

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

D.P., Appellant)
and) Docket No. 15-0449
U.S. POSTAL SERVICE, POST OFFICE,) Issued: December 18, 2015
Hammond, IN, Employer)

)

Appearances: Case Submitted on the Record
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On December 19, 2014 appellant filed a timely appeal from a December 5, 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 over the merits of the case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,170.18 for the period April 1 through May 3, 2014 because he concurrently received retirement benefits from the Office of Personnel Management (OPM) while receiving FECA benefits; and (2) whether OWCP properly found him at fault and thus not entitled to waiver.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant timely requested oral argument pursuant to 20 C.F.R. § 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 505.5(b). The Board exercised its discretion and denied the request as his arguments could adequately be addressed with a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-449 (issued June 16, 2015).

On appeal appellant asserts that he is entitled to waiver because he properly followed all procedures. He maintained that he timely submitted paperwork after the preliminary overpayment finding.

FACTUAL HISTORY

On November 13, 2000 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that his employment factors caused severe pain and swelling in both feet. The claim was accepted for bilateral plantar fasciitis and OWCP accepted recurrences on July 9, 2002 and February 5, 2004. Appellant stopped work on December 13, 2004 and filed a claim for recurrence. OWCP accepted the recurrence and placed appellant on the periodic compensation rolls. It accepted additional conditions of sacroiliac sprain, right radiculitis, lumbosacral radiculitis, and herniated lumbar disc at L5-S1.³

OWCP continued to develop the claim, and in June 2007 referred appellant for vocational rehabilitation services. On June 2, 2008 it reduced his compensation based on his ability to earn wages as a dispatcher. In a February 19, 2010 decision, an OWCP hearing representative reversed the wage-earning capacity determination and appellant's FECA compensation was restored retroactively.

In October 2012 OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Allan M. Brecher, a Board-certified orthopedic surgeon who provided a second opinion evaluation for OWCP, and appellant's attending Board-certified internist, Dr. Joseph A. DeJoan, regarding appellant's disability and restrictions. OWCP referred appellant to Dr. Robert K. Ellis, Board-certified in orthopedic surgery, who advised on March 27, 2013 that appellant could perform sedentary work with physical restrictions.

Appellant was again referred for vocational rehabilitation services in April 2013. A rehabilitation specialist identified the positions of legal clerk and social service worker as within his physical limitations. Appellant was advised that the positions were reasonably available in the local labor market.⁴

On February 24, 2014 OWCP proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages as a social service clerk. In correspondence dated March 13, 2014, it notified appellant that the receipt of retirement benefits and FECA compensation for the same period was a prohibited dual benefit. OWCP forwarded an election form to appellant. On March 24, 2014 appellant elected OPM retirement benefits, effective April 1, 2014.⁵

³ Appellant has additional subsidiary claims. Under file number xxxxxx354, OWCP accepted that on September 20, 2000 he sustained a left knee strain. Under file number xxxxxx120, it accepted that on October 7, 2003 appellant aggravated left plantar fasciitis. Under file number xxxxxx233, OWCP accepted that on September 7, 2004 he aggravated right plantar fasciitis. These claims were combined with the instant claim, adjudicated under file number xxxxxx843, the master file.

⁴ The record indicates that appellant had a bachelor's degree and had attended law school, but did not graduate.

⁵ By decision dated March 28, 2014, OWCP reduced appellant's compensation benefits based on his capacity to earn wages as a social service clerk, effective March 9, 2014.

In correspondence dated April 25, 2014, OWCP informed OPM that appellant had elected retirement benefits in lieu of FECA compensation. It asked OPM to commence monthly annuity payments effective April 1, 2014 and to forward a check in the amount of \$1,679.47 to OWCP as reimbursement for compensation paid from April 1 through May 3, 2014.

On October 29, 2014 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$1,170.18 had been created. It explained that appellant had elected OPM retirement benefits effective April 1, 2014 and continued to receive FECA benefits for the period April 1 through May 3, 2014. OWCP found him at fault because he had elected OPM annuity benefits and was aware or reasonably should have been aware that he was in receipt of compensation after that date to which he was not entitled. The preliminary decision provided an explanation of the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment questionnaire. He was informed of the actions he could take and was afforded 30 days to respond. The record includes a computer print-out indicating that appellant received \$1,170.18 in compensation for the period April 1 through May 3, 2014, the date his FECA compensation was terminated.

Appellant did not respond to the preliminary overpayment notice. By decision dated December 5, 2014, OWCP finalized the preliminary finding that he was at fault in the creation of an overpayment of \$1,170.18 for the period April 1 through May 3, 2014 because he accepted dual benefits he knew or reasonably should have known was incorrect.

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.⁶ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁷ 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.⁸ Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹ The beneficiary must elect the benefit that he or she wishes to receive.¹⁰

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ *Id.* at § 8116(a).

⁹ 20 C.F.R. § 10.421(a).

¹⁰ *Id.*

ANALYSIS -- ISSUE 1

On March 24, 2014 appellant elected OPM retirement benefits, effective April 1, 2014. He received FECA compensation for the period April 1 through May 3, 2014 after which his compensation was terminated.

As noted above, FECA and OWCP regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹¹ The record indicates that appellant received wage-loss compensation totaling \$1,170.18 for the period April 1, 2013 until his compensation was terminated on May 3, 2014.

As appellant elected OPM retirement benefits effective April 1, 2014 and continued to receive FECA disability benefit payments until May 3, 2014, the Board finds that he received an overpayment of compensation. His election of annuity benefits from OPM effective April 1, 2014 created a prohibited dual benefit under section 8116 of FECA. The record supports that appellant received FECA compensation in the amount of \$1,170.18 from April 1, 2014 until his compensation was terminated on May 3, 2014. The Board therefore affirms OWCP's December 5, 2014 decision on the issue of fact and amount of overpayment.¹²

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."¹³

Section 10.433(a) of OWCP 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 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; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

¹¹ *Id.* at § 10.421(a).

¹² 5 U.S.C. § 8116; *see B.G.*, Docket No. 14-2002 (issued August 13, 2015).

¹³ *Supra* notes 6 and 7.

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).¹⁴

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.¹⁵

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in creating the overpayment under the third standard, that he accepted a payment he knew or should have known to be incorrect. The Board finds appellant at fault under this standard.

Appellant elected to receive OPM benefits effective April 1, 2014 yet continued to receive FECA benefits until May 3, 2014. He was advised by letter dated March 13, 2014 that the receipt of retirement benefits for the same period would be a prohibited dual benefit.¹⁶

Whether an individual is at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The circumstances support OWCP's finding. OWCP notified appellant in March 2014 that receipt of retirement benefits and FECA compensation for the same period was a prohibited dual benefit. Appellant elected to receive both OPM retirement benefits and he also received FECA benefits for the period April 1 through May 3, 2014. She knew or should have known that receiving FECA benefits after electing to receive OPM retirement benefits would have created a prohibited dual benefit. Therefore, the Board will affirm OWCP's December 5, 2014 decision on the issue of fault.

As appellant was at fault in creating the overpayment, he is not eligible for waiver. With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁷ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,170.18 for the period April 1 through May 3, 2014 because he received a prohibited dual benefit for that period. The Board further finds that OWCP properly found him at fault and, as such, he was not eligible for waiver of recovery of the overpayment.

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

¹⁵ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁶ *Supra* note 11.

¹⁷ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 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