

On appeal appellant asserts that he was not at fault in the creation of the overpayment because OWCP was informed of his retirement date. He further asserts that OWCP did not properly compensate him for a November 1, 2016 schedule award.

FACTUAL HISTORY

On May 15, 2015 appellant, then a 54-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2015 he injured his left shoulder while transporting food for the employing establishment's annual food drive. OWCP accepted left shoulder rotator cuff tear on December 15, 2015.

On March 9, 2016 Dr. John A. Meaney, a Board-certified orthopedic surgeon, performed left shoulder rotator cuff repair and acromioplasty. Appellant stopped work that day and began filing Form CA-7, claims for compensation.² The record indicates that OWCP electronically paid appellant wage-loss compensation from March 9 through August 5, 2016.³ Appellant retired on July 31, 2016.

On September 2, 2016 appellant filed a schedule award claim (Form CA-7). He submitted an August 25, 2016 report in which Dr. Meaney advised that appellant had six percent permanent left upper extremity impairment. An OWCP medical adviser reviewed the medical record, including Dr. Meaney's report. The medical adviser indicated that appellant had 11 percent permanent left upper extremity impairment. By decision dated November 1, 2016, OWCP granted appellant a schedule award for 11 percent permanent left arm impairment.

On December 25, 2016 appellant elected OPM retirement benefits, effective August 1, 2016. In correspondence dated February 9 and March 30, 2017, OPM notified OWCP that appellant began receiving retirement payments effective August 1, 2016. On April 13, 2017 OWCP informed OPM that an overpayment had been identified, and that it would issue a preliminary overpayment determination.

On April 19, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$513.29 had been created for the period August 1 to 5, 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 because he was aware or should have reasonably been aware that he was not entitled to FECA compensation on the date of his election of OPM retirement benefits. OWCP provided an overpayment action request and overpayment recovery questionnaire (OWCP-20). Appellant was given 30 days to respond. The record contains an overpayment computer worksheet showing appellant's wage-loss compensation for this period.

² The CA-7 forms asked that appellant indicate whether he had "applied for or received payment under any Federal Retirement or Disability law." Appellant checked the box marked "no" with respect to his claim for wage loss for the period July 23 to August 5, 2016.

³ Appellant submitted electronic deposit information on May 4, 2016. He, who had no dependents, was compensated at the basic, two thirds, compensation rate, based on a weekly salary of \$1,151.13.

In a response received by OWCP on May 2, 2017 appellant requested a review of the written record. He contested the fault finding, maintaining that OWCP had been notified of the date of his retirement and failed to properly end his FECA compensation at that time. Appellant also maintained that the amount of his schedule award was incorrect. He submitted one page of an overpayment recovery questionnaire, and OWCP's medical adviser's October 28, 2016 report.

By decision dated May 24, 2017, OWCP finalized the preliminary overpayment determination, finding that appellant was at fault in the receipt of an overpayment of compensation in the amount of \$513.29 and, thus, he was not entitled to waiver of recovery of the overpayment. Repayment was requested in full.

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(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.⁵ 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.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷ OWCP procedures also explain that the employee must make an election between FECA 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.⁸

ANALYSIS -- ISSUE 1

A review of the record indicates that appellant's OPM retirement annuity began on August 1, 2016. He also received FECA wage-loss compensation of \$513.29 for the period August 1 through 5, 2016. As a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,⁹ an overpayment of compensation was created.¹⁰ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ 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).

⁹ *Id.*

¹⁰ *See Franklin L. Bryan*, 56 ECAB 310 (2005).

implementing regulations, and OWCP procedures prohibits the receipt of FECA wage-loss benefits and a federal annuity.¹¹

As appellant received \$513.29 in FECA benefits while concurrently receiving OPM retirement benefits, the Board finds that an overpayment of compensation in that amount was created.

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.”¹²

Section 10.433(a) of OWCP’s regulations provides 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 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).”¹³

To determine whether 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.¹⁴

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment of compensation because he accepted a payment he knew or should have known was incorrect. The Board notes that when an overpayment is created because a claimant receives both FECA compensation and OPM retirement benefits, in order to completely analyze the fault issue,

¹¹ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, *supra* note 8.

¹² *Id.* at § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

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

¹⁴ 20 C.F.R. 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

OWCP must properly consider the first dual payment. In the case at hand, appellant received his FECA compensation by electronic deposit. OPM acknowledged that appellant began receiving retirement benefits on August 1, 2016. A computer print-out in the record indicates that a FECA compensation payment was keyed on August 11, 2016, to cover the period July 23 through August 5, 2016. This was electronically deposited to appellant's bank account. The question is whether appellant accepted a payment he knew or should have known was incorrect at the time of this deposit, part of which constituted the \$513.29 overpayment of compensation found in this case.

The Board finds that appellant was not at fault regarding the August 11, 2016 direct deposit of FECA compensation which covered the period July 23 through August 5, 2016, thus including the entire period of dual benefit, August 1 through 5, 2016, the basis for the \$513.29 overpayment. While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, appellant was not on notice of the amount of the payment until after it was deposited electronically into his account.¹⁵ OWCP has not presented sufficient evidence to establish that appellant accepted a payment at the time of deposit which he knew or should have known to be incorrect.¹⁶

The Board, therefore, finds that appellant was not at fault in accepting the August 11, 2016 payment, as he was not in a position to be aware that this payment was incorrect. As this was the only deposit of FECA compensation at issue in the creation of the \$513.29 overpayment, which covered the period August 1 through 5, 2016, the Board finds appellant not at fault in its creation.¹⁷ Therefore, following return of the case record to OWCP, it should properly consider the issue of waiver of recovery of the \$513.29 overpayment of compensation.

As to appellant's assertion on appeal regarding the November 1, 2016 schedule award decision, for final adverse OWCP decisions issued on or after November 19, 2008, the Board's review authority is limited to appeals which are filed within 180 days from the date of issuance of OWCP's decision.¹⁸ The 180th day following November 1, 2016 was April 30, 2017. As this fell on a Sunday, the appeal would have been due the following business day, which was Monday, May 1, 2017.¹⁹ As appellant did not file an application for review with the Board until

¹⁵ See *M.L.*, Docket No. 15-1683 (issued June 20, 2016).

¹⁶ *Id.*

¹⁷ See *M.O.*, Docket No. 14-1133 (issued September 22, 2014).

¹⁸ 5 U.S.C. § 8149; 20 C.F.R. § 501.3(e).

¹⁹ 20 C.F.R. § 501.3(f)(2).

June 12, 2017, more than 180 days after the November 1, 2016 OWCP decision, the Board is without jurisdiction to review the merits of that schedule award decision.²⁰

CONCLUSION

The Board finds that appellant received a \$513.29 overpayment of compensation for the period August 1 through 5, 2016. The Board further finds that appellant was not at fault in the creation of the overpayment. The case is, therefore, remanded to OWCP to determine whether waiver of the recovery of the overpayment is warranted.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: October 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁰ The Board notes that even had the date of postmark, June 6, 2017, been utilized as the date of appeal, the appeal would still be untimely. Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.