

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

A.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 15-0586
Issued: June 6, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 23, 2015 appellant filed a timely appeal of a January 5, 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 this case.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of \$3,366.84 for the period February 1 to March 9, 2013; and (2) whether OWCP properly determined that appellant was at fault in creating the overpayment, thereby rendering him ineligible for consideration of waiver.

On appeal appellant argued that he was not in receipt of dual benefits from the Office of Personnel Management (OPM) and FECA at the same time.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 8, 2005 appellant, then a 58-year-old manual clerk/mail processor, filed an occupational disease claim (Form CA-2) alleging that on October 1, 2004 he first realized that his bilateral hand and wrist conditions were employment related. OWCP accepted the claim for bilateral radial styloid tenosynovitis, which was expanded to include bilateral thumb carpometacarpal joint arthroplasty with flexor ligament reconstruction. It authorized right thumb carpometacarpal joint interposition arthroplasty with flexor tendon ligament reconstruction surgery, right wrist joint repair surgery, and right transplant forearm tendon surgery, which was performed on November 30, 2005.

By letter dated October 15, 2012, OWCP placed appellant on the periodic rolls for temporary total disability. It informed him that he would be paid every four weeks and his regular payment would begin for the period October 21 to November 17, 2012.

When OWCP placed him on the periodic rolls, it notified him that he was not permitted to receive workers' compensation benefits concurrently with retirement benefits:

“You must report any retirement income, disability income, or compensation benefits from any [f]ederal agency. This is because a recipient of compensation benefits under [FECA] is not permitted to receive benefits under certain other [f]ederal programs, including the Civil Service [R]etirement [P]rogram.”

In Form CA-110 notes dated January 30, 2013, appellant telephoned OWCP to provide notice of his voluntary retirement from the employing establishment effective January 31, 2013.

OWCP received a February 26, 2013 Notification of Personnel Action (Form SF-50) reflecting that appellant had retired from the employing establishment effective January 31, 2013.

The employing establishment requested that OWCP send appellant an election of benefits form to indicate whether he wanted to continue receiving FECA benefits or to receive retirement benefits from OPM.

In a letter dated March 5, 2013, OWCP informed OPM that appellant had elected to receive retirement benefits effective January 31, 2013 and noted that a copy of the election form was attached.² It requested reimbursement from OPM for FECA benefits in the amount of \$3,366.84 for the period February 1 to March 9, 2013.

In a July 17, 2013 letter, OPM informed OWCP that it began retirement benefit payments to appellant effective February 1, 2013.

By letter dated May 28, 2014, OWCP advised appellant of a preliminary determination that an overpayment of compensation in the amount of \$3,366.84 had occurred. It explained that he had elected OPM benefits effective January 31, 2013; therefore, the \$3,366.84 in

² The record does not contain a copy of the election form.

compensation paid from February 1 to March 9, 2013 constituted an overpayment. OWCP made a preliminary determination that appellant was at fault in creating the overpayment as he knew or should have known that he could not receive wage-loss compensation for the same period as OPM retirement benefits.

On May 30, 2014 appellant disagreed with OWCP's preliminary overpayment determination and requested a prerecoupment hearing, which was held on November 3, 2014.

By decision dated January 5, 2015, an OWCP hearing representative finalized the preliminary findings. She found that appellant had received an overpayment of compensation in the amount of \$3,366.84, as he could not collect retirement benefits and compensation for wage loss at the same time. The hearing representative found that he was at fault in the creation of the overpayment as he had accepted payments that he knew or should have known were incorrect. She explained that appellant should have been reasonably aware that he was not entitled to receive compensation from both OWCP and OPM for the same time period.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³ While an employee is receiving compensation, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁴ Thus, a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he wishes to receive and any election, once made, is revocable.⁵

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁶

ANALYSIS -- ISSUE 1

A review of the record establishes that appellant received wage-loss compensation commencing February 1 through March 9, 2013 covering the same period for which he would also receive federal retirement benefits. Appellant retired from the employing establishment effective January 31, 2013. OPM advised OWCP that appellant's federal retirement benefits became effective February 1, 2013. As noted, an employee cannot receive compensation under FECA and retirement pay from OPM for the same period.⁷ Therefore, an overpayment of compensation was created from February 1 to March 9, 2013.

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8116(a). *See Edward W. Spohr*, 57 ECAB 287 (2005).

⁵ 20 C.F.R. § 10.421(a). *See Sharon Handy*, 57 ECAB 446 (2006).

⁶ 5 U.S.C. § 8129(a).

⁷ *Supra* note 5.

OWCP calculated that appellant was paid \$3,366.84 in wage-loss compensation from February 1 to March 9, 2013. On February 9, 2013 appellant received \$818.96 for the period February 1 to 9, 2013 and on March 9, 2013 he received \$2,547.88 for the period February 10 to March 9, 2013, resulting in an overpayment of \$3,366.84. The Board finds that an overpayment of compensation in the amount of \$3,366.84 was created for the period February 1 to March 9, 2013.

On appeal appellant argues that his OPM monthly checks did not start until August 1, 2013 so that he had not actually received prohibited dual benefits from OPM and FECA for the same period. OPM informed OWCP in its July 17, 2013 letter that appellant's retirement benefits became effective on February 1, 2013. The relevant date is the effective date, not the receipt date. OPM retirement benefits became effective February 1, 2013 despite appellant's argument that he did not actually receive payment for that period until August 1, 2013. The Board must therefore find his retirement benefits from OPM commenced February 1, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁸ provides: Adjustment or recovery by the United States may not be made when an 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.⁹

OWCP may consider waiving an overpayment of compensation 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 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 or she knew or should have known to be incorrect; (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).¹⁰

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 or she is being overpaid.¹¹

⁸ *Supra* note 1 at § 8129(b).

⁹ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment under the third standard, namely that he accepted a payment to which he knew or should have known to be incorrect. The Board finds appellant at fault for accepting wage-loss compensation for a period already covered by his election to receive retirement benefits effective February 1, 2013. Appellant had been advised that a person who receives compensation benefits under FECA is not permitted to receive retirement benefits concurrently with FECA payments.

Notwithstanding this notice, appellant made an election to receive retirement benefits retroactively to February 1, 2013. He had already received FECA benefits for a period after the date of election. On February 9, 2013 appellant received \$818.96 for the period February 1 to 9, 2013 and on March 9, 2013 he received \$2,547.88 for the period February 10 to March 9, 2013, resulting in the overpayment of \$3,366.84. He was clearly aware that he could not receive compensation for wage loss and OPM benefits for the same period.

Appellant informed OWCP that he was retiring effective January 31, 2013 and OWCP noted by letter to OPM dated March 5, 2013 that appellant had elected OPM benefits. Although an actual copy of appellant's signed election form indicating the date he elected OPM benefits is not in the record, OPM has verified that retirement benefits were effective February 1, 2013. Appellant made an election, when he elected to receive retirement benefits, to receive a prohibited dual benefit under 5 U.S.C. § 8116. His election created an overpayment of compensation, and as of the effective date of the commencement of his retirement benefits, he knew or should have known that he was not permitted to receive both FECA disability benefits and OPM annuity benefits for the same period.¹²

The Board accordingly affirms OWCP's decision on the issue of fault. OWCP may consider waiving recovery of an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹³ 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.¹⁴ As appellant is no longer receiving compensation benefit payments, the Board lacks jurisdiction to review the issue of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$3,366.84 because appellant received wage-loss compensation concurrently with OPM retirement benefits for the period February 1 through March 9, 2013. The Board further finds that appellant was at

¹² See *B.G.*, Docket No. 14-2002 (issued August 13, 2015); *N.P.*, Docket No. 15-1799 (issued January 11, 2016).

¹³ *Supra* note 10.

¹⁴ *Supra* note 1 at 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

fault in the creation of the overpayment and thus ineligible for consideration of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 5, 2015 is affirmed.

Issued: June 6, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board