

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, MARINA
PROCESSING & DISTRIBUTION CENTER,
Inglewood, CA, Employer**

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**Docket No. 14-548
Issued: February 20, 2015**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2014 appellant timely appealed the December 23, 2013 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 claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$17,595.25 for the period October 1, 2012 through April 6, 2013; and (2) whether appellant was at fault in creating the overpayment.

¹ 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

Appellant, a 60-year-old retired mail processing clerk, has an accepted claim for right shoulder tendinitis, right wrist tenosynovitis and right elbow medial epicondylitis, which arose on or about October 5, 1988.² As of May 19, 2009, as the employing establishment could no longer accommodate her work restrictions, it paid her wage-loss compensation for temporary total disability (TTD) beginning June 8, 2009.

In a June 20, 2012 decision, OWCP reduced appellant's wage-loss compensation for failure to undergo vocational rehabilitation.³ Effective July 1, 2012, appellant's 28-day net compensation was reduced from \$1,578.52 to \$100.52. She requested a hearing.

While appellant's case was pending before the Branch of Hearings and Review, she submitted an application for retirement. Appellant was covered under the Civil Service Retirement System (CSRS). The employing establishment forwarded her October 4, 2012 application to the Office of Personnel Management (OPM) for a determination regarding her eligibility for retirement benefits. A November 6, 2012 notice of personnel action from the employing establishment indicated that appellant retired effective October 1, 2012.

By decision dated January 3, 2013, the Branch of Hearings and Review reversed OWCP's June 20, 2012 decision. The record established that, between April and July 2012, appellant could not fully participate in vocational rehabilitation due to illness. The hearing representative ordered that wage-loss compensation for TTD be reinstated retroactively. He also indicated that appellant should be referred back to vocational rehabilitation.

In a January 28, 2013 letter to OWCP, appellant advised that she had retired effective October 1, 2012. She also stated that she no longer needed compensation benefits, but still required medical benefits. Appellant indicated that she was covered under CSRS, but had not yet received any retirement benefits.

On January 30, 2013 appellant spoke with the claims examiner regarding OPM benefits, as well as retroactive FECA benefits. She advised that, while she requested payment dating back to October 1, 2012, OPM had not yet placed her in pay status. The claims examiner explained that OPM might be awaiting for an election of benefits letter from OWCP before placing appellant in payment status. She assured appellant that she would work on both the retroactive FECA payment and the election of benefits letter.

² At the time of her injury, appellant was a part-time regular (PTR) employee working 5 hours a day, 25 hours per week.

³ OWCP found that had appellant participated in good faith, she would have been able to perform the position of customer complaint clerk with weekly wages of \$520.00.

On February 8, 2013 OWCP initiated an electronic funds transfer (EFT) in the amount of \$11,414.20. The payment was for TTD covering July 1, 2012 through January 12, 2013.⁴ Appellant's bank refused the February 8, 2013 EFT due to account restrictions.

A February 12, 2013 notice from OPM advised OWCP that appellant was entitled to an annuity commencing July 1, 2009, but she elected to receive compensation benefits. There was no indication OPM had paid appellant. Also, OPM specifically noted there was no overpayment.

A February 17, 2013 OPM annuity statement advised appellant that she was eligible for disability retirement effective July 7, 2009. OPM identified the monthly annuity appellant was entitled to receive at various effective dates between July 2009 and January 2013. However, regular annuity payments were "suspended" at the time because of appellant's receipt of workers' compensation.

On February 22, 2013 OWCP made another EFT payment for \$1,727.92, which covered the 28-day period, January 13 through February 9, 2013. On March 1, 2013 it disbursed two EFT payments totaling \$11,414.20 for the period July 1, 2012 through January 12, 2013.⁵

An OPM representative contacted OWCP on February 26, 2013 inquiring as to whether appellant was currently receiving wage-loss compensation. OWCP advised OPM that appellant was on the periodic rolls and had received compensation through February 9, 2013. It further indicated that there was no record of appellant having submitted an election of benefits form. The OPM representative indicated that she would advise appellant to submit an election form.

On March 9, 2013 OWCP paid appellant (EFT) \$1,738.53 for the period February 10 through March 9, 2013.

On March 11, 2013 OWCP provided appellant with an election of benefits form (CA-1150). In an accompanying letter, it identified appellant's various compensation rates for TTD dating back to June 8, 2009 (CA-1102). Additionally, OWCP explained that appellant was not entitled to receive FECA wage-loss compensation and OPM benefits for the same period, and she would have to choose which benefit to receive. It further explained that should appellant elect OPM benefits, she would still be entitled to medical benefits related to her October 5, 1998 employment injury.

On March 13, 2013 appellant elected OPM/CSRS benefits in lieu of FECA wage-loss compensation, retroactive to October 1, 2012.

On April 4, 2013 OWCP issued a preliminary overpayment determination. Appellant had been overpaid \$17,595.25 for the period October 1, 2012 through April 6, 2013. OWCP determined that appellant was at fault in creating the overpayment because she was aware or should have reasonably been aware that she could not receive OPM and FECA benefits for the

⁴ The \$11,414.20 payment took into account compensation appellant previously received based on OWCP's June 20, 2012 wage-earning capacity determination. It also included deductions for health and life insurance premiums.

⁵ Appellant had provided OWCP with an alternate account for direct deposit (EFT) purposes.

same time period. The claims examiner found that appellant “knowingly accepted compensation to which she was not entitled.”

On April 6, 2013 OWCP paid appellant (EFT) \$1,760.92 for the period March 10 through April 6, 2013.⁶ Effective April 7, 2013, it terminated wage-loss compensation for TTD.

Appellant requested a prerecougment hearing. In her May 4, 2013 request, she indicated that she had not received benefits from both OPM and OWCP and challenged OWCP to produce evidence demonstrating she received a dual benefit. Appellant also took issue with the amount of the overpayment, as well as OWCP’s preliminary finding of fault. She argued that the amount of the overpayment was incorrect because it included FECA benefits owed from July 1 to September 30, 2012. Appellant also submitted an overpayment recovery questionnaire (Form OWCP-20) and financial records, including bank statements.

On May 7, 2013 an OPM representative spoke with OWCP’s claims examiner regarding the cessation of FECA benefits. OWCP advised OPM that benefits had been paid through April 6, 2013. The OPM representative told the claims examiner that appellant elected OPM benefits retroactive to October 1, 2012, and as a result “appellant will be overpaid.” OPM inquired whether OWCP advised appellant of the overpayment. The claims examiner indicated that appellant had been notified on April 4, 2013 of the overpayment. The OPM representative indicated that she would call appellant to let her know she has an overpayment.

At the October 28, 2013 prerecougment hearing, appellant testified that she was forced to retire in October 2012 because she could not live off the \$100.00 payments she received from OWCP. She also testified that her claims examiner, Mary Mabra, suggested retirement because appellant would get more money from retirement than from OWCP. Appellant further testified that, although she retired on October 1, 2012, she did not receive her first OPM payment until September 10, 2013, which was for \$2,048.25. She received another OPM payment on September 19, 2013 for \$12,751.95, which represented back pay to October 1, 2012.

In a December 23, 2013 decision, the Branch of Hearings and Review affirmed OWCP’s preliminary overpayment determination.

LEGAL PRECEDENT -- ISSUE 1

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.⁷ 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 Employees’ Retirement System, the employee must make an election between FECA benefits

⁶ The April 6, 2013 payment had already been included in OWCP’s \$17,595.25 overpayment calculation.

⁷ 5 U.S.C. § 8116(a)(4); 20 C.F.R. § 10.421(a).

and OPM benefits.⁸ The employee has the right to elect the monetary benefit that is most advantageous.⁹ The election, once made, is revocable.¹⁰

ANALYSIS -- ISSUE 1

On March 13, 2013 appellant advised OWCP of her election (CA-1150) of OPM/CSRS benefits in lieu of FECA wage-loss compensation retroactive to October 1, 2012. Her retroactive election of federal retirement benefits ultimately gave rise to a prohibited dual benefit for the period October 1, 2012 through April 6, 2013, when her FECA benefits were terminated. Appellant testified that she first received OPM retirement benefits in September 2013.

The Board finds that the claims examiner's April 4, 2013 preliminary overpayment determination was inaccurate.

The hearing representative affirmed the claims examiner's April 4, 2013 preliminary determination in all respects. Appellant argued that the \$17,595.25 overpayment calculation is excessive. OWCP declared an overpayment of compensation for the period October 1, 2012 through April 6, 2013, which represented approximately six months of wage-loss compensation for TTD. Appellant's 28-day net compensation during this period was about \$1,750.00, which would be approximately \$10,500.00 over a six-month period.

It is unclear how the claims examiner arrived at her \$17,595.25 overpayment figure. Despite appellant's assertion that the amount was excessive, the hearing representative accepted this figure without question or explanation. Accordingly, OWCP's finding regarding the amount of overpayment will be set aside. On remand, OWCP shall obtain verification from OPM regarding the period of coverage for any CSRS disability or regular retirement benefits appellant may have received. Also, it shall provide a clear and precise calculation of the wage-loss compensation appellant received for the period October 1, 2012 through April 6, 2013. Moreover, OWCP should provide an account of all overpayment collection activities, including funds remitted by appellant and/or funds withheld from any federal retirement annuity on behalf of OWCP.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.¹¹ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from OWCP are proper.¹² Recipients must show good faith and exercise a high

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.421(a).

¹¹ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(a).

degree of care in regard to receipt of their benefits.¹³ A recipient will be found to be at fault with respect to creating an overpayment if she “[a]ccepted a payment which [she] knew or should have known to be incorrect.”¹⁴

ANALYSIS -- ISSUE 2

OWCP found appellant at fault on the basis that she accepted payment which she knew or should have known to be incorrect. Whether an individual is at fault in creating an overpayment depends on the circumstance of the overpayment.¹⁵ The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that she is being overpaid.¹⁶ In determining fault OWCP applies a “reasonable person” standard.¹⁷

The event that triggered the overpayment scenario was appellant’s March 13, 2013 election of CSRS benefits effective October 1, 2012. As previously discussed, there is no evidence of appellant having received a prohibited dual benefit when she accepted FECA wage-loss compensation payments in February, March, and April 2013. Moreover, even with the retroactive election of CSRS retirement benefits, appellant was still entitled to a substantial portion of the March 1, 2013 EFT payments totaling \$11,414.20, which included wage-loss compensation owed from July 1, 2012.

Appellant was entitled to FECA benefits at the time she accepted payment. Accordingly, OWCP’s finding that appellant was at fault in creating the overpayment shall be reversed. The case will be remanded to OWCP for consideration of waiver of recovery of the overpayment. Additionally, OWCP shall provide appellant the opportunity to submit an updated OWCP-20 form with information regarding her current income, expenses, assets, and liabilities. After appropriate development, OWCP shall issue a *de novo* decision.

CONCLUSION

The case is not in posture for decision regarding the fact and amount of overpayment. The Board also finds that OWCP incorrectly found appellant at fault in creating the overpayment.

¹³ *Id.*

¹⁴ *Id.* at § 10.433(a)(3).

¹⁵ *Id.* at § 10.433(b).

¹⁶ *Id.*; J.S., 58 ECAB 515, 521-22 (2007).

¹⁷ L.D., 59 ECAB 673, 679 (2008).

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2013 decision of the Office of Workers' Compensation Programs is set aside in part and reversed in part.

Issued: February 20, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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