

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

N.P., Appellant

and

**U.S. POSTAL SERVICE, CANAL STREET
STATION, New York, NY, Employer**

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**Docket No. 15-1799
Issued: January 11, 2016**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 31, 2015 appellant, through counsel, filed a timely appeal from an August 4, 2015 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 \$11,317.50 for the period May 20, 2013 through February 7, 2015 because she elected to receive retirement benefits from the Office of Personnel Management (OPM) while receiving FECA benefits; and (2) whether OWCP properly found her at fault and thus not entitled to waiver.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that appellant has a second appeal pending before the Board, Docket No. 15-1580, that will be adjudicated separately.

On appeal counsel asserts that because appellant was in a serious motor vehicle accident in Florida on June 17, 2015 in which she suffered serious injuries and was hospitalized for approximately one month, he was unable to timely request a prereducement hearing on appellant's behalf, and OWCP prematurely issued its final overpayment decision.

FACTUAL HISTORY

OWCP accepted that on March 28, 1996 appellant, then a 31-year-old letter carrier, incurred a right hand sprain, right and left knee sprains, and lumbosacral sprain. She stopped work on April 29, 1996 and was placed on the periodic compensation rolls.

In June 2003 appellant accepted a modified position for six hours a day. She continued to receive two hours of daily FECA compensation. Appellant continued the part-time modified position until December 21, 2010 until she incurred a second employment injury and received additional compensation under that claim.³

While appellant was in receipt of wage-loss compensation, she signed annual certifications acknowledging the need to immediately report changes in income from federally-assisted disability or benefit programs. This included a February 5, 2013 OWCP letter, which noted that other federal benefits could affect her FECA benefits and advised her that she must report any income or change in income from federally-assisted disability or benefit programs.

On September 3, 2014 counsel informed OWCP that appellant was awarded disability retirement by the Office of Personnel Management (OPM) and that she wished to elect to receive Federal Employee Retirement Service (FERS) benefits, effective May 20, 2013. In correspondence dated October 9, 2014, OWCP notified appellant that her current four-week compensation was \$542.00. Appellant was informed that receipt of retirement benefits and FECA compensation for the same period was a prohibited dual benefit. OWCP forwarded an election form to appellant with a copy to counsel. On January 8, 2015 appellant submitted the election form to OWCP in which she elected FERS retirement benefits, effective May 20, 2013. On January 7, 2015 counsel forwarded the election form to OPM, asked that appellant's retirement be processed, and that OWCP be reimbursed for back pay.

On February 5, 2015 appellant's partial wage-loss compensation for the March 28, 1996 claim was terminated, effective February 7, 2015. On February 5, 2015 OWCP also informed OPM that, in lieu of FECA compensation, she had elected to receive FERS retirement benefits effective May 20, 2013. It asked that OPM commence monthly annuity payments effective May 20, 2013 and reimburse OWCP \$11,317.50 for FECA compensation benefits which had been paid from May 20, 2013 to February 7, 2015. There is no evidence in the record to establish that OPM reimbursed OWCP.

On June 26, 2015 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$11,317.50 had been created. It explained that appellant had elected FERS retirement benefits retroactive to May 20, 2013, but had continued to receive

³ *Id.* Appellant's wage-loss compensation and medical benefits under this claim were terminated on May 20, 2013.

FECA compensation for that same period May 20, 2013 through February 7, 2015. OWCP found appellant at fault because she knew or should have known that she was in receipt of compensation to which she 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 (Form CA-20). She was informed of the actions she could take and was afforded 30 days to respond. A copy of the preliminary determination was forwarded to counsel.

The record includes a computer print-out indicating that appellant received \$11,317.50 in compensation for the period May 20, 2013 to February 7, 2015. As she had elected FERS retirement benefits for the same period, OWCP found that the entire amount was an overpayment.

In correspondence dated July 28, 2015, counsel disagreed with the June 26, 2015 preliminary determination. He requested a stay of collection to allow appellant an opportunity to complete an overpayment questionnaire, reporting that she had been in a serious motor vehicle accident in Florida on June 17, 2015 with multiple injuries and had just been discharged. Counsel maintained that OPM should have reimbursed OWCP, and disagreed that an overpayment occurred and that appellant was with fault.

By decision dated August 4, 2015, OWCP finalized the preliminary finding that appellant was at fault in the creation of an overpayment of \$11,317.50 for the period May 20, 2013 through February 7, 2015 because she accepted dual benefits that she knew or 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.⁴ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁵ 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.⁶ Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8116(a).

retirement or survivor annuity.⁷ The beneficiary must elect the benefit that he or she wishes to receive.⁸

ANALYSIS -- ISSUE 1

Counsel notified OWCP on September 3, 2014 that appellant had been awarded OPM disability retirement benefits. In an election form received by OWCP on January 8, 2015, appellant elected OPM retirement benefits, retroactive to May 20, 2013. 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.⁹ The record indicates that appellant received FECA wage-loss compensation totaling \$11,317.50 for the period May 20, 2013 until her compensation was terminated on February 7, 2015.

As appellant elected FERS retirement benefits retroactive to a period already covered by FECA compensation payments, the Board finds that she did in fact receive an overpayment of compensation for the entire amount. Her election of retirement annuity benefits from OPM, retroactive to May 20, 2013, created a prohibited dual benefit under section 8116 of FECA. The record supports that appellant received wage-loss compensation in the amount of \$11,317.50 for the period May 20, 2013 until her compensation was terminated on February 7, 2015. The Board will therefore affirm OWCP's August 4, 2015 decision on the issue of fact and amount of overpayment.¹⁰

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."¹¹

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

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

⁹ *Id.* at § 10.421(a).

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

¹¹ *Supra* notes 6 and 7.

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).”¹²

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.¹³

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. Counsel noted on September 3, 2014 that appellant had been awarded FERS disability retirement benefits. In January 2015 she elected to receive those retirement benefits retroactive to May 20, 2013. Because appellant had already received FECA compensation for the period May 20, 2013 through February 7, 2015, when her wage-loss compensation was terminated, her election of retirement benefits beginning May 20, 2013 was, in effect, an election to receive a prohibited dual benefit under section 8116 of FECA.

Whether an individual is at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The circumstances in this case support OWCP’s finding. OWCP notified appellant in October 2014 that receipt of retirement benefits and FECA compensation for the same period was a prohibited dual benefit. Appellant nonetheless chose to receive both FERS disability retirement benefits and FECA benefits for the period May 20, 2013 through February 7, 2015. The Board will therefore affirm OWCP’s August 4, 2015 decision as appellant knew or should have known she would be receiving a prohibited dual payment.¹⁴

As to counsel’s assertion on appeal that appellant was in an automobile accident in June 2015 and could not timely respond to the preliminary overpayment determination, he submitted no evidence to substantiate the accident to support his claim of extenuating circumstances. Furthermore, counsel received a copy of the June 26, 2015 preliminary determination and did not timely respond.

As appellant was at fault in creating the overpayment, she 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

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

¹³ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁴ *See B.G.*, *supra* note 10.

under FECA.¹⁵ 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.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount \$11,317.50 for the period May 20, 2013 through February 7, 2015 because she elected to receive retirement benefits from OPM while receiving FECA benefits. The Board also finds that OWCP properly found appellant at fault and thus not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁶ *Id.*