

vehicular accident at work. OWCP accepted that he sustained several injuries to his back, left shoulder, and left knee. Appellant received disability compensation on the daily rolls effective May 19, 2009 and on the periodic rolls effective February 13, 2011.²

The record contains a July 30, 2012 letter, received by OWCP on August 7, 2012, in which appellant advised that he was retiring on disability retirement effective August 4, 2012. On August 15, 2012 OWCP sent appellant a letter requesting that he sign and return an enclosed election form and, on August 4, 2012, it received an undated signed election form in which appellant elected to receive retirement benefits from the Office of Personnel Management (OPM) effective August 4, 2012 in lieu of FECA benefits.³

In letters to OPM dated September 10 and October 2, 2012, OWCP advised that appellant had elected to receive OPM benefits effective August 4, 2012 in lieu of FECA benefits and requested that OPM reimburse it for the \$1,954.43 in FECA benefits it had paid to appellant for the period August 4 to 25, 2012. The record does not contain any response from OPM to these letters.

In a June 19, 2013 notice, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,954.43 for the period August 4 to 25, 2012 because he had received both FECA and OPM benefits for the same period.⁴ It also made a preliminary determination that he was without fault in the creation of the overpayment, noting that he “was not aware nor could [he] reasonably have been expected to know that OWCP had paid compensation incorrectly due to the timing of the election and termination of compensation process.” OWCP advised appellant that he could submit evidence challenging the fact, or amount of the overpayment, and request waiver of recovery of the overpayment. It informed him that he could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

On June 28, 2013 OWCP received a financial information questionnaire which appellant had completed on an unspecified date. Appellant listed figures for monthly income, monthly expenses, and assets and he challenged the fact and amount of the \$1,954.43 overpayment. He submitted a portion of an OPM form (CSA-8) entitled “retroactive benefits explanation” which indicated that he had “Gross Benefits due from December 28, 2010 through November 30, 2012”

² Appellant last received OWCP compensation on February 16, 2015.

³ The certification portion of the form indicated, “I understand that I am not entitled to receive FECA benefits and [OPM disability] benefits concurrently (except for a schedule award).”

⁴ The record contains OWCP payment records and worksheets showing that appellant received \$1,954.43 in disability compensation benefits for the period August 4 to 25, 2012.

of \$5,982.60.⁵ The form listed various deductions from that amount, including a “Government Claim Collection” of \$1,954.43.⁶

In a letter to OPM dated December 4, 2013, OWCP again requested that OPM reimburse it for the \$1,954.43 in FECA benefits it paid to appellant for the period August 4 to 25, 2012. It indicated, “[W]e do n[o]t have a record of receiving this amount. Can you please forward this amount to us or inform us when it was sent.” The record does not contain any response from OPM to this letter.

In a May 3, 2016 decision, OWCP determined that appellant received an overpayment of compensation in the amount of \$1,954.43 for the period August 4 to 25, 2012 because he had received both FECA and OPM benefits for the same period.⁷ It found that he was at fault in the creation of the \$1,954.43 overpayment, thereby precluding waiver of recovery of the overpayment.⁸ OWCP noted that it had “determined that the preliminary finding that you were with fault in the matter of the overpayment was correct” and indicated that appellant “was found with fault in the creation of the overpayment because [he] accepted a payment that [he] or reasonably should have known was incorrect.”

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.⁹ 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.¹⁰ 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.¹¹

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.¹²

⁵ It is unclear why the form lists OPM retirement benefits beginning effective December 28, 2010 given that the record contains an election form in which appellant elected to receive OPM retirement benefits effective August 4, 2012 in lieu of FECA benefits.

⁶ OPM also listed a \$1,677.16 deduction for “Health Insurance Premium,” an \$817.69 deduction for “Federal Income Tax,” and a \$64.66 deduction for “Basic Life Insurance,” and noted that appellant was “due a net retroactive payment of \$1,468.66.”

⁷ It is unclear why OWCP issued its final overpayment decision almost three years after making its preliminary overpayment determination.

⁸ The Board notes that, in its preliminary determination dated June 19, 2013, OWCP found appellant without fault in the creation of the \$1,954.43 overpayment.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8116(a). See *Edward W. Spohr*, 57 ECAB 287 (2005).

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

¹² 5 U.S.C. § 8129(a).

ANALYSIS -- ISSUE 1

A review of the record establishes that appellant received wage-loss compensation for the period August 4 to 25, 2012 in the amount of \$1,954.43 while also receiving federal retirement benefits from OPM for this period.¹³ The receipt of federal retirement benefits for the period August 4 to 25, 2012 is confirmed by an OPM form (CSA-8) entitled “retroactive benefits explanation.” The form listed various deductions from the amount of retirement benefits due appellant from OPM, including a “Government Claim Collection” of \$1,954.43. However, OWCP records show that, despite OWCP’s attempts to have OPM pay it the \$1,954.43 in FECA benefits appellant received from August 4 to 25, 2013, no such payment was made by OPM to OWCP. As noted, an employee cannot receive compensation under FECA and retirement pay from OPM for the same period.¹⁴ Therefore, an overpayment of compensation was created from August 4 to 25, 2012 in the amount of \$1,954.43.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁶ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁷ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁸

In determining whether an individual is not “without fault” or alternatively “at fault” in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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; or

¹³ The record contains OWCP payment records and worksheets showing that appellant received \$1,954.43 in disability compensation benefits for the period August 4 to 25, 2012.

¹⁴ See *supra* notes 11 and 12.

¹⁵ On appeal, appellant indicated that \$1,954.43 was deducted from his OPM benefits. However, as noted, there is no evidence that this amount was paid by OPM to OWCP, and appellant provided no evidence to support his contention that it had been deducted from his OPM benefits.

¹⁶ 5 U.S.C. § 8129(a).

¹⁷ *Id.* at § 8129(b).

¹⁸ *L.J.*, 59 ECAB 264 (2007).

(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....”¹⁹

ANALYSIS -- ISSUE 2

In a June 19, 2013 notice, OWCP made a preliminary determination that appellant was without fault in the creation of the \$1,954.43 overpayment, noting that he “was not aware nor could [he] reasonably have been expected to know that it had paid compensation incorrectly due to the timing of the election and termination of compensation process.” However, in a May 3, 2016 decision, it found that appellant was at fault in the creation of the \$1,954.43 overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted that it had “determined that the preliminary finding that you were with fault in the matter of the overpayment was correct” and indicated that appellant “was found with fault in the creation of the overpayment because [he] accepted a payment that [he] reasonably should have known was incorrect.”

Given the disparity between OWCP’s finding of no fault in the creation of the \$1,954.43 overpayment in its preliminary overpayment determination and its finding of fault in the creation of the \$1,954.43 overpayment in its final overpayment decision, appellant was deprived an opportunity to submit evidence and argument challenging the finding of fault and the denial of waiver of recovery of the overpayment.²⁰

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.²¹ Therefore, the case is set aside with respect to the matters of fault and waiver of recovery of the \$1,954.43 overpayment and the case is remanded to OWCP for further development such that appellant has an opportunity to submit evidence and argument regarding these issues. After carrying out this development, OWCP will issue a *de novo* decision regarding the matters of fault and waiver of recovery of the \$1,954.43 overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$1,954.43 overpayment of compensation. The Board further finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant was at fault in the creation of the \$1,954.43 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹⁹ 20 C.F.R. § 10.433(a).

²⁰ See *Carol Walters*, Docket No. 93-40 (issued January 14, 1994) (after OWCP informed appellant that it made a preliminary finding that she was without fault, it erred when it subsequently changed the preliminary determination to a fault finding without providing appellant an opportunity to respond).

²¹ *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the \$1,954.43 overpayment. The May 3, 2016 decision is set aside and the case remanded to OWCP with respect to the matters of fault and waiver of recovery of the \$1,954.43 overpayment. After proceedings consistent with this decision of the Board, OWCP will issue a *de novo* decision.

Issued: November 7, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board