purposefully accepted a prohibited dual benefit. Such a narrow interpretation opens the compensation fund to abuse, particularly by those who might be eligible for waiver of recovery of the overpayment.

If the payments were reversed, with the employee first accepting OPM retirement benefits and then electing retroactive FECA disability payments, there would be no question that the employee was at fault because, with proper notice, the employee knew or should have known that FECA payments were incorrect at the time of acceptance.

For purposes of fault, it should not matter which benefit came first. Fault arises from possessing sufficient knowledge when accepting a prohibited dual benefit under 5 U.S.C. § 8116. The Board therefore finds that it should interpret the word “payment” in a way that avoids potential abuse, loopholes, or unanticipated and seemingly inconsistent results. The Board thus interprets the word “payment” under the third standard for fault to mean any payment that creates a prohibited dual benefit under 5 U.S.C. § 8116.

Whether an individual is at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The circumstances here support OWCP’s finding. OWCP well notified appellant that annuity benefits paid by OPM and compensation for wage loss paid by OWCP were not payable for the same period of time. Appellant nonetheless chose to receive both for the period August 1 through September 21, 2013. The Board will therefore affirm OWCP’s August 12, 2014 decision on the issue of fault.

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ As appellant was at fault in creating the overpayment, he is not eligible for waiver. OWCP must therefore recover the debt.

The Board’s jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.¹¹ Because collection of the overpayment in this case cannot be made by adjusting later payments of compensation as appellant is no longer in receipt of compensation benefits, the Board lacks jurisdiction to review the issue of recovery of the overpayment.

⁹ See also *Earl C. Poppell*, 39 ECAB 1455 (1988) (when the claimant elected OPM benefits in lieu of FECA benefits on October 1, 1983, and the election was made retroactive to June 21, 1967, OWCP found that the claimant was without fault in creating an overpayment that stretched nearly 16 years).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

CONCLUSION

The Board finds that appellant received a \$1,521.00 overpayment of compensation from August 1 through September 21, 2013. The Board further finds that appellant was at fault in creating the overpayment and, thus, he is ineligible for waiver.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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