

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$89,062.79; and (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

On appeal, appellant's representative contends that the workers' compensation claim has nothing to do with appellant's post-traumatic stress disorder case with the Department of Veterans Affairs (VA).

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are incorporated herein by reference.³ The facts relevant to this appeal are set forth below.

OWCP accepted that on June 6, 2002 appellant, then a 33-year-old letter carrier, sustained aggravation of preexisting hypertension and post-traumatic stress disorder resulting from a dispute with his supervisor over completing his route. Appellant stopped work in March 2003 and was placed on the periodic rolls.

Appellant began receiving benefits from the VA for service-related post-traumatic disorder, as appellant noted on EN1032 forms dated March 19, 2010 and February 18, 2011. In response to queries from OWCP, the VA indicated in a March 4, 2011 letter that appellant received \$2,849.00 per month in service-connected disability compensation effective December 1, 2008 and was 70 percent disabled.

OWCP informed appellant in an October 6, 2011 letter that FECA prohibits dual benefits for a federal civilian employment-related injury and that he was required to elect either the entire amount of compensation paid by it since December 1, 2008 or the amount of the increase in benefits paid by VA since December 1, 2008. It also noted that he had received an overpayment of benefits, therefore, an election must be made within 30 days. In a November 2, 2011 letter, appellant indicated that he elected to receive disability retirement benefits from the Office of Personnel Management (OPM) retroactive to December 1, 2008 because an overpayment had occurred.

In a November 1, 2012 decision, OWCP determined that appellant knowingly received wage-loss compensation to which he was not entitled, and that this resulted in an overpayment of \$89,062.79 for the period December 1, 2008 to November 19, 2011. Appellant appealed to the Board.

By May 16, 2013 decision, the Board found that the case was not in posture for decision. The Board informed OWCP that proper procedures were not followed with regard to appellant's election of benefits. The Board noted that follow-up was needed with regard to appellant's election of benefits letter of November 2, 2011 prior to finding an overpayment. The Board

³ Docket No. 13-336 (issued May 16, 2013).

noted that the record did not establish that appellant received dual benefits. The Board remanded the case for OWCP to develop the evidence of record and make proper factual findings with regard to whether appellant received dual benefits.⁴

By form dated August 1, 2013, appellant indicated that he received disability benefits from the VA for post-traumatic stress disorder (PTSD).

In a September 13, 2013 response to questions from OWCP, OPM indicated that an application for OPM benefits had been received, and that appellant received OPM benefits in the amount of \$44,516.00 from December 1, 2008 to March 30, 2012, \$1,139.00 monthly effective April 1, 2012, and \$1,159.00 monthly effective December 1, 2012.

By letter dated January 9, 2014, OWCP made a preliminary determination that appellant was overpaid compensation in the amount of \$89,062.79 because he was paid disability compensation under FECA while at the same time he received dual benefits from OPM. It also made a preliminary determination that appellant was at fault in the creation of this overpayment because he accepted payments that he knew or should have known to be incorrect. Appellant was provided instructions as to procedures for contesting the overpayment, the finding of fault, and was provided financial forms to complete.

On January 27, 2014 appellant requested a prerecoupment hearing. He disagreed that the overpayment occurred and also argued that, if the overpayment occurred, it was not his fault. Appellant requested waiver of recovery of the overpayment. At the hearing held on August 14, 2014, appellant's representative argued that, although appellant received benefits from the VA for PTSD, this was a completely different claim than the compensation claim with OWCP, and that accordingly, there was no overpayment. He contended that in 2011 appellant was given a retroactive award for his PTSD from the military at which time he applied for OPM to give him a retroactive claim back to the time of his PTSD claim from the VA hospital. Appellant's representative argued that it would be a hardship for a single parent to pay back the \$89,000.00 and also argued that appellant could not be at fault for retroactive pay. The hearing representative informed appellant's representative that overpayment financial forms were never returned.

By decision dated November 4, 2014, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$89,062.79. It also determined that as he was at fault in the creation of the overpayment, he was not entitled to waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. While an employee is receiving such compensation, however, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for service actually performed or for certain payments related to service in the Armed Forces. The latter includes benefits

⁴ *Id.*

administered by the VA, unless such benefits are payable for the same injury being compensated for under FECA.⁵ The prohibition against dual payment of FECA and veterans' benefits extends to cases in which: (1) the disability or death of an employee resulted from an injury sustained while in federal civilian employment and VA held that the same disability or death was caused by military service; or (2) an increase in a veteran's service-connected disability award was brought about by an injury sustained while in federal civilian employment.⁶

If the case record demonstrates that a claimant is receiving compensation under FECA and a veteran's award other than pension for service in the Army, Navy, or Air Force, OWCP must determine whether: (1) the veteran's award is based on a finding that the same disability for which FECA benefits are payable was caused by the military service; or (2) VA increased an award or found an award was payable for service-connected disability because of the civilian employment injury for which FECA benefits are claimed.

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

An election between these benefits is required under both scenarios.⁹ An overpayment of compensation under FECA may occur when a claimant is not entitled to the amount already paid.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$89,062.79. Initially appellant received FECA disability benefits for aggravation of PTSD and hypertension resulting from a June 6, 2002 injury. He also received VA disability benefits for PTSD as of December 1, 2008. Once OWCP learned that appellant was receiving VA disability benefits, it required him to make an election of benefits. On November 2, 2011 appellant advised OWCP that he elected to receive disability retirement benefits, in lieu of FECA benefits, effective December 1, 2008.

In its prior decision, the Board instructed OWCP to develop the evidence of record regarding appellant's receipt of dual benefits. By letter dated June 7, 2013, OWCP requested further information from OPM. The response from OPM to OWCP queries indicated that an application for disability retirement benefits had been received, and that benefits were paid.

⁵ 5 U.S.C. §§ 8102(a), 8116(a). *See also S.G.*, Docket No. 12-779 (issued September 17, 2012).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8(b) (December 1997).

⁷ 20 C.F.R. § 10.421(a); *N.P.*, Docket No. 15-1799 (issued January 11, 2016).

⁸ *Id.*

⁹ *Id.* at Chapter 2.1000.8(a)(5).

¹⁰ *Supra* note 6 at Part 6 -- Debt Management, *Identification of Overpayments and Debts*, Chapter 6.200.2(d) (May 2004).

OPM noted that appellant received monthly payments of \$1,159.00 effective December 1, 2012, \$1,139.00 from April 1 through November 30, 2012, and collectively \$44,516.00 from December 1, 2008 to March 30, 2012.

OWCP determined that at the time of the overpayment, appellant was on the periodic rolls, and received compensation every 28 calendar days. However, he elected to receive disability retirement benefits in lieu of FECA benefits effective December 1, 2008. Nevertheless, appellant continued to be paid FECA benefits through November 19, 2011. The overpayment occurred in this case because he elected disability retirement benefits as of December 1, 2008. Following this election of benefits appellant was no longer entitled to FECA benefits.¹¹ OWCP correctly calculated the amount of the overpayment as \$89,062.79.¹²

The Board therefore affirms the finding that appellant received an overpayment in the amount of \$89,062.79.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when 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. The only exception to this requirement is 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 be against equity and good conscience.¹³

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who --

- (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

¹¹ *Supra* note 9.

¹² OWCP noted that the period of the overpayment was from December 1, 2008 through January 17, 2009, a period of 1084 calendar days. For the period December 1, 2008 through January 17, 2009, OWCP determined that appellant was overpaid \$3,964.66. For the period January 18, 2009 through January 16, 2010 appellant was overpaid \$29,498.30. For the period January 17 through February 13, 2010 he was overpaid \$2,223.66. For the period February 14 through March 13, 2010 appellant was overpaid \$2,266.84. For the period March 14, 2010 through January 15, 2011, he was overpaid \$25,483.26. For the period January 16 through March 12, 2011, appellant was overpaid \$4,577.00. For the period March 13 through April 9, 2011, he was overpaid \$2,357.07. For the period April 10 through November 19, 2011, appellant was overpaid \$18,692.00. Adding these figures together yielded an overpayment of \$89,062.79.

¹³ *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

(3) Accepted a payment which he or she knew or should have known to be incorrect.”¹⁴

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹⁵ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that appellant is at fault in that he accepted a payment which he knew or should have known was incorrect as he accepted OPM annuity benefits for a period already covered by his FECA disability payments.

OWCP notified appellant by letter dated October 6, 2011 that a person who receives compensation benefits under FECA is not permitted to receive dual benefits. Appellant thereafter made an election on November 2, 2011 to receive OPM benefits retroactive to December 1, 2008. Because he was already receiving FECA benefits, his receipt of disability retirement benefits beginning December 1, 2008 was a prohibited dual benefit under 5 U.S.C. § 8116. Appellant’s receipt of the retroactive OPM annuity benefits created an overpayment of compensation, and at the time he accepted those OPM benefits, he knew or should have known based on past notice, that he was not permitted to receive both FECA disability benefits and OPM annuity benefits for the same period.¹⁷ He is therefore at fault in creating the overpayment based on the fact that he accepted a payment which he knew or should have known to be incorrect.

The Board will therefore affirm OWCP’s November 4, 2014 decision on the issue of fault. As appellant was not without fault in creating the overpayment, he is not eligible for waiver.¹⁸ OWCP must therefore recover the debt.¹⁹

The Board’s jurisdiction to review the collection of any overpayment is limited to cases of adjustment where OWCP decreases later payments of compensation.²⁰ As appellant is no longer receiving compensation benefit payments, the Board lacks jurisdiction to review the issue of recovery of the overpayment.

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.*

¹⁷ *B.G.*, Docket No. 14-2002 (issued August 13, 2015).

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ *A.P.*, Docket No. 15-0586 (issued June 6, 2016).

²⁰ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$89,062.79. The Board further finds that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2014 is affirmed.²¹

Issued: September 15, 2016
Washington, DC

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

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

²¹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.