

retirement benefits while receiving FECA benefits for the period May 20 to 28, 2016; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

On appeal counsel asserts that, as appellant's retirement benefits did not commence on May 20, 2016, there had been no dual payment and thus no overpayment of compensation.

FACTUAL HISTORY

On March 4, 2011 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he felt immediate back pain and right-sided numbness when he lifted mail at work. He stopped work that day. On March 6, 2011 he had cervical discectomy and decompression surgery.

Following an initial denial on April 27, 2011 decision dated October 31, 2011, OWCP vacated the prior decision, and accepted cervical stenosis at C5-6 with myelopathy. Appellant received retroactive compensation, and was placed on the periodic compensation rolls.

On May 20, 2016 counsel notified OWCP that appellant elected to receive OPM retirement benefits, effective May 20, 2016. He submitted an election form to that effect, signed by appellant on May 20, 2016.

OWCP terminated appellant's wage-loss compensation effective May 20, 2016. It noted that he had received compensation through May 28, 2016.

By letter dated June 1, 2016, OWCP notified OPM that appellant had elected to receive retirement benefits effective May 20, 2016 in lieu of FECA compensation. It noted that appellant had received FECA compensation through May 28, 2016. OWCP asked that OPM begin annuity payments effective May 20, 2016 and reimburse OWCP \$1,023.72 for FECA benefits paid for the period May 20 to 28, 2016.

On July 28, 2016 OWCP issued a preliminary finding that a \$1,023.72 overpayment of compensation had been created for the period May 20 to 28, 2016. It explained that the overpayment occurred because appellant received both FECA benefits and OPM retirement benefits during this period. Appellant was found at fault and was provided an overpayment action request and overpayment recovery questionnaire (OWCP-20). The record contains an overpayment computer printout worksheet showing that, for the period May 20 to 28, 2016, appellant received net FECA wage-loss compensation totaling \$1,023.72.

Appellant completed an overpayment action request on August 17, 2016, which was received by OWCP on August 26, 2016. He maintained that no overpayment existed. In attached correspondence, counsel asserted that, as OPM had not commenced monthly annuity payments, there was no overpayment and certainly no fault on the part of appellant.

By decision dated September 28, 2016, OWCP finalized the preliminary overpayment decision, finding that appellant was at fault in the receipt of an overpayment in compensation in the amount of \$1,023.72 and, thus, was not entitled to waiver of the overpayment. It requested

that appellant repay the overpayment in full or contact OWCP to make arrangements for recovery.

LEGAL PRECEDENT

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.³ Section 8116(a) states 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.⁴ 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.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶ OWCP procedures also explain that the employee must make an election between OWCP benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous. This policy also applies to reemployed annuitants.⁷

ANALYSIS

The Board finds this case is not in posture for decision.

OWCP based its overpayment finding on its determination that appellant received impermissible dual OPM and FECA benefits for the period May 20 to 28, 2016. While the record reflects that appellant received FECA benefits for this period, OWCP has not shown that he received OPM benefits for the period. Although OWCP wrote OPM on June 1, 2016, (rd6/1/16) at the time OWCP issued the final overpayment decision on September 28, 2016, OPM had not responded. Thus, there is no documentation in the record establishing, as a matter of fact, if and when appellant received OPM benefits, the periods for which he received such benefits, or the amount of benefits he received.⁸ Therefore, the evidence of record does not contain documentation showing that appellant received OPM benefits between May 20 and 28, 2016. It was alleged that appellant received dual benefits during this period, OWCP has not met its burden to establish the fact of an overpayment of compensation in the amount of

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* R.S., Docket No. 11-428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁸ The election form signed by appellant on May 20, 2016 is not sufficient to show that he actually began receiving OPM benefits that day or any other time.

\$1,023.72 for this period.⁹ The case will be remanded to OWCP for further development of this matter to be followed by an appropriate decision.

Given that the case is not in posture regarding whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,023.72, it is premature for the Board to consider whether OWCP properly determined that he was at fault in the creation of any overpayment.

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 23, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ *D.O.*, Docket No. 15-1004 (issued July 28, 2015).