

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

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**E.H., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
CITIZENSHIP & IMMIGRATION SERVICES,  
Los Angeles, CA, Employer**

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**Docket No. 15-0312  
Issued: August 19, 2016**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*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 November 24, 2014 appellant, through counsel, filed a timely appeal from an October 31, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$17,806.25 for the period July 31, 2010 through January 15, 2011 because she concurrently received retirement benefits from the Office of Personnel Management (OPM) and FECA benefits; and (2) whether OWCP properly found her at fault in creating the overpayment.

On appeal, counsel asserts that the decision is contrary to law and fact.

## FACTUAL HISTORY

This case has previously been before the Board. In a July 1, 2009 decision, the Board reversed November 5, 2007 and June 13, 2008 decisions in which OWCP found that a constructed position of branch manager represented appellant's wage-earning capacity and reduced her compensation effective October 28, 2007. The Board found that the selected position was medically suitable but that, since appellant had relocated from California to Utah prior to the wage-earning capacity determination, OWCP erred by basing the decision on labor market data from the greater Los Angeles area.<sup>3</sup> The facts and law of the previous Board decision are incorporated herein by reference.<sup>4</sup>

Appellant was returned to the periodic compensation rolls, effective July 1, 2009. She received appropriate retroactive compensation effective October 27, 2008

On January 5, 2011 appellant retroactively elected OPM retirement benefits, effective July 30, 2010.

On January 12, 2011 OWCP notified OPM of appellant's election to receive OPM benefits effective July 30, 2010 and indicated that she had received FECA compensation of \$26,191.78 since that date. On February 3, 2011 it revised that amount, for the period July 31,

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<sup>3</sup> Docket No. 08-2057 (issued July 1, 2009). On November 4, 1999 OWCP accepted that appellant, an information officer, sustained a sprain of the right knee and leg on September 24, 1999. Appellant had right knee meniscectomy on December 17, 1999 and returned to modified duty in January 2000. On January 17, 2002 she was granted a schedule award for two percent impairment of the right leg. In February 2005 appellant was sent home because no work was available within her restrictions. She received appropriate compensation thereafter and was placed on the periodic compensation rolls. Appellant was referred for vocational rehabilitation in June 2005.

<sup>4</sup> During the pendency of the appeal before the Board, on January 16, 2007, the employing establishment informed OWCP that appellant had applied for disability retirement. After the Board's July 1, 2009 decision, in August 1, 2009 correspondence, OPM noted that appellant had elected to return to FECA benefits effective October 27, 2008. It advised that she had received OPM retirement since October 26, 2008 which was paid through July 31, 2009, thus creating an overpaid annuity from October 27, 2008 through July 31, 2009 totaling \$7,976.07. OWCP repaid OPM \$7,976.07. On July 16 and 23, 2009 appellant informed OWCP that she had won a Merit Systems Protection Board (MSPB) claim for improper termination and would receive back pay from the employing establishment. On an OWCP EN1032 form, completed on September 20, 2009 she indicated that she was also receiving social security benefits. In April 2010, OWCP received a reimbursement check totaling \$113,864.11 from the employing establishment covering pay period 5 in 2005 through pay period 7 in 2007. The record contains an MSPB decision dated March 13, 2009. Appellant was to be retroactively restored to employment effective February 17, 2005 with appropriate back pay awarded. A settlement agreement between her and the employing establishment dated May 24, 2010 is also in the record.

2010 through January 15, 2011, to \$27,840.00.<sup>5</sup> Appellant has not received FECA compensation since January 15, 2011.

OPM reimbursed OWCP a portion of the dual payment in the amount of \$10,033.75.

A computer print-out indicated that the principal amount of the dual payment was \$27,840.00 and the balance remaining on August 8, 2013 was \$17,806.25. On August 8, 2013 OWCP informed appellant that it had notified OPM that an overpayment of \$17,806.25 remained. By letter dated August 28, 2013, it asked OPM to resume reimbursement payments. OPM did not respond or forward additional monies.

On January 29, 2014 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$17,806.25 had been created. It explained that the overpayment occurred because, for the period July 31, 2010 through January 15, 2011, appellant received both FECA compensation and retirement compensation from OPM, a prohibited dual benefit. OWCP found her at fault because she had retroactively elected OPM annuity benefits and that she knew or should have known that this would create an overpayment. The preliminary decision provided an explanation of the calculation of the overpayment, stating that appellant had received FECA compensation totaling \$27,840.00 for the above period, that OPM had reimbursed \$10,033.75, and that an overpayment of \$17,806.25 remained. OWCP explained that, because OPM ceased reimbursement in April 2013, appellant was responsible for the repayment. She was provided an overpayment action request and an overpayment questionnaire, informed of the actions she could take, and was allotted 30 days to respond.

On February 6, 2014 appellant requested a prerecoupment hearing and submitted an overpayment questionnaire in which she indicated that she had monthly household income of \$4,169.00 and monthly expenses of \$3,851.00. She listed additional assets of \$109,000.00. In February 9, 2014 correspondence, appellant indicated that she was unaware that she had received duplicate payments, that on January 5, 2011 she had elected OPM retirement effective July 30, 2010, but that she did not actually begin receiving her federal pension until January 2011. She stated that, when a lump sum was deposited into her bank account electronically, she assumed it was a Thrift Savings reimbursement from the employing establishment related to the MSPB settlement and was not retroactive OPM retirement benefits. On March 12, 2014 OWCP informed appellant that she could change her election of benefits at any time, and that, if she elected FECA benefits for the period of the overpayment, it would satisfy her debt to OWCP but she would then be required to repay OPM.

At the hearing, held on August 13, 2014, appellant testified that she had informed both OPM and OWCP that she intended to retire on July 30, 2010, and that she began getting OPM benefits in January 2011 which at first contained deductions to repay OWCP but now was at full pension rate. She stated that she later got a lump-sum payment from OPM that was

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<sup>5</sup> On October 9, 2009 OWCP denied appellant's claim for an additional schedule award. On December 22, 2009 it accepted additional conditions of lumbar disc herniation at L4-5; medial meniscus tear, right; and degenerative arthritis of the right knee. On May 6, 2010 an OWCP hearing representative affirmed the October 9, 2009 decision. On March 13, 2011 appellant filed a schedule award claim. She was referred for vocational rehabilitation on March 17, 2011.

electronically deposited to her bank account, which she thought was a Thrift Savings contribution owed her by the employing establishment. Appellant maintained that she had no knowledge that she was receiving a dual benefit. Counsel asserted that the amount of the overpayment was incorrect because appellant had cancelled her life insurance and it had not been reflected in FECA payments. Counsel asserted that more information was needed from OPM. The hearing representative advised that she would send another overpayment questionnaire and left the record open for 30 days.

An overpayment questionnaire, received by OWCP on August 29, 2014, indicated that she had monthly household income of \$4,163.00 and monthly expenses of \$4,323.00. This included the \$436.00 owed to OWCP. Appellant listed additional assets of \$98,900.00, noting that she withdrew approximately \$1,000.00 monthly from this, and that she had Thrift Savings of \$145,000.00.

In an October 31, 2014 decision, an OWCP hearing representative finalized the preliminary finding that appellant was at fault in creating a \$17,806.25 overpayment for the period July 31, 2010 through January 15, 2011 because she received dual benefits. The hearing representative noted that, as OPM notified OWCP that appellant had continued optional life insurance, and because the record did not contain notification that the life insurance had been cancelled, the withholding of the premium for optional life insurance was appropriate.

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

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> *Id.* at § 8116(a).

<sup>9</sup> 20 C.F.R. § 10.421(a).

<sup>10</sup> *Id.*

### **ANALYSIS -- ISSUE 1**

The record supports that appellant received both wage-loss compensation under FECA and OPM retirement benefits for the period July 31, 2010 through January 15, 2011. The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibits the receipt of FECA wage-loss benefits and a federal annuity.<sup>11</sup> As appellant received FECA benefits while concurrently receiving OPM retirement benefits, an overpayment of compensation was created.<sup>12</sup> The amount of the overpayment correctly included all FECA benefits appellant received for that period \$27,840.00 less the amount of reimbursement received by OWCP from OPM in the amount of \$10,033.75. Thus the Board finds that OWCP properly determined her overpayment in the amount of \$17,806.25.

Counsel asserted at the prereducement hearing that the amount of the overpayment was incorrect because appellant had cancelled her life insurance and it had not been reflected in her FECA payments. OWCP noted that the record contained no evidence that appellant's life insurance had been cancelled and advised appellant to submit such evidence to OWCP. As that issue has not been decided by OWCP, it is not before the Board for decision.

### **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."<sup>13</sup>

Section 10.433(a) of OWCP regulations provides 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 (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."<sup>14</sup>

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<sup>11</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a).

<sup>12</sup> See *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>13</sup> 5 U.S.C. § 8129(b).

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

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.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

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

On January 5, 2011 appellant retroactively elected OPM retirement benefits, effective July 30, 2010. She has not received FECA compensation since January 15, 2011.

On January 29, 2014 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$17,806.25 had been created. It explained that the overpayment occurred because, for the period July 31, 2010 through January 15, 2011 appellant had received both FECA compensation and retirement compensation from OPM, a prohibited dual benefit. OWCP found appellant at fault because she had elected OPM annuity benefits retroactively and knew or should have known that this would create an overpayment. In the October 31, 2014 decision, an OWCP hearing representative found appellant at fault in the creation of an overpayment of compensation of \$17,806.25.

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 of fault. Appellant was well aware that receipt of retirement benefits and FECA compensation for the same period was a prohibited dual benefit as she had previously elected retroactively to receive FECA benefits in August 2009. Appellant knew or should have known that another retroactive election would have created another overpayment for the period July 31, 2010 through January 15, 2011. The Board will therefore affirm OWCP's August 4, 2015 decision on the issue of fault.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount \$17,806.25 for the period July 31, 2010 through January 15, 2011, and that OWCP properly found her at fault and thus not entitled to waiver.

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<sup>15</sup> 20 C.F.R. § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>16</sup> *See B.G.*, Docket No. 14-2002 (issued August 13, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 31, 2014 decision of the Office of Workers' Compensation Programs is affirmed.<sup>17</sup>

Issued: August 19, 2016  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> James A. Haynes, Alternate Judge participated in the original decision but was no longer a member of the Board effective November 16, 2015.